Item number: 01

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Appellate Procedure: Appointment of Counsel in Misdemeanor Appeals

Committee or other entity submitting the proposal:
Appellate Advisory Committee

Staff contact (name, phone and e-mail): Christy Simons, 415-865-7694, christy.simons@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 10/28/19 and 10/19/2018
Project description from annual agenda: Consider amending rule 8.851 to (1) conform to the California Supreme Court's opinion in Gardner v. Superior Court (2019) 6 Cal.5th 998, which held that a misdemeanor defendant has a right to appointed counsel to respond to a pretrial prosecution appeal; and (2) clarify that an appellate division may deny a request by a defendant convicted of a misdemeanor to be self-represented on appeal and instead appoint appellate counsel (Martinez v. State of California (2000) 528 U.S. 152, 161; People v. Barnett (2003) 31 Cal.4th 466, 473). Also consider revising form CR-133, Request for Lawyer in Misdemeanor Appeal, to clarify that a defendant need not be the appellant to use the form to request appointment of counsel. Subcommittee: Appellate Division.

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: May 14–15, 2020

Title
Appellate Procedure: Appointment of Counsel in Misdemeanor Appeals

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rule 8.851; revise forms CR-131-INFO and CR-133

Recommended by
Appellate Advisory Committee
Hon. Louis R. Mauro, Chair

Agenda Item Type
Action Required

Effective Date
September 1, 2020

Date of Report
March 9, 2020

Contact
Christy Simons, Attorney, 415-865-7694
christy.simons@jud.ca.gov

Executive Summary

To implement the California Supreme Court's decision in *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998, the Appellate Advisory Committee recommends amending the rule regarding appointment of counsel in misdemeanor appeals to expand the circumstances under which the appellate division is authorized to appoint counsel for an indigent defendant. The proposal would also revise two forms to be consistent with the rule amendments.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective September 1, 2020:

1. Amend California Rules of Court, rule 8.851 to require the appellate division to appoint counsel for an indigent defendant who has been charged with a misdemeanor and the appeal qualifies as a critical stage of the criminal process; allow the appellate division to appoint counsel for any other indigent defendant charged with a misdemeanor; add an advisory committee comment describing *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998; and make other conforming changes and corrections;
2. Revise form CR-131-INFO to reflect the amendments to rule 8.851 and to clarify language explaining that a misdemeanor defendant does not have a right of self-representation; and

3. Revise form CR-133 to reflect the amendments to rule 8.851.

The text of the amended rule and the revised forms are attached at pages 6–18.

Relevant Previous Council Action

In 1991, the Judicial Council adopted former rule 185.5 regarding appointment of counsel. The rule provided in part: "On application of an indigent defendant-appellant, the appellate department shall appoint counsel on appeal for a defendant convicted of a misdemeanor who is subject to incarceration or a fine of more than $500 (including penalty and other assessments), or who is likely to suffer significant adverse collateral consequences as a result of the conviction." (Former Cal. Rules of Court, rule 185.5(a).) In the years since, the rule has been amended and renumbered, but the portion of the rule that is relevant to this proposal has not substantively changed.

Similarly, both of the forms have been revised at various times, but the council has not taken action relevant to this report.

Analysis/Rationale

Currently, rule 8.851 of the California Rules of Court provides for the appointment of counsel on appeal only for convicted defendants. On application, the appellate division must appoint appellate counsel for a defendant convicted of a misdemeanor who was represented by appointed counsel in the trial court or establishes indigency and who either "is subject to incarceration or a fine of more than $500," or "is likely to suffer significant adverse collateral consequences as a result of the conviction." (Cal. Rules of Court, rule 8.851(a)(1).) The appellate division "may appoint counsel for any other indigent defendant convicted of a misdemeanor." (*Id.*, rule 8.851(a)(2).) The rule does not authorize the appointment of counsel for defendants who have not been convicted.

In *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998 (*Gardner*), the Supreme Court addressed the question of whether a defendant facing misdemeanor charges, who filed a successful motion to suppress evidence with the help of court-appointed counsel, was entitled to appointed counsel's assistance in responding to a pretrial prosecution appeal of the suppression order. The court explained that, under the California Constitution, a criminal defendant's right to counsel is not limited to trial; rather, it "extends to other, 'critical' stages of the criminal process." (*Gardner*, 6 Cal.5th at p. 1004 (citations omitted).) Further, "critical stages can be understood as those events or proceedings in which the accused is brought in confrontation with the state, where potential substantial prejudice to the accused's rights inheres in the confrontation, and where counsel's assistance can help to avoid that prejudice." (*Id*., at pp. 1004–1005.) In light of the consequences to the defendant if she lost the appeal and the difficulty of defending a suppression order without the assistance of counsel, the court held that the pretrial prosecution appeal of an order granting the defendant's motion to suppress evidence was a "critical stage" of the proceedings at which the defendant had a right to appointed counsel as a matter of state constitutional law. (*Id*., at p. 1005.)

Rule 8.851

To implement the *Gardner* decision, the Appellate Advisory Committee recommends amending rule 8.851(a) to require the appellate division to appoint counsel for defendants charged with a misdemeanor in circumstances that qualify as "critical stages" of the proceedings. A pretrial prosecution appeal of a suppression order is a critical stage for which counsel must be appointed, but, as noted above, the *Gardner* court's holding was not limited to this one situation. Accordingly, the recommended rule language is intended to be broad enough to encompass other possible critical stages in the proceedings for a defendant who has been charged with, but not convicted of, a misdemeanor. For clarity and to avoid repetitiveness, the committee has reorganized paragraph (1) of subdivision (a) to include the indigency requirement, kept the provisions regarding defendants convicted of a misdemeanor in subdivision (a)(1)(A), and drafted new language for subdivision (a)(1)(B) regarding defendants charged with a misdemeanor who are entitled to appointed counsel.

The committee also recommends amending rule 8.851(a)(2), which currently allows the appellate division to appoint counsel "for any other indigent defendant convicted of a misdemeanor," to allow the appellate division, in its discretion, to appoint counsel for any other defendant charged with a misdemeanor. This amendment would maintain the parallel structure of *requiring* the appointment of counsel in certain situations for those charged with *or* convicted of misdemeanors, and *permitting* the appointment of counsel in other situations for those charged with *or* convicted of misdemeanors. A situation warranting the discretionary appointment of appellate counsel for a defendant charged with a misdemeanor would be relatively rare, but authorizing the appellate division to appoint counsel should the circumstances support it is consistent with the Supreme Court's reasoning in *Gardner* and with the Judicial Council's goal of improving access to impartial justice.

The rule amendments also include minor conforming changes to other parts of subdivisions (a) and (b) and the existing advisory committee comment, as well as a new advisory committee comment for subdivision (a)(1)(B) to provide information on the *Gardner* decision.

***Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO)**

The committee recommends revisions to this information sheet that conform to the proposed rule amendments. Item 5 ("How do I get a lawyer to represent me?"), which describes the circumstances in which the appellate division is required to appoint counsel, would be revised to include an appeal involving a defendant who has been charged with a misdemeanor and faces potential substantial prejudice (i.e., a *Gardner* situation). A reference to rule 8.851 would also be added to item 5.

Item 6 ("Who can appeal?") would be revised to clarify that, in some cases, the government agency that filed the criminal charges is the appellant and the party against whom the charges were filed is the respondent.

In addition, the committee recommends revising item 4 ("Do I need a lawyer to appeal?") to clarify that a defendant does not have a right of self-representation and to add language advising a defendant whose request for self-representation was denied of the need to either hire an attorney or request that an attorney be appointed.

Request for Court-Appointed Lawyer in Misdemeanor Appeal **(form CR-133)**

The committee recommends a number of changes to this form for requesting a court-appointed lawyer, to be consistent with *Gardner*. Currently, the form is addressed exclusively to an appellant who has filed a notice of appeal, and the instructions refer only to a convicted defendant as eligible for appointed counsel. References to "appellant" and "your notice of appeal" in various places on the form would be replaced with "defendant" and "the notice of appeal." The instructions would be revised to include defendants in *Gardner* situations by adding the same new language proposed for item 5 on form CR-131-INFO. Current item 4 would be renumbered as item 3f to group together all questions regarding a convicted defendant's sentence and other negative consequences resulting from the conviction. A new item 4 would be added for defendants who have not been convicted to describe the order being challenged so the appellate division can determine whether the appeal is a "critical stage" of the criminal process under *Gardner*.

Policy implications

The committee has identified no significant policy implications associated with the recommended changes to the rule and forms.

Comments

The proposed amendments to rule 8.851 and revisions to the two forms were circulated for public comment between December 13, 2019, and February 11, 2020, as part of the winter comment cycle. Eight individuals or organizations submitted comments on this proposal. Four commenters agreed with the proposal, two agreed with the proposal if modified, and two did not state a position on the proposal but provided positive comments. A chart with the full text of the comments received and the committee's responses is attached at pages 19–34.

The committee sought specific comments on whether subdivision (a)(2) of rule 8.851, which allows the appellate division to make a discretionary appointment of counsel "for any other indigent defendant convicted of a misdemeanor," should be amended to authorize such an appointment for any other defendant *charged with* a misdemeanor. Four commenters responded to this question: three indicated support for this amendment, one recommended against it. For the reasons described above, the committee recommends this amendment.

The committee also requested comments on whether there should be a separate rule regarding appointment of counsel in appellate division writ proceedings. Four commenters responded; all were in favor. The committee will consider developing such a rule as a future project.

In its comments, a bar association suggested adding specific examples of "significant adverse collateral consequences" (rule 8.851(a)(1)(A)) to clarify the information being sought on form

CR-133 in requesting appointment of counsel. The committee recommends clarifying language regarding the different requirements for entitlement to appellate counsel on both forms and the corresponding questions asked on form CR-133, and agrees with the commenter that specific examples would be helpful. The committee has made these modifications to item 5 on the information sheet, and to the instructions and items 3f and 4 on the request form.

Alternatives considered

In the wake of *Gardner*, the rule and forms were no longer correct. Thus, the committee did not consider the alternative of taking no action.

The committee considered narrower language in rule 8.851 to implement *Gardner*, but concluded that the Supreme Court's analysis of the right to counsel was broad enough potentially to include proceedings other than a pretrial prosecution appeal of an order granting a motion to suppress evidence that take place before the trial court issues a final judgment.

The committee also considered a new subdivision (d) of rule 8.851 regarding appointment of counsel for a defendant whose request for self-representation was denied. The committee does not recommend a new subdivision because self-representation on appeal is not sufficiently related to the content of rule 8.851 and would be better addressed, if at all in the rules of court, in a separate rule. The proposed revisions to item 4 on form CR-131-INFO, described above, are intended to clarify that a misdemeanor defendant does not have a right of self-representation on appeal.

Fiscal and Operational Impacts

Based on feedback in the comments, the committee anticipates that impacts on the courts will include some education and training, updates to procedures, and changes to case management systems. The Civil and Appellate Division of the Superior Court of Orange County estimates that 16 hours by a Program Coordinator Specialist over the course of one month will be required to revise procedures, train staff, and implement the changes.

JRS notes there will be cost impacts to the county indigent defense fund and potential issues with implementation and payment since current contracts likely do not address the expected additional appointments. Communication with justice partners will be important.

Attachments and Links

1. Cal. Rules of Court, rule 8.851, at pages 6–7
2. Forms CR-131-INFO and CR-133, at pages 8–18
3. Chart of comments, at pages 19–34

Rule 8.851 of the California Rules of Court would be amended, effective September 1, 2020, to read:

Rule 8.851. Appointment of appellate counsel

(a) Standards for appointment

(1) On application, the appellate division must appoint appellate counsel for a defendant ~~convicted of a misdemeanor~~ who was represented by appointed counsel in the trial court or establishes indigency and who:

(A) Was convicted of a misdemeanor and is subject to incarceration or a fine of more than $500 (including penalty and other assessments), or who is likely to suffer significant adverse collateral consequences as a result of the conviction; ~~and~~ or

(B) ~~Was represented by appointed counsel in the trial court or establishes indigency.~~ Is charged with a misdemeanor and the appeal is a critical stage of the criminal process.

(2) On application, the appellate division may appoint counsel for any other indigent defendant charged with or convicted of a misdemeanor.

(3) For applications under (1)(A), a defendant is subject to incarceration or a fine if the incarceration or fine is in a sentence, is a condition of probation, or may be ordered if the defendant violates probation.

(b) Application; duties of trial counsel and clerk

(1) If defense trial counsel has reason to believe that the client is indigent and will file an appeal or is a party in an appeal described in (a)(1)(B), counsel must prepare and file in the trial court an application to the appellate division for appointment of counsel.

(2) If the defendant was represented by appointed counsel in the trial court, the application must include trial counsel's declaration to that effect. If the defendant was not represented by appointed counsel in the trial court, the application must include a declaration of indigency in the form required by the Judicial Council.

(3) Within 15 court days after an application is filed in the trial court, the clerk must send it to the appellate division. A defendant may, however, apply directly to the appellate division for appointment of counsel at any time after ~~filing~~ the notice of appeal is filed.

(4) The appellate division must grant or deny a defendant's application for appointment of counsel within 30 days after the application is filed.

(c) * * *

Advisory Committee Comment

Request for Court-Appointed Lawyer in Misdemeanor Appeal (form CR-133) may be used to request that appellate counsel be appointed in a misdemeanor case. If the ~~appellant~~ defendant was not represented by the public defender or other appointed counsel in the trial court, the ~~appellant~~ defendant must use *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form ~~MC-210~~CR-105) to show indigency. These forms are available at any courthouse or county law library or online at *www.courts.ca.gov/forms*.

Subdivision (a)(1)(B). In *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998, the California Supreme Court addressed what constitutes a critical stage of the criminal process. The court provided the analysis for determining whether a defendant has a right to counsel in confrontational proceedings other than trial, and held that the pretrial prosecution appeal of an order granting the defendant's motion to suppress evidence was a critical stage of the process at which the defendant, who was represented by appointed counsel in the trial court, had a right to appointed counsel as a matter of state constitutional law.

CR-131-INFO Information on Appeal Procedures for Misdemeanors

1 What does this information sheet cover?

This information sheet tells you about appeals in misdemeanor cases. It is only meant to give you a general idea of the appeal process, so it does not cover everything you may need to know about appeals in misdemeanor cases. To learn more, you should read rules 8.800–8.816 and 8.850–8.890 of the California Rules of Court, which set out the procedures for misdemeanor appeals. You can get these rules at any courthouse or county law library or online at *www.courts.ca.gov/rules.*

For information about appeal procedures in other cases, see:

- *Information on Appeal Procedures for Infractions* (form CR-141-INFO)
- *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO)

You can get these forms at any courthouse or county law library or online at *www.courts.ca.gov/forms.*

2 What is a misdemeanor?

A misdemeanor is a crime that can be punished by jail time of up to one year, but not by time in state prison. (See Penal Code sections 17 and 19.2. You can get a copy of these laws at *http://leginfo.legislature.ca.gov /faces/codes.xhtml*.) If you were also charged with or convicted of a felony, then your case is a felony case, not a misdemeanor case.

3 What is an appeal?

An appeal is a request to a higher court to review a decision made by a lower court. **In a misdemeanor case, the court hearing the appeal is the appellate division of the superior court and the lower court—called the "trial court" in this information sheet—is the superior court.**

It is important to understand that **an appeal is NOT a new trial**. The appellate division will not consider new evidence, such as the testimony of new witnesses or new exhibits. The appellate division's job is to review a record of what happened in the trial court and the trial court's decision to see if certain kinds of legal errors were made in the case:

- ***Prejudicial error:*** The party that appeals (called the "appellant") may ask the appellate division to determine if an error was made about either the law or court procedures in the case that caused substantial harm to the appellant (this is called "prejudicial error"). Prejudicial error can include things like errors made by the judge about the law, errors or misconduct by the lawyers, incorrect instructions given to the jury, and misconduct by the jury that harmed the appellant. When it conducts its review, the appellate division presumes that the judgment, order, or other decision being appealed is correct. It is the responsibility of the appellant to show the appellate division that an error was made and that the error was harmful.
- ***No substantial evidence:*** The appellant may also ask the appellate division to determine if there was substantial evidence supporting the judgment, order, or other decision being appealed. When it conducts its review, the appellate division only looks to see if there was evidence that reasonably supports the decision. The appellate division generally will not reconsider the jury's or trial court's conclusion about which side had more or stronger evidence or whether witnesses were telling the truth or lying.

The appellate division generally will not overturn the judgment, order, or other decision being appealed unless the record clearly shows that one of these legal errors was made.

4 Do I need a lawyer to appeal?

You will probably need a lawyer. You are not allowed to represent yourself in an appeal in a misdemeanor case unless the appellate division permits you to do so. But appeals can be complicated, and you would have to follow the same rules that lawyers have to follow. If you have any questions about the appeal procedures, you should talk to a lawyer.

If the appellate division permits you to represent yourself, you must put your address, telephone number,

fax number, and email address (if available) on the cover of every document you file with the court and let the court know if this contact information changes so that the court can contact you if needed.

If the appellate division does not permit you to represent yourself, you must hire a lawyer at your own expense or ask the court to appoint a lawyer to represent you.

5 How do I get a lawyer to represent me?

The court is required to appoint a lawyer to represent you if you are indigent (you cannot afford to pay for a lawyer) and:

- You were convicted and your punishment includes going to jail or paying a fine of more than $500 (including penalty and other assessments); or
- You are likely to suffer other negative consequences from the conviction (for example, immigration problems or inability to get or keep a license or permit); or
- You have not been convicted but you are likely to suffer significant harm if you lose the appeal.

See rule 8.851 of the California Rules of Court for more information about when the court is required to appoint a lawyer to represent you.

The court may, but is not required to, appoint a lawyer to represent you on appeal in other circumstances if you are indigent. You are automatically considered indigent if you were represented by the public defender or other court-appointed lawyer in the trial court. You will also be considered indigent if you can show that your income and assets are too low to pay for a lawyer.

If you think you are indigent, you can ask the court to appoint a lawyer to represent you for your appeal. You may use *Request for Court-Appointed Lawyer in Misdemeanor Appeal* (form CR-133) to ask the court to appoint a lawyer to represent you on appeal in a misdemeanor case. You can get form CR-133 at any courthouse or county law library or online at *www.courts.ca.gov/forms*.

If you want a lawyer and you are not indigent or if the court turns down your request to appoint a lawyer, you must hire a lawyer at your own expense. You can get information about finding a lawyer on the California Courts Online Self-Help Center at *www.courts.ca.gov /selfhelp.htm* at the "Getting Started" tab.

6 Who can appeal?

Only a party in the trial court case can appeal a decision in that case. You may not appeal on behalf of a friend, a spouse, a child, or another relative.

The party that is appealing is called the APPELLANT; in a misdemeanor case, this is usually the party convicted of committing the misdemeanor. The other party is called the RESPONDENT; in a misdemeanor case, this is usually the government agency that filed the criminal charges (on court papers, this party is called the People of the State of California). In some cases, the government agency is the appellant and the party against whom the charges were filed is the respondent.

7 Can I appeal *any* decision that the trial court made?

No. Generally, you may appeal only the final judgment —the decision at the end that decides the whole case. The final judgment includes the punishment that the court imposed. With the exception listed below, rulings made by the trial court before final judgment generally cannot be separately appealed, but can be reviewed only later as part of an appeal of the final judgment. In a misdemeanor case, the party convicted of committing a misdemeanor usually appeals that conviction or the sentence (punishment) ordered by the trial court. In a misdemeanor case, a party can also appeal:

- Before the trial court issues a final judgment in the case, from an order granting or denying a motion to suppress evidence (Penal Code section 1538.5(j))
- From an order made by the trial court after judgment that affects a substantial right of the appellant (Penal Code section 1466(2)(B))

You can get a copy of these laws at *http://leginfo.legislature.ca.gov/faces/codes.xhtml*.

8 How do I start my appeal?

First, you must file a notice of appeal. The notice of appeal tells the other party in the case and the trial court that you are appealing the trial court's decision. You may use *Notice of Appeal (Misdemeanor)* (form CR-132) to prepare and file a notice of appeal in a misdemeanor case. You can get form CR-132 at any courthouse or county law library or online at *www.courts.ca.gov/forms.*

9 Is there a deadline for filing my notice of appeal?

Yes. Except in the very limited circumstances listed in rule 8.853(b), in a misdemeanor case, you must file your notice of appeal within **30 days** after the trial court makes ("renders") its final judgment in your case or issues the order you are appealing. (You can get a copy of rule 8.853 at any courthouse or county law library or online at *www.courts.ca.gov/rules*). The date the trial court makes its judgment is normally the date the trial court issues its order saying what your punishment is (sentences you). **This deadline for filing the notice of appeal cannot be extended. If your notice of appeal is late, the appellate division will not be able to consider your appeal.**

10 How do I file my notice of appeal?

To file the notice of appeal in a misdemeanor case, you must bring or mail the original notice of appeal to the clerk of the trial court that made the judgment or issued the order you are appealing. It is a good idea to bring or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

There is no fee for filing the notice of appeal in a misdemeanor case. You can ask the clerk of that court if there are any other requirements for filing your notice of appeal.

After you file your notice of appeal, the clerk will send a copy of your notice of appeal to the office of the prosecuting attorney (for example, the district attorney, county counsel, city attorney, or state Attorney General).

11 If I file a notice of appeal, do I still have to go to jail or complete other parts of my punishment?

Filing the notice of appeal does NOT automatically postpone your punishment, such as serving time in jail, paying fines, or probation conditions.

If you have been sentenced to jail in a misdemeanor case, you have a right to be released either with or without bail while your appeal is waiting to be decided, but you must ask the court to set bail or release you. If the trial court has not set bail or released you after your notice of appeal has been filed, you must ask the trial court to set bail or release you. If the trial court denies your release or sets the bail amount higher than you think it should be, you can apply to the appellate division for release or for lower bail.

Other parts of your punishment, such as fines or probation conditions, will be postponed ("stayed") only if you request a stay and the court grants your request. If you want a stay, you must first ask the trial court for a stay. You can also apply to the appellate division for a stay, but you must show in your application to the appellate division that you first asked the trial court for a stay and that the trial court unjustifiably denied your request. If you do not get a stay and you do not pay your fine or complete another part of your punishment by the date ordered by the court, a warrant may be issued for your arrest or a civil collections process may be started against you, which could result in a civil penalty being added to your fine.

12 What do I need to do after I file my appeal?

You must tell the trial court (1) whether you have agreed with the respondent ("stipulated") that you do not need parts of the normal record on appeal, and (2) whether you want a record of what was said in the trial court (this is called a record of the "oral proceedings") sent to the appellate division and, if so, what form of that record you want to use. You may use *Notice Regarding Record on Appeal (Misdemeanor)* (form CR-134) for this notice. (You can get form CR-134 at any courthouse or county law library or online at *www.courts.ca.gov/forms*). You must file this notice either:

- Within 20 days after you file your notice of appeal; or, if it is later,

- Within 10 days after the court decides whether to appoint a lawyer to represent you (if you ask the court to appoint a lawyer within 20 days after you file your notice of appeal).

13 In what cases does the appellate division need a record of what was said in the trial court?

You do not *have* to send the appellate division a record of what was said in the trial court. But if you want to raise any issue in your appeal that would require the appellate division to consider what was said in the trial court, the appellate division will need a record of these oral proceedings. For example, if you are claiming that there was not substantial evidence supporting the judgment, order, or other decision you are appealing, the appellate division will need a record of the oral proceedings. Since the appellate division judges were not there for the proceedings in the trial court, an official record of these oral proceedings must be prepared and sent to the appellate division for its review.

Depending on what form of the record you choose to use, you will be responsible for paying to have the official record of the oral proceedings prepared (unless you are indigent) or for preparing an initial draft of this record yourself. If you do not take care of these responsibilities, a record of the oral proceedings in the trial court will not be prepared and sent to the appellate division. If the appellate division does not receive this record, it will not be able to consider what was said in the trial court in deciding whether a legal error was made and it may dismiss your appeal.

14 What are the different forms of the record?

There are three ways a record of the oral proceedings in the trial court can be prepared and provided to the appellate division in a misdemeanor case:

a. If a court reporter was there during the trial court proceedings, the reporter can prepare a record called a *"reporter's transcript."*

b. If the proceedings were officially electronically recorded, the trial court can have a transcript prepared from that recording; or if the court has a local rule permitting this and you and the respondent (the prosecuting agency) agree ("stipulate") to this, you can use the *official electronic recording* itself as the record, instead of a transcript.

c. You can use a *statement on appeal.*

Read below for more information about these options.

a. Reporter's transcript

When available: In some misdemeanor cases, a court reporter is there in the trial court and makes a record of the oral proceedings. If a court reporter made a record of your case, you can ask to have the court reporter prepare a transcript of those oral proceedings, called a "reporter's transcript." You should check with the trial court to see if a court reporter made a record of your case before you choose this option. Some courts also have local rules that establish procedures for deciding whether a statement on appeal or a transcript of only some of the oral proceedings will be a good enough record to consider the issues you are raising on appeal. You should check whether the court has such a local rule.

Cost*:* Ordinarily, the appellant must pay for preparing a reporter's transcript. The court reporter will provide the clerk of the trial court with an estimate of the cost of preparing the transcript and the clerk will notify you of this estimate. If you want the reporter to prepare a transcript, you must deposit this estimated amount or one of the substitutes allowed under rule 8.866 with the clerk within 10 days after the clerk sends you the estimate. However, under rule 8.866 you can decide to use a different form of the record or take other action instead of proceeding with a reporter's transcript.

If, however, you are indigent (you cannot afford to pay the cost of a reporter's transcript), you may be able to get a free transcript. If you were represented by the public defender or another court-appointed lawyer in the trial court, you are automatically considered indigent. If you were not represented by a court-appointed lawyer in the trial court, you can complete and file *Defendant's*

Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense (form CR-105), to show that you are indigent. You can get form CR-105 at any courthouse or county law library or online at *www.courts.ca.gov/forms.* The court will review this form to decide whether you are indigent.

If the court finds that you are indigent, a court reporter made a record of your case, and you show that you need a transcript, the court must provide you with a free transcript. Whether you need a transcript depends on the issues you are raising on appeal. If the issues you are raising on appeal include that there was not substantial evidence supporting the judgment, order, or other decision you are appealing or that there was misconduct in your case that harmed you, that is generally enough to show that you need a transcript. If you ask for a reporter's transcript, the court may ask you what issues you are raising on appeal and may decide that a statement on appeal or a transcript of only some of the oral proceedings will be a good enough record to consider the issues you are raising.

If the court finds that you are not indigent, it will send you a notice and you will have a chance to pick another form of the record or take other actions listed in rule 8.866.

Completion and delivery: Once you deposit the estimated cost of the transcript or one of the substitutes allowed under rule 8.866 or show the court you are indigent and need a transcript, the clerk will notify the reporter to prepare the transcript. When the reporter completes the transcript, the clerk will send the reporter's transcript to the appellate division along with the clerk's transcript.

b. Official electronic recording or transcript from an official recording

When available: In some misdemeanor cases, the trial court proceedings are officially recorded on approved electronic recording equipment. If your case was officially recorded, you can ask to have a transcript prepared from that official electronic recording. You should check with the trial court to see if your case was officially electronically recorded before you choose this option. As with reporter's transcripts, some courts also have local rules that establish procedures for deciding whether a statement on appeal or a transcript of only some of the oral proceedings will be a good enough record to consider the issues you are raising on appeal. You should check whether the court has such a local rule.

If the court has a local rule for the appellate division permitting this and all the parties agree ("stipulate"), a copy of the official electronic recording itself can be used as the record of the oral proceedings instead of preparing a transcript. You should check with the trial court to see if your case was officially electronically recorded and check to make sure there is a local rule permitting the use of the recording itself before choosing this option. If you choose this option, you must attach a copy of your agreement with the other parties (called a "stipulation") to your notice regarding the oral proceedings.

Cost: Ordinarily, the appellant must pay for preparing a transcript or making a copy of the official electronic recording. The court will send you an estimate of the cost for this transcript or the copy of the electronic recording. If you still want this transcript or recording, you must deposit this amount with the court. However, you can also choose to use a statement on appeal instead, or take one of the other actions listed in rule 8.868.

If, however, you are indigent (you cannot afford to pay the cost of the transcript or recording), you may be able to get a free transcript or recording. If you were represented by the public defender or another court-appointed attorney in the trial court, you are automatically considered indigent. If you were not represented by a court-appointed lawyer in the trial court, you can complete and file *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form CR-105) to show that you are indigent. You can get form CR-105 at any courthouse or county law library or online at *www.courts.ca.gov/forms.* The court will review this form to decide whether you are indigent.

If you are indigent, an official electronic recording of your case was made, and you show that you need a transcript, the court must provide you with a free transcript. As with reporter's transcripts, whether you need a transcript depends on the issues you are raising on appeal. If the issues you are raising on appeal include that there was not substantial evidence supporting the judgment, order, or other decision you are appealing or that there was misconduct in your case that harmed you, that is generally enough to show that you need a transcript. If you ask for a transcript, the court may ask you what issues you are raising on appeal and may decide that a statement on appeal or a transcript of only some of the oral proceedings will be a good enough record to consider the issues you are raising.

If the court finds that you are not indigent, it will send you a notice and you will have a chance to use a statement on appeal instead or take one of the other actions listed in rule 8.868.

Completion and delivery: Once you deposit the estimated cost of the transcript or the official electronic recording with the clerk or show the court you are indigent and need a transcript, the clerk will have the transcript or copy of the recording prepared. When the transcript is completed or the copy of the official electronic recording is prepared, the clerk will send the transcript or recording to the appellate division along with the clerk's transcript.

c. Statement on appeal

Description: A statement on appeal is a summary of the trial court proceedings approved by the trial court judge who conducted those proceedings (the term "judge" includes commissioners and temporary judges).

When available: If the trial court proceedings were not recorded either by a court reporter or by official electronic recording equipment, or if you do not want to use either of these forms of the record, you can choose ("elect") to use a statement on appeal as the record of the oral proceedings in the trial court (please note that it may take more of your time to prepare a statement on appeal than to use either a reporter's transcript or electronic recording, if they are available).

Contents: A statement on appeal must include:

- A statement of the points you (the appellant) are raising on appeal;
- A summary of the trial court's rulings and judgment; and
- A summary of the testimony of each witness and other evidence that is relevant to the issues you are raising on appeal.

(See rule 8.869 of the California Rules of Court for more information about what must be included in a statement on appeal and the procedures for preparing a statement. You can get this rule at any courthouse or county law library or online at *www.courts.ca.gov/rules.htm.*)

Preparing a proposed statement: If you choose to use a statement on appeal, you must prepare a proposed statement. If you are not represented by a lawyer, you must use *Proposed Statement on Appeal (Misdemeanor)* (form CR-135) to prepare your proposed statement. You can get form CR-135 at any courthouse or county law library or online at *www.courts.ca.gov/forms.*

Serving and filing a proposed statement: You must serve and file your proposed statement in the trial court within 20 days after you file your notice regarding the record of the oral proceedings. "Serve and file" means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") a copy of the proposed statement to the prosecuting attorney and any other party in the way required by law.
- Make a record that the proposed statement has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who

served the proposed statement, who was served with the proposed statement, how the proposed statement was served (by mail or in person), and the date the proposed statement was served.

- File the original proposed statement and the proof of service with the trial court. You should make a copy of the proposed statement you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the proposed statement to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*

Review and modifications: The prosecuting attorney and any other party have 10 days from the date you serve your proposed statement to serve and file proposed changes (called "amendments") to this statement. The trial court judge then reviews both your proposed statement and any proposed amendments filed by the prosecuting attorney and any other party. The judge will then make or order you to make any corrections or modifications to the statement needed to make sure that the statement provides a complete and accurate summary of the relevant testimony and other evidence.

Completion and certification: If the judge makes or orders you to make any corrections or modifications to the proposed statement, the corrected or modified statement will be sent to you, the prosecuting attorney, and any other party for your review. If you disagree with anything in the judge's statement, you will have 10 days from the date the statement is sent you to serve and file objections to the statement. The judge then reviews any objections, makes any additional corrections to the statement, and certifies the statement as a complete and accurate summary of the relevant testimony and other evidence.

Sending the statement to appellate division: Once the trial court judge certifies the statement on appeal, the trial court clerk will send the statement to the appellate division along with the clerk's transcript.

15 Is there any other part of the record that needs to be sent to the appellate division?

Yes. There are two other parts of the official record that need to be sent to the appellate division:

- ***Documents filed in the trial court:*** The trial court clerk is responsible for preparing a record of the written documents filed in your case, called a "clerk's transcript," and sending this to the appellate division. (The documents the clerk must include in this transcript are listed in rule 8.861 of the California Rules of Court. You can get a copy of this rule at any courthouse or county law library or online at *www.courts.ca.gov/rules.htm.*)

- ***Exhibits submitted during trial:*** Exhibits, such as photographs, that were admitted in evidence, refused, or lodged (temporarily placed with the court) in the trial court are considered part of the record on appeal. If you want the appellate division to consider such an exhibit, however, you must ask the trial court clerk to send the original exhibit to the appellate division within 10 days after the last respondent's brief is filed in the appellate division. (See rule 8.870 of the California Rules of Court for more information about this procedure. You can get a copy of this rule at any courthouse or county law library or online at *www.courts.ca.gov/rules.*) Sometimes, the trial court returns an exhibit to a party at the end of the trial. If the trial court returned an exhibit to you or another party and you or the other party ask for the exhibit to be sent to the appellate division, the party who has the exhibit must deliver that exhibit to the appellate division as soon as possible.

16 What happens after the record is prepared?

As soon as the record of the oral proceeding is ready, the clerk of the trial court will send it to the appellate division along with the clerk's transcript. When the appellate division receives this record, it will send you a notice telling you when you must file your brief in the appellate division.

17 What is a brief?

A brief is a party's written description of the facts in the case, the law that applies, and the party's argument about the issues being appealed. If you are represented by a lawyer in your appeal, your lawyer will prepare your brief. If the appellate division has permitted you to represent yourself, you will have to prepare your brief yourself. You should read rules 8.880–8.891 of the California Rules of Court, which set out the requirements for preparing, serving, and filing briefs in misdemeanor appeals, including requirements for the format and length of those briefs. You can get copies of these rules at any courthouse or county law library or online at *www.courts.ca.gov/rules.htm.*

Contents: If you are the appellant (the party who is appealing), your brief, called the "appellant's opening brief," must clearly explain what you believe are the legal errors made in the trial court. Your brief must refer to the exact places in the clerk's transcript and the reporter's transcript (or other record of the oral proceedings) that support your argument. Remember that an appeal is not a new trial. The appellate division will not consider new evidence, such as the testimony of new witnesses or new exhibits, so do not include any new evidence in your brief.

Serving and filing: You must serve and file your brief in the appellate division by the deadline the court set in the notice it sent you, which is usually 30 days after the record is filed in the appellate division. "Serve and file" means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the brief to the respondent (the prosecuting agency) and any other party in the way required by law.
- Make a record that the brief has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the brief, who was served with the brief, how the brief was served (by mail or in person), and the date the brief was served.
- File the original brief and the proof of service with the appellate division. You should make a copy of the brief you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the brief to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and at *www.courts.ca.gov/selfhelp-serving.htm.*

If you do not file your brief by the deadline set by the appellate division, the court may dismiss your appeal.

18 What happens after I file my brief?

Within 30 days after you serve and file your brief, the respondent (the prosecuting agency) may, but is not required to, respond by serving and filing a respondent's brief. If the respondent does not file a brief, the appellant does not automatically win the appeal. The court will decide the appeal on the record, the appellant's brief, and any oral argument by the appellant.

If the respondent serves and files a brief, within 20 days after the respondent's brief was served, you may, but are not required to, serve and file another brief replying to the respondent's brief. This is called a "reply brief."

19 What happens after all the briefs have been filed?

Once all the briefs have been served and filed or the time to serve and file them has passed, the court will notify you of the date for oral argument in your case unless your case presents no arguable issues for the court to

consider. If your case presents no arguable issues, the court will not hold oral argument.

20 What is oral argument?

"Oral argument" is the parties' chance to explain their arguments to the appellate division judges in person. You do not have to participate in oral argument if you do not want to; you can notify the appellate division that you want to "waive" (give up) oral argument by serving and filing a notice within 7 days after the notice of oral argument was sent by the court. You can use *Notice of Waiver of Oral Argument (Misdemeanor)* (form CR-138) to waive oral argument.

If all parties waive oral argument, and the appellate division approves the waiver and takes the oral argument off calendar, the judges will decide your appeal based on the briefs and the record that were submitted. But if one party waives oral argument and another party or parties do not, the appellate division will hold oral argument with any party or parties who choose to participate, including any party who asked to waive oral argument.

If you choose to participate in oral argument, each party will have up to 10 minutes for argument, unless the court orders otherwise. If the appellate division has permitted you to represent yourself, remember that the judges will already have read the briefs, so you do not need to read your brief to the judges. It is more helpful to tell the judges what you think is most important in your appeal or ask the judges if they have any questions you could answer.

21 What happens after oral argument?

After the oral argument is held (or all parties waive oral argument and the court approves the waiver), the judges of the appellate division will make a decision about your appeal. The appellate division has 90 days after oral argument (or the date its waiver was approved) to decide the appeal. The clerk of the court will mail you a notice of that decision.

22 What should I do if I want to give up my appeal?

If you decide you do not want to continue with your appeal, you must file a written document with the appellate division notifying it that you are giving up (this is called "abandoning") your appeal. You can use *Abandonment of Appeal (Misdemeanor)* (form CR-137) to file this notice in a misdemeanor case. You can get form CR-137 at any courthouse or county law library or online at *www.courts.ca.gov/forms.htm.*

If you decide not to continue your appeal and it is dismissed, you will (with only very rare exceptions) permanently give up the chance to raise any objections to your conviction, sentence, or other matter that you could have raised on the appeal. If you were released from custody with or without bail or your sentence or any probation conditions were stayed during the appeal, you may be required to start serving your sentence or complying with your probation conditions immediately after your appeal is dismissed.

CR-133 Request for Court-Appointed Lawyer in Misdemeanor Appeal

Clerk stamps date here when form is filed.

DRAFT

03-09-20

Not approved by the Judicial Council

Instructions

- This form is only for requesting that the court appoint a lawyer to represent a defendant in a **misdemeanor** appeal.
- Before you fill out this form, read *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO) to know your rights and responsibilities. You can get form CR-131-INFO at any courthouse or county law library or online at *www.courts.ca.gov/forms*.
- The court is required to appoint a lawyer to represent you if you are indigent (you cannot afford to pay for a lawyer) and:
  - (1) You were convicted and your punishment includes going to jail or paying a fine of more than $500 (including penalty and other assessments); or
  - (2) You are likely to suffer other negative consequences from the conviction (for example, immigration problems or inability to get or keep a license or permit); or
  - (3) You have not been convicted but you are likely to suffer significant harm if you lose the appeal.
- Fill out this form and make a copy of the completed form for your records.
- Take or mail the completed form to the clerk's office for the same trial court where the notice of appeal was filed. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

a. Name of Defendant (the party who is filing this request):

Name: _____

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different)*: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ Email: _____

b. Defendant's lawyer *(skip this if the defendant is filling out this form)*:

Name: _____ State Bar number: _____

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different)*: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ Email: _____

Fax: _____

Trial Court Case Name: _____ Trial Court Case Number:

Information About Your Case

2 Were you/was your client represented by the public defender or another court-appointed lawyer in the trial court proceedings in this case? *(Check a or b.)*

a. ☐ Yes

b. ☐ No *(Complete and attach* Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense *(form MC-210) showing that you/your client cannot afford to hire a lawyer. You can get form MC-210 at any courthouse or county law library or online at* www.courts.ca.gov/forms.*)*

3 If you have been convicted, describe the punishment the trial court gave you/your client in this case *(check all that apply and fill in any required information):*

a. ☐ Jail time

b. ☐ A fine (including penalty and other assessments) *(fill in the amount of the fine):* $ _____

c. ☐ Restitution *(fill in the amount of the restitution):* $ _____

d. ☐ Probation *(fill in the amount of time on probation):* _____

e. ☐ Other punishment *(describe any other punishment that the trial court gave you/your client in this case):*

_____

_____

_____

f. ☐ *Describe any other negative consequences that you are/your client is likely to suffer because of this conviction:*

_____

_____

_____

4 *If you have not been convicted, describe the order being challenged on appeal:*

_____

_____

_____

Notice to Defendant: If you were represented by appointed counsel in the trial court and the trial court finds that you are able to pay all or part of the cost of that counsel, at the conclusion of the proceedings, the court may also determine after a hearing whether you are able to pay all or a portion of the cost of any attorney appointed to represent you in this appeal. If the court determines that you are at that time able to pay, the court will order you to pay all or part of such cost. Such orders will have the same force and effect as a judgment in a civil action and will be subject to enforcement.

Date: _____

_____ ▶ _____

Type or print name *Signature of defendant or attorney*

W20-01

Appellate Procedure: Appointment of Counsel in Misdemeanor Appeals (Amend Cal. Rules of Court, rule 8.851; revise forms CR-131-INFO and CR-133)

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

	Commenter	Position	Comment	DRAFT Committee Response
1.	California Lawyers Association By Leah Spero, Chair Committee on Appellate Courts and Saul Bercovitch, Director of Governmental Affairs	A	The Committee on Appellate Courts supports this proposal. The proposed amendments to Rule 8.851 sufficiently implement the ruling in *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998, by requiring the appellate division to appoint counsel for an indigent defendant facing a misdemeanor charge when an appeal is taken by either party before judgment, if the appeal arises from a "critical stage" of the criminal proceedings.	The committee notes the commenter's support for the proposal.
			The Request for Specific Comment asks whether subdivision (a)(2) of the rule should be amended to specifically authorize the appellate division to appoint counsel even if the proceedings are not at a critical stage, and the Committee supports that further amendment. The Committee does not anticipate that this provision would be invoked often, and the appellate division would have the discretion to decline any unwarranted request for appointment of counsel at a non-critical stage. In the Committee's view, the appellate division is in the best position to determine whether an individual request for counsel is unwarranted, and its discretionary authority should not be limited as a whole based on theoretical concerns that the rule could have unintended consequences.	The committee appreciates this feedback and agrees with allowing the appellate division the discretion to make this determination.
			The Committee suggests the following amendment to Rule 8.851, subdivision (a)(2): "On application, the appellate division may	The committee thanks the commenter for suggesting specific language and has included this language in the proposal.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

	Commenter	Position	Comment	DRAFT Committee Response
			appoint counsel for any other indigent defendant charged with or convicted of a misdemeanor."	
2.	Jayce Hottenroth Cypress, California	NI	My name is Jayce Hottenroth. I am currently a student at Oxford Academy in Cypress California, and am writing in regard to the proposals open to public comment. Specifically this email is directed towards the Appellate Procedure, and the Appointment of Counsel in Misdemeanor Appeals. The judicial system plays such an important role in the image of our nation, as well as a massive role in people's lives, those innocent and guilty. The judicial system is far from perfect as all things are, and I believe such action towards the Appellate Procedure is a step in the right direction. More outlets for those who are placed on trial will not only benefit the individual, it would benefit the government as each individual prisoner requires an estimated $31,000 dollars a year. A more open minded judicial system when it comes to those who are attempting to appeal their cases would also be beneficial. The Judicial system can make mistakes whether it be due to false forms of evidence, such as false testimony. This lack of certainty in the conviction process as well as the cost of financing a prisoner makes it all the more reasonable to hear more cases. In a nation where an immense number of individuals are convicted yearly, the introduction of such action	The committee notes the commenter's support of efforts to improve the justice system and appreciates the thoughtful comments and participation in this process. The committee appreciates the commenter's thoughts on the judicial system. The committee works to improve the administration of justice in appellate proceedings (see Cal. Rules of Court, rule 10.40), and welcomes feedback and suggestions for how it may best serve the interests of the public.

	Commenter	Position	Comment	DRAFT Committee Response
			towards the Appellate procedure is a step towards the right direction. As humans we are imperfect which suggests faulty systems all throughout the globe, however steps such as the inclusion of such proposal to the Appellate Procedure is a major step in the right direction. Directing our judicial system in this manner will only yield positivity for our nation and I hope for further advocating for actions which may benefit all citizens equally in court. Thank you for your time in reading this email.	The committee thanks the commenter for taking an interest in this proposal and the time to respond.
3.	Joint Rules Subcommittee (JRS) of the Trial Court Presiding Judges Advisory Committee (TCPJAC) and the Court Executives Advisory Committee (CEAC)	AM	The JRS notes the following impact to court operations: • Impact on existing automated systems (e.g., case management system, accounting system, technology infrastructure or security equipment, Jury Plus/ACS, etc.) • Results in additional training, which requires the commitment of staff time and court resources. • Impact on local or statewide justice partners. The JRS notes that training would not create a major impact given the straight-forward nature of the change and that the forms will be updated within the same implementation timeframe as the rule change. Changes to CMS systems may present delays given time to develop, test and implement. Costs should be within the cost for	The committee notes the commenter's support for the proposal if modified and appreciates the feedback regarding impact to court operations. The committee appreciates this information, and acknowledges the commenter's concern regarding the time for implementation.

	Commenter	Position	Comment	DRAFT Committee Response
			maintenance and changes due to change in law and under the purview of the vendor.	
			There will be cost impacts to the county indigent defense fund as appointments increase with this proposed change. Current contracts likely do not address this additional appointment which may lead to delayed implementation and appointment/payment challenges. Communications to Justice Partners will be vital.	The committee notes this feedback and appreciates the commenter's raising these points.
			Request for Specific Comments: 1. Does the proposal appropriately address the stated purpose?	The committee thanks the commenter for responding to the request for specific comments.
			• Yes	No further response required.
			2. Should subdivision (a)(2) of the rule be amended to authorize the appellate division, in its discretion, to appoint counsel for any other indigent defendant accused of a misdemeanor?	
			• Including the term "accused" may be an expansion of the rule beyond the intent of *Gardner v. Appellate Division of Superior Court*. It is difficult to see how the appellate division will be hearing a matter that does not follow a conviction or responding to an appeal from the prosecution following a suppression motion or a motion to dismiss. This idea may have flowed from language in *Gardner* that	The committee agrees that the situation warranting a discretionary appointment of appellate counsel for a defendant charged with a misdemeanor would be relatively rare. However, defendants may appeal under both Penal Code section 1510 and 1538.5(j). The committee concluded that amending the rule to provide the appellate division with discretion to appoint counsel if warranted is consistent with *Gardner*

	Commenter	Position	Comment	DRAFT Committee Response
			identified a right to counsel during pre-indictment lineups, citing *Bustamante*. The appellate department would not appoint counsel until there was some trial court decision to appeal. 3. Should the committee consider developing a separate rule regarding appointment of counsel in writ proceedings in the appellate division?	and could improve access to justice if the situation did arise.
			• Yes. Suggest amending Rule 8.931 and the APP-151 form to include a right to counsel in misdemeanor writ proceedings.	The committee appreciates this feedback and specific suggestion for a future proposal.
			4. Would the proposal provide a cost savings? If so, please quantify.	
			• No. However, there may be a time-saving advantage to the court to have attorneys, rather than self-represented litigants, file and process the misdemeanor appeals. The clerks often spend a great deal of time working with self-represented litigants when processing appeals, and documents are routinely returned multiple times due to errors.	The committee appreciates this feedback.
			5. What would the implementation requirements be for courts - for example, training staff, revising processes and procedures, changing docket codes in case management systems, or modifying case management systems?	

	Commenter	Position	Comment	DRAFT Committee Response
			• Training on forms changes and minute order entries would likely be minimal in time and cost and would likely be part of meetings or updates incorporating other law or procedural changes. Cost would be negligible. The change may or may not include a required change to the CMS system, but costs would likely be covered by ongoing maintenance by vendor which includes revisions required due to change in law. 6. Would three months for Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? • Changes to CMS systems routinely take time to develop, test and implement. Six months would be a necessary minimum although courts with manual processes could begin within the three-month time period. An effective date of January 1, 2021 should provide sufficient time for implementation. 7. How well would this proposal work in courts of different sizes? • Resultant procedures will vary depending on automation maturity of each court and there will be a larger impact on public defenders in larger courts which may increase delays in case flow. Other Comments:	The committee thanks the commenter for this information on implementation requirements for courts. The committee notes the commenter's recommendation that the amended rule and revised forms take effect on January 1, 2021 rather than September 1, 2020. However, it is important that they take effect as soon as possible. The current version of the rule is incorrect and the forms are incomplete. The committee appreciates this insight.

	Commenter	Position	Comment	DRAFT Committee Response
			In looking at the language proposed in rule 8.551(1) (B), consider using the language in the proposed CR-133 form: The appeal is before a final judgment, and the defendant is likely to suffer significant harm if the defendant loses the appeal. Also, it would seem consistent that an appeal of a pre-conviction ruling would also be limited by the same penalty provision in 8.551(a)(1)(A), i.e., when the conviction would subject the defendant to incarceration, fine of more than $500, or likely result in significant collateral consequences. This language would cover all of the situations raised in *Gardner* and would also cover pre-final judgment writ proceedings. The judgment is final when the time to appeal any proceeding within the case has lapsed, or when all appellate remedies have been exhausted. This would also apply to retroactivity issues when new statutes are enacted, and conviction is not final (i.e., suspended sentence). (See, for example, *People v. McKenzie* (2018) 25 Cal.App.5th 1207.) Right to self-representation. There is a suggestion on the bottom of page two that item 4 of the CR-131 INFO form be modified to clarify that a defendant does not have a right of self-representation and to add language advising a defendant whose request	The committee appreciates this suggestion. In drafting the amendments for rule 8.851(a)(1), the committee sought to maintain the current structure of the rule and to use language that closely tracks *Gardner*. Since *Gardner* did not limit the appointment of counsel for a pre-conviction defendant to the same penalty provisions that apply for a defendant who has been convicted of a misdemeanor, the committee did not include that language. The committee will consider developing a rule for appointment of counsel in misdemeanor writ proceedings. The point about retroactivity issues and a judgment that is not final is an interesting one. The committee has removed reference to final judgment from the forms and would welcome further input if there are any ambiguities in the language.

	Commenter	Position	Comment	DRAFT Committee Response
			for self-representation was denied of the need to either hire an attorney or request that an attorney be appointed. This raises two questions: 1. Should Rule 8.851(a) (1) be amended to provide that an attorney will be appointed, rather than include the language "on application"? If there is no right to self-representation for an appeal, then why is an application necessary? 2. Does the limitation on the right to self-representation apply to all types of appeal, including the appeal at issue in *Gardner* that was an appeal that occurred prior to a conviction? The California Supreme Court, *In Re Barnett* (2003) 31 Cal.4th 466, a capital case, held that a criminal defendant's rights regarding legal representation are more limited on appeal than at trial. This is because the Sixth Amendment does not include a right to appeal. California has conferred a right to appeal in a criminal case. The court held that "Notably, however, there is no right—constitutional, statutory, or otherwise—to self-representation in a criminal appeal in California." As the United States Supreme Court recently explained [*Martinez v. Court of Appeal* (2000) 528 US 152] , the sole constitutional right to self-representation derives	An application is required in order for the court to determine whether the defendant is requesting appointed counsel and entitled to appointed counsel. The committee's understanding of the case law is that a misdemeanor defendant has no right of self-representation on appeal, including a pre-conviction appeal.

	Commenter	Position	Comment	DRAFT Committee Response
			from the Sixth Amendment, which pertains strictly to the basic rights that an accused enjoys in defending against a criminal prosecution and does not extend beyond the point of conviction. Emphasizing that the change in one's position from "defendant" to "appellant" is a significant one, the high court found that the balance between a criminal defendant's interest in acting as his or her own lawyer and a state's interest in ensuring the fair and efficient administration of justice "surely tips in favor of the [s]tate" once the defendant is no longer presumed innocent but found guilty beyond a reasonable doubt. Consequently, the court concluded, states may exercise broad discretion when considering what representation to allow and may require an indigent inmate "to accept against his will a state-appointed attorney" for representation on a direct appeal without violating the federal Constitution. (emphasis added.) *People v Johnson* (2012) 53 Cal.4th 519 held "California law is subject to the United States Constitution, including the Sixth Amendment right to self-representation as established in *Faretta*. Thus, a criminal defendant's right of self-representation in California is rooted in the federal constitution only, and a court in California may deny self-representation to the extent permitted by *Faretta* and its progeny. (*Johnson*, at p. 528.)	

W20-01

Appellate Procedure: Appointment of Counsel in Misdemeanor Appeals (Amend Cal. Rules of Court, rule 8.851; revise forms CR-131-INFO and CR-133)

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

	Commenter	Position	Comment	DRAFT Committee Response
			Opposing an appeal from the People following a successful suppression motion occurs prior to conviction (the person remains a defendant and not an appellant) and appears to fall within the scope of "defending against a criminal prosecution." If a self-represented litigant can argue a suppression motion, then it is not clear why they would not have the right to represent themselves in an appeal from a ruling on that motion by the People.	The committee appreciates the commenter's observations. No further response required.
4.	Office of the Marin County Public Defender by Jose H. Varela Public Defender	A	At the Marin County Office of the Public Defender we do not have a writs and appeals attorney as do other larger counties. This proposal ensures that our misdemeanor clients, the vast majority of our clients, have equal access to appellate review. The changes are doable and clear.	The committee notes the commenter's agreement with the proposal and appreciates the feedback.
5.	Orange County Bar Association by Scott B. Garner, President Newport Beach, California	A	Does the proposal appropriately address the stated purpose? Yes. Should subdivision (a)(2) of the rule be amended to authorize the appellate division, in its discretion, to appoint counsel for any other indigent defendant accused of a misdemeanor? Yes. Currently subdivision (a)(2) permits the discretionary appointment of counsel when a defendant has been convicted of a crime that	The committee notes the commenter's agreement with the proposal and thanks the commenter for responding to specific questions. The committee agrees with the commenter that this subdivision should be amended, but to clarify, the amendment would *add* the category of

	Commenter	Position	Comment	DRAFT Committee Response
			does not meet the criteria delineated in subdivision (a)(1). Historically, this has meant individuals who were convicted of misdemeanors not punishable by incarceration or a fine of more than $500 or were not likely to suffer adverse collateral consequences, such as violations of Health and Safety Code section 11357(b) [possession of less than an ounce of marijuana], prior to the statute being amended by Proposition 64. Amending the subdivision by replacing "convicted" with "accused of" will presumably only impact self-represented defendants who find themselves as real party in interest when opposing counsel seeks review of pre-trial orders (primarily orders related to discovery) in the appellate division by way of extraordinary writ petitions. Gardner explains that appointment of counsel to assist in the appellate phase of a misdemeanor criminal case is required because appellate "rules are forbidding for any layperson, but all the more so for criminal defendants who come to court with a wide range of educational backgrounds and linguistic and other abilities." (Id. at p. 1006.) The same could be said of extraordinary writs. Should the committee consider developing a separate rule regarding appointment of counsel in writ proceedings in the appellate division? Yes, assuming the subdivision (a)(2) is changed as contemplated above. If that change	defendants accused of/charged with a misdemeanor to those for whom the appellate division is authorized to appoint counsel, i.e., defendants convicted of a misdemeanor, rather than replace "convicted of" with "accused of." The committee notes the commenter's support for a rule regarding appointment of counsel in misdemeanor writ proceedings.

	Commenter	Position	Comment	DRAFT Committee Response
			does not occur, there would be no authority for the appellate division appointing counsel, absent a determination that a writ is a critical stage of the proceedings.	
6.	Orange County Superior Court Civil and Appellate Division Management and Analyst Team	NI	Does the proposal appropriately address the stated purpose? Yes, the proposal addresses the stated purpose. Should subdivision (a)(2) of the rule be amended to authorize the appellate division, in its discretion, to appoint counsel for any other indigent defendant accused of a misdemeanor? Yes, subdivision (a)(2) should be amended to read "convicted or accused of a misdemeanor". Ensuring the appellate division has broad discretion to appoint is in the spirit of the purpose of the proposed revisions. Should the committee consider developing a separate rule regarding appointment of counsel in writ proceedings in the appellate division? Likewise, since the purpose of this revision is to remove any constraints on the appellate division's authority and discretion to appoint, management agrees that proposing a separate rule regarding appointment of counsel in writ proceedings in the appellate division would be appropriate.	The committee thanks the commenter for responding to specific questions presented. No further response required. The committee agrees with the commenter, and has amended this subdivision of the rule, modifying "accused of" to "charged with." The committee notes the commenter's support for a rule regarding appointment of counsel in misdemeanor writ proceedings.

W20-01

Appellate Procedure: Appointment of Counsel in Misdemeanor Appeals (Amend Cal. Rules of Court, rule 8.851; revise forms CR-131-INFO and CR-133)

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

	Commenter	Position	Comment	DRAFT Committee Response
			Would the proposal provide cost savings? If so, please quantify? Costs would increase commensurate with the increased number of appointments and appellate division hearings. However, this might be offset by a reduced number of criminal proceedings in the superior court. 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? For implementation, court operations would need to update procedures to include the revisions to form CR-133. Information would need to be provided to the Judicial Officers. Courtroom clerks and case processing staff would need training. Training materials would need to be updated and/or created. The approximate level of effort is estimated at 16 hours FTE by a Program Coordinator Specialist over approximately one month to revise procedures, approve through workflow, train staff and implement.	The committee appreciates this feedback. The committee thanks the commenter for this input regarding specific implementation requirements.
7.	San Diego County Bar Association Appellate Practice Section by Helen Irza, Chair	AM	The Appellate Practice Section of the San Diego County Bar Association shared with its membership the proposed changes to the California Rules of Court contained in	The committee notes the commenter's support for the proposal if modified.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-01

Appellate Procedure: Appointment of Counsel in Misdemeanor Appeals (Amend Cal. Rules of Court, rule 8.851; revise forms CR-131-INFO and CR-133)

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

	Commenter	Position	Comment	DRAFT Committee Response
			Invitation to Comment W20-01. After canvassing its membership and forming a subcommittee to discuss them, our section has the following comments about the proposal: General Comments The Invitation to Comment requested comments on these general topics. 1. Does the proposal appropriately address the stated purpose? The Executive Summary of the Invitation to Comment states the purpose of the proposed rule change and form change is to implement the California Supreme Court's decision in *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998 by expanding the circumstances under which the superior court appellate division in misdemeanor appeals must appoint counsel for an indigent defendant. Our section agrees that the proposal as a whole appropriately gives flexibility for the appellate division to appoint counsel for indigent defendants in misdemeanor appeals at critical stages of a criminal proceeding other than a People's pretrial appeal of the grant of a motion to suppress evidence. Regarding the specific changes that are proposed for the forms, we suggest adding language to the information sheet on form CR-	The committee notes this feedback. The committee appreciates the suggestion that the information sheet provide more assistance and specific examples of significant adverse

	Commenter	Position	Comment	DRAFT Committee Response
			131-INFO in section 5 ("How do I get a lawyer") to provide more directed guidance to the defense about potential adverse collateral consequences. Questions 3-f and 4 of CR-133 ask defendants to describe any significant harm they are likely to suffer because of the conviction or if they lose the appeal. Presumably, these questions relate to rule 8.851(a)(1)(A)'s language directing that defendants be appointed counsel if they are "likely to suffer significant adverse collateral consequences as a result of the conviction." Based on experience, our members believe that absent a concrete list of specific examples of potential adverse collateral consequences, defendants will not tailor their responses in questions 3-f and 4 of CR-133 appropriately and will give generic or unhelpful responses that the vast majority of criminal defendants would otherwise state (e.g., if they are not appointed counsel they may lose on appeal and the risk of conviction increases). The information sheet gives examples in section 7 ("Can I appeal any decision that the trial court made?") of what types of rulings can be appealed. The Appellate Practice Section suggests section 5 of CR-131-INFO provide a nonexhaustive list of examples of adverse collateral consequences that may follow a conviction that would correspond to the significant harm that is referenced in questions 3-f and 4 of CR-133. For example, such harm could include, but not be limited to, immigration consequences, professional or vocational	collateral consequences to assist the defense in answering questions on the request for counsel form. The committee agrees and has revised language on both forms.

	Commenter	Position	Comment	DRAFT Committee Response
			licensing consequences, or student loan eligibility. 2. Should subdivision (a)(2) of the rule be amended to authorize the appellate division, in its discretion, to appoint counsel for any other indigent defendant accused of a misdemeanor No comment. 3. Should the committee consider developing a separate rule regarding appointment of counsel in writ proceedings in the appellate division Our section supports developing a separate rule to address the appointment of counsel in writ proceedings in the appellate division. In general, the rules distinguish between direct appeals and writ proceedings. (Compare Cal. Rules of Court, rules 8.252, 8.366 with rules 8.368, 8.384.) Without a rule addressing appointment of counsel in misdemeanor writ proceedings, defendants in such proceedings may be confused as to whether they can or should rely on the rules that relate to appointment of counsel in appeals. Clarity would be helpful.	No response required. The committee appreciates the feedback on this question and will consider developing a rule for appointment of counsel in writ proceedings in a future rules cycle.
8.	Superior Court of San Diego County by Mike Roddy Executive Officer	A	No specific comments provided.	The committee notes the commenter's support for the proposal and appreciates the response.

Item number: 02

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Appellate Procedure: Access to Juvenile Case Files in Appellate Court Proceedings

Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV 291-INFO; revise forms JV 285, JV 290, JV 295, JV 321, JV 325, JV 569, JV 570, JV 571, JV 572, JV 573, JV 574, JV 800, JV 820, and JV 822

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

Staff contact (name, phone and e-mail): Christy Simons, 415-865-7694, christy.simons@jud.ca.gov and Daniel Richardson, 415-865-7619, daniel.richardson@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 10/28/2019

Project description from annual agenda: Implement legislation (AB 1617 (Bloom) Juvenile case files: inspection (Ch. 992, Statutes of 2018)) that allows certain parties involved in appeals of juvenile court orders, who previously had been granted access to the juvenile court case file under a court order, to access the case file for proceedings in the appellate courts. Requires the Judicial Council to adopt rules to implement this provision.

If requesting July 1 or out of cycle, explain:
Winter cycle proposal; second circulation

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

Item No.:

For business meeting on: September 25, 2020

Title

Appellate Procedure: Access to Juvenile Case Files in Appellate Court Proceedings

Rules, Forms, Standards, or Statutes Affected

Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV-325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822

Recommended by

Appellate Advisory Committee
Hon. Louis R. Mauro, Chair
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Chair
Hon. Mark A. Juhas, Chair

Agenda Item Type

Action Required

Effective Date

September 1, 2020

Date of Report

April 2, 2020

Contact

Christy Simons, 415-865-7694
christy.simons@jud.ca.gov
Daniel Richardson, 415-865-7619
daniel.richardson@jud.ca.gov

Executive Summary

Recent Judicial Council–sponsored legislation amended the statute governing access to records in a juvenile case. The statutory amendment provides that individuals who petitioned for, and by order of the juvenile court were granted access to, the juvenile case file are entitled to access those same records for purposes of appellate court proceedings in which they are parties. To implement that legislation, the Appellate Advisory Committee and the Family and Juvenile Law Advisory Committee now recommend amending the rules regarding confidentiality in juvenile court and appellate court proceedings, approving a new information sheet, and revising a number of forms used in juvenile dependency matters and subsequent appellate proceedings.

Recommendation

The Appellate Advisory Committee and the Family and Juvenile Law Advisory Committee recommend that the Judicial Council, effective September 1, 2020:

1. Amend rule 5.552 of the California Rules of Court to replace the terms "disclosure" and "disclosed" with "access to" and "released," to more accurately describe the juvenile court's action as permitting access to records in the juvenile case file rather than permitting disclosure;

2. Amend rule 8.401 of the California Rules of Court to add new subdivision (b)(2) to implement the new statutory provision, add a new advisory committee comment for the new subdivision, add definitions to clarify terms, and make other changes to clarify the application of each paragraph;

3. Approve *Information on Requesting Access to Records for Persons With a Limited Right to Appeal* (form JV-291-INFO);

4. Revise the following forms to add a notice to potential parties in appellate proceedings who are not entitled to access records in the juvenile case file absent court order:

    a. Relative Information (form JV-285);
    b. Caregiver Information Form (form JV-290);
    c. De Facto Parent Request (form JV-295);
    d. Request for Prospective Adoptive Parent Designation (form JV-321); and
    e. Objection to Removal (form JV-325);

5. Revise *Proof of Service—Request for Disclosure* (form JV-569) to rename it *Proof of Service—Petition for Access to Juvenile Case File*, update the language, and add new item 3 for the filer to explain any failure to serve required public entities;

6. Revise *Request for Disclosure of Juvenile Case File* (form JV-570) to rename it *Petition for Access to Juvenile Case File*, update the language, and make other clarifying changes;

7. Revise *Notice of Request for Disclosure of Juvenile Case File* (form JV-571) to rename it *Notice of Petition for Access to Juvenile Case File* and update the language;

8. Revise *Objection to Release of Juvenile Case File* (form JV-572) to update the language;

9. Revise *Order on Request for Disclosure of Juvenile Case File* (form JV-573) to rename it *Order on Petition for Access to Juvenile Case File*, update the language, add check boxes and space in item 1 for the judicial officer to state the reason for denying the petition, and add new item 6 to provide space for other orders;

10. Revise *Order After Judicial Review* (form JV-574) to rename it *Order After Judicial Review on Petition for Access to Juvenile Case File*, update the language, and add check boxes for

the judicial officer to indicate the reason for denying the petition and information regarding redaction and dissemination of records;

11. Revise *Notice of Appeal—Juvenile* (form JV-800) to add a notice to potential parties in appellate proceedings who are not entitled to access records in the juvenile case file absent court order, to add an item allowing the litigant who has been granted access to records to indicate this and attach a copy of the order, and to add to the list of appealable orders in item 7 an order under Welfare and Institutions Code section 305.5 denying transfer to the tribal court and an order under section 388;

12. Revise *Notice of Intent to File Writ Petition and Request for Record to Review Order Setting a Hearing Under Welfare and Institutions Code Section 366.26* (form JV-820) to add a notice to potential parties in appellate proceedings who are not entitled to access records in the juvenile case file absent court order and to add an item allowing the litigant who has been granted access to indicate this and attach a copy of the order; and

13. Revise *Notice of Intent to File Writ Petition and Request for Record to Review Order Designating or Denying Specific Placement of a Dependent Child After Termination of Parental Rights* (form JV-822) to add a notice to potential parties in appellate proceedings who are not entitled to access records in the juvenile case file absent court order, add an item allowing the litigant who has been granted access to indicate this and attach a copy of the order, and clarify that this form may be signed by the attorney of record.

The text of the amended rules and the new and revised forms are attached at pages 13–41.

Relevant Previous Council Action

In 2017 the Appellate Advisory Committee, after consultation with the Family and Juvenile Law Advisory Committee, recommended that the Judicial Council sponsor legislation to amend the statute that specifies who may access and copy records in a juvenile case file. The amendment would clarify that persons who are entitled to seek review of certain orders in juvenile proceedings or who are respondents in such appellate proceedings may, for purposes of those appellate proceedings, access and copy those records to which they were previously given access by order of the juvenile court.

This legislation, Assembly Bill 1617, added new subdivision (a)(6) to Welfare and Institutions Code section 827[1] (section 827) and took effect on January 1, 2019. New subdivision (a)(6) authorizes a person who is not entitled to access the juvenile case file under section 827(a)(1)(A)–(P) to access records in the case file for purposes of the appeal or writ if the person has previously petitioned for, and been granted access to, those records under section

[1] All further unspecified statutory references are to the Welfare and Institutions Code, and all rule references are to the California Rules of Court. The full text of this statute is available at http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=827.&lawCode=WIC.

827(a)(1)(Q) by the juvenile court. New subdivision (a)(6) also requires the Judicial Council to adopt rules to implement the paragraph.

Rules 5.552 and 8.401 have been amended over the years, but the council has not taken action relevant to the recommendations contained herein. Similarly, the forms have been revised periodically, but none of those prior revisions has bearing on this proposal.

Analysis/Rationale

This proposal is intended to help parties to appellate court proceedings, particularly those who are self-represented, recognize as early as possible whether they need to file a petition for access to records, better understand the procedure, and better navigate the process. The new and revised forms are also intended to assist judicial officers, who must review the petitions and make decisions regarding access to records in the juvenile case file, and court staff, who must prepare and send the record.

Background

The confidentiality of juvenile case files is established by section 827. This confidentiality is intended to protect the privacy rights of the child who is the subject of the juvenile court proceedings. Section 827(a)(1) identifies those who may inspect and receive copies of a juvenile court case file, including the child who is the subject of the proceeding, the child's parent or guardian, the attorneys for the parties, the petitioning agency in a dependency action, or the district attorney, city attorney, or city prosecutor authorized to prosecute criminal or juvenile cases under state law.

Ordinarily, to help resolve these matters as quickly as possible, when an appeal or petition is filed challenging a judgment or order in a juvenile proceeding, the record for that appellate proceeding is prepared and sent to the Court of Appeal and the parties very quickly. The items that must be included in the record on appeal or for certain writ proceedings are listed in rules 8.407, 8.450, and 8.454. The trial court is required to begin preparing the record in these proceedings upon filing of the notice of appeal or notice of intent to file a writ petition.

However, some individuals who are authorized to participate in juvenile proceedings and have the right to seek review of certain orders in those proceedings or who have a right to respond to an appeal or petition seeking such review are not entitled under section 827, absent court order, to access (inspect or copy) any records in a juvenile case file. This situation occurs, for example, when the appellant is a family member or other person who files a petition seeking de facto parent status and is appealing the denial of that petition or who files a petition under section 388 to change, modify, or set aside a juvenile court order on grounds of change of circumstance or new evidence and is appealing the denial of that petition. In those cases, before the recent legislation, the juvenile courts and Court of Appeal followed various procedures to decide, on a case-by-case basis, what records such litigants could receive. Doing so took time and resources of the juvenile court, the Court of Appeal, and the persons seeking access to records for such proceedings. It also resulted in delays and, particularly when the appellant or petitioner was self-

represented and failed to obtain the necessary records, procedural dismissals of these appeals without consideration of their merit.

Prior circulation

This proposal circulated previously in spring 2019. At that time, the committees proposed extensive amendments to several rules relating to juvenile appeals and writs to include provisions relating to persons required to petition for access to records in the juvenile case file and the limited record to be prepared and provided to these persons. The proposal included a new information sheet and a notice on certain forms regarding the process to seek authorization from the juvenile court to access records in the juvenile case file.

The committees received a number of public comments raising various concerns with the prior proposal, including, among others, due process issues and perceived gaps in the proposed rules that would require more rules. The committees concluded that, in attempting to provide detailed procedures and information for litigants and courts and to account for various situations that could arise, the proposal's scope and complexity expanded beyond what was necessary to implement the legislation, which was narrow in scope and aimed at a situation that arises relatively infrequently. Accordingly, the committees determined that the best way to move forward would be a more focused rules proposal to add the juvenile court petition process to the appellate rule on access to records in a juvenile case.

Rule amendments

The committees recommend amending both the appellate and juvenile rules on confidentiality of records. The proposed rule amendments appropriately track the provisions of section 827.

Rule 5.552

To be consistent with the language of section 827, the committees recommend amending the rule on confidentiality of records in the juvenile court to replace the terms "disclosure" and "disclosed" with "access to" and "released," respectively. The committees also recommend making these changes to the names of several forms that are referenced in the rule and are part of this proposal (see below). These changes would more accurately describe the juvenile court's action in granting a petition as permitting *access* to records in the juvenile case file rather than permitting *disclosure*, which could suggest that the petitioner may disclose the information.

Rule 8.401

Rule 8.401 is the appellate rule on confidentiality in juvenile proceedings; subdivision (b) addresses access to documents and records. The committees recommend adding a new paragraph regarding access to records in the juvenile case file under section 827 stating that individuals who were granted access to records by order of the juvenile court may access the same records for purposes of an appeal or writ proceeding. A new advisory committee comment would describe the petition process under section 827 and refer to rule 5.552 and the mandatory form a petitioner must use.

Other amendments to this rule would add definitions to clarify terms. Existing rule 8.401(b) refers to "filed documents," "documents filed by the parties," "the record on appeal," and "records" in presenting various rules regarding access to documents and records, and proposed new subdivision (b)(2) would add the term "records in the juvenile case file." To eliminate confusion and draw clear distinctions, the committees recommend defining "filed document," "record on appeal," "record on a writ proceeding," and "records in the juvenile case file."

New and revised forms

Whereas the rules component of this revised proposal is narrower than what was originally circulated, the forms portion now includes several additional forms. The committees recommend a new information sheet for individuals who must use the petition process to access records in the juvenile case file and adding a notice regarding the petition process to certain forms. Other revisions to forms are intended to raise awareness of the possible need to petition for access to records and to assist the juvenile court and litigants in that process. In addition, several changes are intended to update or clarify content on the forms.

Proposed information sheet

Information on Requesting Access to Records for Persons With a Limited Right to Appeal (form JV-291-INFO) provides information for individuals with a limited right to seek review of a juvenile court order, such as relatives and de facto parents. This includes information about requesting access to the juvenile case file through a petition under section 827(a)(1)(Q). The form emphasizes that these individuals have a right to appeal or file a writ petition only in limited circumstances. This form is substantially similar to the version included in the earlier proposal, but renamed and with other minor clarifying changes.

Notice on JV forms

Potential parties in appellate proceedings who are not entitled to access records in the juvenile case file absent a court order may be unaware of the requirement to petition for such access, and thus may not file such a petition until after the appellate proceeding has begun. This situation can cause delays and difficulties for litigants and the courts—problems the legislation was intended to solve. The committees recommend adding a short notice to forms typically used by these litigants in dependency and juvenile justice cases. The notice reads as follows:

> If you are not the child, child's parent, or child's legal guardian, you may have a right to challenge a decision by the juvenile court, but only in very limited circumstances. You may need a court order granting you access to records in the juvenile case file. For more information, please see *Information on Requesting Access to Records for Persons With a Limited Right to Appeal* (form JV-291-INFO). You can get form JV-291-INFO at any courthouse or county law library or online at www.courts.ca.gov/forms.

The committees recommend adding this notice to the following forms:

- *Relative Information* (form JV-285)
- *Caregiver Information Form* (form JV-290)
- *De Facto Parent Request* (form JV-295)
- *Request for Prospective Adoptive Parent Designation* (form JV-321)
- *Objection to Removal* (form JV-325)
- *Notice of Appeal—Juvenile* (form JV-800)
- *Notice of Intent to File Writ Petition and Request for Record to Review Order Setting a Hearing Under Welfare and Institutions Code Section 366.26* (form JV-820)
- *Notice of Intent to File Writ Petition and Request for Record to Review Order Designating or Denying Specific Placement of a Dependent Child After Termination of Parental Rights* (form JV-822)

Revisions to notice of appeal and notice of intent to file writ petition forms

In addition to adding the notice described above, the committees recommend adding an item to these forms so that the litigant who has been granted access to records by order of the juvenile court may indicate this and attach a copy of the order, if it is available. This item will provide notice to the juvenile court clerk who prepares the appellate court record that the litigant's access to records is specified in the juvenile court's order.

The committees recommend adding this item to the following forms:

- *Notice of Appeal—Juvenile* (form JV-800)
- *Notice of Intent to File Writ Petition and Request for Record to Review Order Setting a Hearing Under Welfare and Institutions Code Section 366.26* (form JV-820)
- *Notice of Intent to File Writ Petition and Request for Record to Review Order Designating or Denying Specific Placement of a Dependent Child After Termination of Parental Rights* (form JV-822)

Revisions to mandatory forms for the section 827 petition process

The Judicial Council adopted mandatory forms for use by litigants and the juvenile courts in the section 827 petition process. The committees recommend updating the names of these forms and language within the forms to refer to "access" and "petition for access" rather than "disclosure" and "request for disclosure."

The committees propose making these revisions to the following forms:

- *Proof of Service—Request for Disclosure* (form JV-569), renamed *Proof of Service—Petition for Access to Juvenile Case File*
- *Request for Disclosure of Juvenile Case File* (form JV-570), renamed *Petition for Access to Juvenile Case File*
- *Notice of Request for Disclosure of Juvenile Case File* (form JV-571), renamed *Notice of Petition for Access to Juvenile Case File*

- *Objection to Release of Juvenile Case File* (form JV-572)
- *Order on Request for Disclosure of Juvenile Case File* (form JV-573), renamed *Order on Petition for Access to Juvenile Case File*
- *Order After Judicial Review* (form JV-574), renamed *Order After Judicial Review on Petition for Access to Juvenile Case File*

Other revisions to forms

The committees recommend additional changes to the forms as described below.

Form JV-569 is the mandatory form for filing proof of service of the petition under section 827(a)(1)(Q). Under rule 5.552, the petitioner is required to serve notice of the petition on certain individuals and entities, but if the petitioner does not know the names and addresses and is unable to effect service for that reason, the clerk must do it. The committees recommend adding a new item 3 for litigants to indicate that they were unable to serve county counsel and the child welfare agency (if the petition is filed under section 300), or the district attorney and the probation department (if the petition is filed under section 601 or 602). The new item requires the litigant to describe the efforts to locate the addresses and to provide an explanation for not being able to locate the addresses. This is intended to reduce the number of instances in which the burden of serving notice on public entities is unnecessarily transferred to the court.

Form JV-570 is the mandatory form used to petition for access to the juvenile case file. It requires the petitioner to describe in detail the records that are sought and why the records are needed. The committees recommend expanding the instructions for item 5, which requires the petitioner to describe the records being sought, and revising item 6 to add the option that records are sought for a juvenile court proceeding or an appellate court proceeding and provide space for the petitioner to list the relevant hearing dates.

Form JV-573 is the mandatory form for the juvenile court to make its ruling on the petition. The revisions would add check boxes and space in item 1 for the judicial officer to indicate the reason for denying the petition, and add new item 6 to provide space for other orders.

Form JV-574 is the mandatory form for the juvenile court to issue orders after judicial review of the juvenile case file. The committees recommend adding check boxes and space in item 2 for the judicial officer to indicate the reason or reasons for denying the petition, adding a check box to items 3a and 4c to indicate that records released to the petitioner must be redacted, and adding a check box and space to item 6 to permit the petitioner to disseminate records to a specified person and to indicate that those records must be redacted or are subject to a protective order.

Form JV-800, the notice of appeal form, would be revised to add check boxes to item 7, which lists appealable orders under different sections of the Welfare and Institutions Code, to include an order under section 305.5 denying transfer to a tribal court and an order under section 388 (request to change a court order).

Form JV-820, the notice of intent to file a writ petition challenging the setting of a hearing under section 366.26, would be revised to add language to the box on page 2 titled "What Will Happen at the Hearing to Make a Permanent Plan?" to include the court's option of ordering another planned permanent living arrangement for a child who is 16 years old or older at the section 366.26 hearing.

Form JV-822, the notice of intent to file a writ petition challenging the court's placement order, would be revised to add language to the box on page 2 titled "Who Must Sign the *Notice of Intent*?" to clarify that the notice of intent may be signed by the attorney of record.

Policy implications

The committees have identified no policy implications.

Comments

This proposal was circulated for public comment from December 13, 2019, to February 11, 2020, as part of the regular winter comment cycle. Eleven organizations submitted comments on this proposal. Three commenters agreed with the proposal. Five organizations, including the Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee, agreed if the proposal if it is modified. Three others submitted comments but did not state a position. A chart with the full text of all comments received and the committee's responses is attached at pages 42–96.

Petition process

Three commenters, Advokids, Appellate Defenders, and California Appellate Project–Los Angeles (CAP-LA), submitted extensive comments regarding the petition process: that it is difficult and frustrating, causes long delays, and results in an inadequate record on appeal. The committees understand the difficulties and attempted to address them more fully in the earlier proposal. However, as described above, those proposed rule amendments raised extensive issues and concerns, created additional gaps in procedures, and far exceeded the legislative mandate to implement the new statutory provision.

Advokids comments that limiting access to the record in appellate matters without also amending the rules regarding juvenile appeals and writs will create confusion and delay. To address this issue and to streamline the process, Advokids proposes revising several forms used in the juvenile court to add an item that requests an order granting access to records in the juvenile case file pursuant to section 827(a)(1)(Q). The committees note that the limitation on access to records in the juvenile case file is mandated by statute and has not changed as a result of this proposal. The committees will retain this suggestion for consideration in the future.

To ease the delay problems, Appellate Defenders contends that third party litigants (family members, former caretakers) who have been present at juvenile court hearings have been implicitly granted access to the records used at those hearings, meaning they should not have to file a petition. This commenter also suggests that a full copy of the record should be provided for appellate counsel for the third party, with the caveat that counsel cannot share it with the client.

However, absent case law or statute supporting these interpretations, the committees reject these interpretations as inconsistent with section 827. To address the problem of an inadequate record, Appellate Defenders suggest including on form JV-570 additional specific types of records to assist third party litigants with requesting what they will need. The committees declined to add this content to the form, reasoning that the additions would likely result in voluminous requests and that the instructions on the form are sufficient.

CAP-LA suggests shifting the burden of designating the record and serving the JV-570 petition from the third party appellant to the juvenile court judicial officer who heard the dependency case, and to include a time frame for the judicial officer to return form JV-570 to the clerk. The commenter suggests that the judicial officer is better able to identify the necessary record based on the order being appealed from, and also suggests adding a mechanism for seeking completion of an inadequate record filed in the Court of Appeal, prior to briefing. These comments are beyond the scope of the proposal that circulated for public comment. The committees will retain them for consideration as part of a future proposal.

Questions presented in the ITC

The committees included four additional questions on the ITC.

On the first question regarding whether the definition of "records in the juvenile case file" in rule 8.401(b) should more closely track the definition of "juvenile case file" in rule 5.552(a) or section 827(e), the committees received four responses that came to various conclusions. The committees considered the feedback and modified the definition of "records in the juvenile case file" to include records lodged, as well as filed, in the juvenile court.

The second question asked for feedback on the new information sheet, form JV-291-INFO. Most of the commenters responded that the form is helpful and provides the necessary information. One commenter suggested formatting it along the lines of form JV-060-INFO, which uses a question-and-answer format. The committees will retain this suggestion for future consideration. Two commenters suggested including a note of caution or warning that the petition process can cause lengthy delays. The committees declined to add this note because each court is different and there are no "typical" time frames. In addition, such warning might have the unintended effect of deterring someone from filing a petition.

The third and fourth questions concerned the notice requirements of rule 5.552. Question three asked whether rule 5.552 should continue to require notice to county counsel and the parents when a petition for access to records is filed by an adult who is a former or current dependent. Question four asked whether the rule should be changed to require that a parent's attorney of record receive notice of a petition for access to records. To the third question, two commenters responded no, and one said yes. Five commenters responded to the fourth question; all said some version of yes. The committees decided that notice to parents and county counsel is important to any petition for access as their input is needed on confidentiality issues concerning records in the case file. The committees also determined that notice to parents usually includes their attorney if they have one, so notice is sufficient in this respect as well.

Suggestions for rules and forms
Several commenters submitted specific suggestions for clarifying edits and corrections to rule language and the forms. As indicated in the comment chart, a number of these suggestions were accepted; others were declined or deferred.

Alternatives Considered

The committees did not consider proposing no rule changes because the legislation requires the Judicial Council to adopt implementing rules.

As described above, the committees previously proposed more extensive rule amendments to describe procedures for appellate proceedings involving individuals whose access to records is limited. However, these extensive changes to the juvenile appellate rules would have added numerous new procedures, raised many more issues that would have to be addressed, and went well beyond what is necessary to implement the new statutory provision.

The committees considered making no changes to JV forms, but rejected this option. Because of the likelihood that individuals may be unaware of the potential need to petition for access to records in the juvenile case file, the committees chose to develop a new information sheet, include a notice on certain forms, and make other changes to improve awareness of the petition process and assist litigants and courts in navigating it.

Fiscal and Operational Impacts

The Joint Rules Subcommittee and a superior court advise that implementation requirements for the courts will include staff time and printing costs for the new information sheet, communication with judicial officers and staff, and possible revisions to procedures and updates to case management systems.

Another superior court cited training for staff who process appeals and writ petitions and clerks who process petitions for access to records under section 827. Revision of local rules, local forms, and local procedures will also be required. In addition, the court indicated that it may need to collaborate with the Court of Appeal to ensure efficiency and compliance with new rules.

A third superior court also mentioned training, including training on redaction software, and updates to its case management system. The court also noted that non-party appeals and writs require significant additional resources. Redactions to both clerks' and reporters' transcripts are necessary and costly.

Attachments and Links

1. Cal. Rules of Court, rules 5.552 and 8.401, at pages 13–15
2. Forms JV-291-INFO, JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822, at pages 16–41
3. Chart of comments, at pages 42–96

4. Attachment A: Chart of comments on proposal SPR19-06 (proposal circulated for comment twice; this chart from first comment cycle provided for background)
5. Link A: Welfare and Institutions Code section 827, *http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=827.&lawCode=WIC*
6. Link B: Assembly Bill 1617 (Stats. 2018, ch. 992), *http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB1617*

Rules 5.552 and 8.401 of the California Rules of Court are amended, effective September 1, 2020, to read:

Rule 5.552. Confidentiality of records (§§ 827, 827.12, 828)

(a) * * *

(b) Petition

Juvenile case files may be obtained or inspected only in accordance with sections 827, 827.12, and 828. They may not be obtained or inspected by civil or criminal subpoena. With the exception of those persons permitted to inspect juvenile case files without court authorization under sections 827 and 828, and the specific requirements for accessing juvenile case files provided in section 827.12(a)(1), every person or agency seeking to inspect or obtain juvenile case files must petition the court for authorization using ~~*Request for Disclosure of*~~ *Petition for Access to Juvenile Case File* (form JV-570). A chief probation officer seeking juvenile court authorization to access and provide data from case files in the possession of the probation department under section 827.12(a)(2) must comply with the requirements ~~of~~ in ~~subdivision~~ (e) of this rule.

(1)–(2) * * *

(c) Notice of petition for ~~disclosure~~ access

(1) At least 10 days before the petition is submitted to the court, the petitioner must personally or by first-class mail serve ~~*Request for Disclosure of*~~ *Petition for Access to Juvenile Case File* (form JV-570), *Notice of* ~~*Request for Disclosure of*~~ *Petition for Access to Juvenile Case File* (form JV-571), and a blank copy of *Objection to Release of Juvenile Case File* (form JV-572) on the following:

(A)–(I) * * *

(2) The petitioner must complete *Proof of Service—* ~~*Request for Disclosure*~~ *Petition for Access to Juvenile Case File* (form JV-569) and file it with the court.

(3) If the petitioner or the petitioner's counsel does not know or cannot reasonably determine the identity or address of any of the parties in (c)(1) above, the clerk must:

(A) Serve personally or by first-class mail to the last known address a copy of ~~*Request for Disclosure of*~~ *Petition for Access to Juvenile Case File*

(form JV-570), *Notice of ~~Request for Disclosure of~~ Petition for Access to Juvenile Case File* (form JV-571), and a blank copy of *Objection to Release of Juvenile Case File* (form JV-572); and

(B) Complete *Proof of Service—~~Request for Disclosure~~ Petition for Access to Juvenile Case File* (form JV-569) and file it with the court.

(4) For good cause, the court may, on the motion of the person seeking the order or on its own motion, shorten the time for service of the petition for ~~disclosure~~ access.

(d) Procedure

(1)–(4) * * *

(5) If the court grants the petition, the court must find that the need for ~~discovery~~ access outweighs the policy considerations favoring confidentiality of juvenile case files. The confidentiality of juvenile case files is intended to protect the privacy rights of the child.

(6) The court may permit ~~disclosure of~~ access to juvenile case files only insofar as is necessary, and only if petitioner shows by a preponderance of the evidence that the records requested are necessary and have substantial relevance to the legitimate need of the petitioner.

(7) If, after in camera review and review of any objections, the court determines that all or a portion of the juvenile case file may be ~~disclosed~~ accessed, the court must make appropriate orders, specifying the information ~~to be disclosed~~ that may be accessed and the procedure for providing access to it.

(8) * * *

(e)–(f) * * *

Rule 8.401. Confidentiality

(a) * * *

(b) Access to filed documents and records

For the purposes of this rule, "filed document" means a brief, petition, motion, application, or other thing filed by the parties in the reviewing court in a proceeding under this chapter; "record on appeal" means the documents referenced in rule

8.407; "record on a writ petition" means the documents referenced in rules 8.450 and 8.454; and "records in the juvenile case file" means all or part of a document, paper, exhibit, transcript, opinion, order, or other thing filed or lodged in the juvenile court.

(1) Except as provided in (2)–~~(3)~~(4), a filed document, the record on appeal, or the record on a writ petition ~~and documents filed by the parties in proceedings under this chapter~~ may be inspected only by the reviewing court, ~~and~~ appellate project personnel, the parties, ~~or their~~ attorneys for the parties, ~~and~~ or other persons the reviewing court may designate.

(2) Access to records in the juvenile case file, including any such records made part of the record on appeal or the record on a writ petition, is governed by Welfare and Institutions Code section 827. A person who is not described in section 827(a)(1)(A)–(P) may not access records in the juvenile case file, including any such records made part of the record on appeal or the record on a writ petition, unless that person petitioned the juvenile court under section 827(a)(1)(Q) and was granted access by order of the juvenile court.

~~(2)~~(3) A filed document~~s~~ that protects anonymity as required by (a) may be inspected by any person or entity that is considering filing an amicus curiae brief.

~~(3)~~(4) Access to a filed document or ~~records~~ items in the record on appeal or the record on a writ petition that are sealed or confidential under authority other than Welfare and Institutions Code section 827 is governed by rules 8.45–8.47 and the applicable statute, rule, sealing order, or other authority.

(c) * * *

Advisory Committee Comment

Subdivision (b)(2). Welfare and Institutions Code section 827(a)(1)(Q) authorizes a petition by which a person may request access to records in the juvenile case file. The petition process is stated in rule 5.552. The Judicial Council has adopted a mandatory form—*Petition for Access to Juvenile Case File* (form JV-570)—that must be filed in the juvenile court to make the request. This form is available at any courthouse or county law library or online at *www.courts.ca.gov/forms*.

JV-285 Relative Information

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

As the relative of a child who has been removed from the home, you may give written information to the court about the child at any time on this form or in a letter. After filling out this form, give it to the clerk of the court.

Please note that other people involved in the case, including the parents, will see your answers on this form. If you prefer to keep your contact information private, fill out *Confidential Information* (form JV-287) and do not write your address or telephone number below.

Social worker fills in court name and street address.

Superior Court of California, County of

Social worker fills in child's name and date of birth.

Child's Name:

Date of Birth:

Social worker fills in case number.

Case Number:

1 Your name: _____

Your address: _____

_____

Your telephone number: _____

☐ *Check here if contact information is confidential and form JV-287 is attached.*

2 Your relation to the child: ☐ maternal ☐ paternal

☐ grandparent ☐ brother/sister ☐ aunt/uncle ☐ cousin

☐ family friend

☐ tribal extended family member

☐ other *(specify):* _____

3 Child's name: _____

4 ☐ I would like to talk to the judge at the next court hearing.

Please fill in as much of the following information as you know. If you need more space to respond to any section on this form, attach additional pages as needed and check the box at item 12.

5 Information about the child's medical, dental, and general physical health:

_____

_____

6 Information about the child's emotional and behavioral health:

_____

_____

7 Information about the child's education:

_____

_____

8 Other information that might be helpful to the court:

_____

_____

_____

_____

_____

_____

Child's name: _____ **Case Number:**

Below are some things you might do to help the child. You can pick some or none of the things listed below. It is up to the social worker and the court whether you will be asked to do these things.

9 I want to

- ☐ telephone the child.
- ☐ write letters to the child.
- ☐ take the child on outings.
- ☐ take the child to/from school.
- ☐ take the child to visits with brothers or sisters.
- ☐ take the child to therapy.
- ☐ take the child to family gatherings.
- ☐ help the social worker make a case plan for the child.
- ☐ take the child to visits with parents.
- ☐ take the child to medical appointments.
- ☐ supervise the child during visits with brothers and sisters.
- ☐ watch the child after school.
- ☐ have the child live with me.
- ☐ other *(describe):* _____

You can also help the parents. For example, you might help with transportation, housing, visits, or child care. It is up to the social worker and the court whether you will be asked to do these things.

10 I want to help the ☐ father ☐ mother
(Describe): _____

11 Other relatives who might be able to help the child:

a. Name: _____ Relationship to child: _____
Contact information: _____
or ☐ I want to keep the contact information confidential and ask that the child's social worker get this information from me.

b. Name: _____ Relationship to child: _____
Contact information: _____
or ☐ I want to keep the contact information confidential and ask that the child's social worker get this information from me.

c. Name: _____ Relationship to child: _____
Contact information: _____
or ☐ I want to keep the contact information confidential and ask that the child's social worker get this information from me.

12 ☐ If you need more space to respond to any section on this form, please check this box and attach additional pages.
Number of pages attached: _____

NOTICE

If you are not the child, child's parent, or child's legal guardian, you may have a right to challenge a decision by the juvenile court, but only in very limited circumstances. You may need a court order granting you access to records in the juvenile case file. For more information, please see *Information on Requesting Access to Records for Persons With a Limited Right to Appeal* (form JV-291-INFO). You can get form JV-291-INFO at any courthouse or county law library or online at www.courts.ca.gov/forms.

Date:

_____ ▶ _____
Type or print your name *Sign your name*

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY* **DRAFT** **Not approved by the Judicial Council**
CHILD'S NAME: HEARING DATE AND TIME:	
CAREGIVER INFORMATION FORM	CASE NUMBER:

To the current caregiver, preadoptive parent, community care facility, or foster family agency caring for the child: You may submit written information to the court, and you may attend review and permanency hearings. You may use this optional form to provide written information to the court. Please type or print clearly in ink and submit the original and eight copies of the form to the court clerk's office at least five calendar days (or seven calendar days, if filing by mail) before the hearing. Be aware that other individuals involved in the case have access to this information. See form JV-290-INFO for instructions on how to complete this form and file it with the court.

1. a. Child's name:
   b. Child's date of birth: c. Child's age:
2. **Caregiver Information** *(Answer only if you are a caregiver, skip #3.):*
   a. Name of caregiver:
   b. Type of caregiver: ☐ Foster parent ☐ Relative ☐ Legal guardian ☐ Preadoptive parent ☐ Nonrelative extended family member ☐ Other *(specify):*
   c. The child has been living in my home for *(specify):* years months.
3. **Agency or Facility Information** *(Answer only if you are an agency or facility, skip #2.):*
   a. Name of agency or facility:
   b. Address:
   c. Telephone number:
   d. Type of facility: ☐ Foster family agency ☐ Community care agency ☐ Other *(specify):*
   e. The child has been placed with our agency/facility for *(specify):* years months and in the current home for (specify): years months.
   f. Name of person completing form: Title:
   g. Hours per week the person completing this form spends with the child *(specify):* hours/week.
   h. The information on this form consists of
      (1) ☐ the observations and recommendations of the person filling out this form.
      (2) ☐ the observations and recommendations of a group or team made up of the following individuals *(specify):*
4. **Current Status of Child's Medical, Dental, and General Physical and Emotional Health**
   a. ☐ There is no new or additional information since the last court hearing.
   b. ☐ There is new or additional information since the last court hearing, as follows *(do not include the names of doctors):*
5. **Current Status of Child's Education**
   a. ☐ There is no new or additional information since the last court hearing.
   b. ☐ There is new or additional information since the last court hearing, as follows *(do not include the names of schools):*

Form Approved for Optional Use
Judicial Council of California
JV-290 [Rev. September 1, 2020]

Welfare and Institutions Code, §§ 366.21(c), (d);
Cal. Rules of Court, rule 5.534(k)
www.courts.ca.gov

CHILD'S NAME:	CASE NUMBER:

6. **Child's Special Education Status**
   a. ☐ The child is a special education student. Date of last Individualized Education Plan (IEP):
   b. ☐ The child is not a special education student.
   c. ☐ I do not know the child's special education status.

7. **Current Status of Child's Adjustment to Living Arrangement**
   a. ☐ There is no new or additional information since the last court hearing.
   b. ☐ There is new or additional information since the last court hearing, as follows:

8. **Current Status of Child's Social Skills and Peer Relationships**
   a. ☐ There is no new or additional information since the last court hearing.
   b. ☐ There is new or additional information since the last court hearing, as follows:

9. **Current Status of Child's Special Interests and Activities**
   a. ☐ There is no new or additional information since the last court hearing.
   b. ☐ There is new or additional information since the last court hearing, as follows:

10. **Other Helpful Information**
    a. ☐ There is no new or additional information since the last court hearing.
    b. ☐ There is new or additional information since the last court hearing, as follows:

11. **Recommendation for Disposition *(Outcome)***
    a. ☐ I have no recommendation for disposition *(outcome).*
    b. ☐ I am recommending the following disposition *(outcome):*

12. ☐ If you need more space to respond to any section on this form, please check this box and attach additional pages.
    Number of pages attached:

NOTICE

If you are not the child, child's parent, or child's legal guardian, you may have a right to challenge a decision by the juvenile court, but only in very limited circumstances. You may need a court order granting you access to records in the juvenile case file. For more information, please see *Information on Requesting Access to Records for Persons With a Limited Right to Appeal* (form JV-291-INFO). You can get form JV-291-INFO at any courthouse or county law library or online at www.courts.ca.gov/forms.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF CAREGIVER OR FACILITY/AGENCY STAFF PERSON WHO HAS COMPLETED THIS FORM)

JV-291-INFO Information on Requesting Access to Records for Persons With a Limited Right to Appeal

Under very limited circumstances, a person who is not the child, parent, or legal guardian in a dependency or juvenile justice case has the right to seek review of decisions made by the juvenile court by filing an appeal or writ petition in the Court of Appeal. Such a person, however, is typically not entitled to access records from the juvenile court case file that will be considered by the Court of Appeal unless the person gets approval from the juvenile court. The purpose of this information sheet is to inform those persons who are not the child, parent, or legal guardian, and who may have the right to seek appellate review, of the requirement to file a *Petition for Access to Juvenile Case File* (form JV-570) to have access to certain records in the juvenile case file during an appeal or writ.

1 When would I have the right to seek review?

To have a right to seek review, you must be harmed by an order or judgment of the juvenile court. In the vast majority of cases, only the child, parent, legal guardian, county welfare department, or district attorney will have the right to file an appeal or a writ petition challenging a juvenile court ruling. However, the law also protects those individuals who have a relationship to the child in certain situations.

You might have a right to appeal or file a writ petition if, for example, you are:

- The child's relative, and the child was ordered to be removed from your home, or you requested that the child live with you and the court denied your request.
- Someone who requested de facto parent status, which was denied;
- Someone who requested a change of court order through a section 388 petition (form JV-180), which was denied; or
- A prospective adoptive parent or de facto parent challenging the juvenile court's decision to remove the child from your home.

2 If I want to file an appeal or writ petition, what additional steps must I take?

If the juvenile court has not already authorized you to access records in the juvenile case file, to have access to such records for an appeal or writ proceeding, you must request access from the juvenile court. To make this request, you must file *Petition for Access to Juvenile Case File* (form JV-570). Use *Notice of Petition for Access to Juvenile Case File* (form JV-571) to provide notice of this request. You will need to serve copies of these forms on all interested parties to the case, if you know their names and addresses, including the child, parents, social worker, and probation officer.

On the petition form, you will need to identify which specific records you are requesting. Your request for information can include any documents that you are aware of that exist in the juvenile court file. Be sure to indicate the dates of the hearings that relate to the decision you are challenging. As the basis for the petition, you may indicate the appeal or writ proceeding in the Court of Appeal. You will also need to explain why you are requesting the records. Your explanation should show how the records, including any transcripts, relate to the decision you are challenging (for example, a report or court order following a hearing on your issue). The juvenile court will make a decision on your petition by issuing an order that identifies the records you are authorized to access. The court's order is made on *Order After Judicial Review on Petition for Access to Juvenile Case File* (form JV-574).

When you file a notice of appeal or a notice of intent to file a writ petition, you should attach a copy of the court's order on the JV-574, if you have one. Doing so will alert the clerk that you are authorized to access records in the case file and will ensure that a record will be prepared for you.

Note: An order from the juvenile court granting you access to records in the case file is not a condition for filing an appeal or writ petition.

You may wish to consult with an attorney when considering whether to file an appeal or a writ petition and request access to records in the juvenile case file. The timelines for filing an appeal or a writ petition apply whether or not the juvenile court has granted you access to the juvenile case file. A notice of appeal usually must be filed within 60 days of the date the order being appealed was made. For writ review, a notice of intent to file a writ petition must be filed as early as 7 days after the court makes the challenged order, either orally in court or in writing, whichever occurs first. But note that the deadlines for filing a notice of appeal or a notice of intent to file a writ petition may differ, depending on the circumstances. For more information, read rules 8.406, 8.450, and 8.454 of the California Rules of Court.

JV-295 De Facto Parent Request

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

The address of any licensed foster family home must remain confidential unless the judge or the foster parent authorizes release of the address. Court clerks should not send this page to the parties without a court order or authorization of the foster parent. (Welf. & Inst. Code, § 308(a).)

1 My/Our name(s): _____

My/Our address: _____

City: _____ State: _____ Zip: _____

My/Our phone #: _____

Fill in court name and street address:

Superior Court of California, County of

2 I am/We are asking that I/we be appointed de facto parent(s) of

(Child's name): _____

Court fills in case number when form is filed.

Case Number:

Date: _____ _____ ▶ _____

Type or print your name *Signature of person requesting de facto parent status*

Date: _____ _____ ▶ _____

Type or print your name *Signature of person requesting de facto parent status*

Date: _____ _____ ▶ _____

Type or print attorney's name *Signature of attorney (if applicable)*

Attorney's address: _____

City: _____ State: _____ Zip: _____

Attorney's phone #: _____

NOTICE

If you are not the child, child's parent, or child's legal guardian, you may have a right to challenge a decision by the juvenile court, but only in very limited circumstances. You may need a court order granting you access to records in the juvenile case file. For more information, please see *Information on Requesting Access to Records for Persons With a Limited Right to Appeal* (form JV-291-INFO). You can get form JV-291-INFO at any courthouse or county law library or online at www.courts.ca.gov/forms.

JV-321 Request for Prospective Adoptive Parent Designation

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

After filling out this form, bring it to the clerk of the court. If you want to keep an address or telephone number confidential, do not write that information on this form. Instead, include that information in Confidential Information—Prospective Adoptive Parent *(form JV-322).*

Fill in court name and street address:

Superior Court of California, County of

Fill in child's name and date of birth:

Child's Name:

Date of Birth:

Fill in case number:

Case Number:

1 Information about the person or persons you want to be designated as prospective adoptive parents:

a. Name: _____
b. Name: _____
c. Street address: _____
d. City: _____ State: _____ Zip: _____
e. Telephone number: _____

2 If you are not a person in (1), fill out below.

a. Name: _____
b. I am the ☐ child ☐ child's attorney ☐ other
(specify role): _____
c. Street address: _____
d. City: _____ State: _____ Zip: _____
e. Telephone number: _____

3 If you are not the child's attorney and you know who the child's attorney is, fill out below.

a. Name of child's attorney: _____
b. Street address of child's attorney: _____
c. City: _____ State: _____ Zip: _____
d. Telephone number of child's attorney: _____

4 ☐ The child is 10 years of age or older. Child's telephone number: _____
or ☐ Telephone number is confidential.

5 The child has lived with the person from *(date):* _____ to the present.
In order for the person in (1) to become a prospective adoptive parent, the child must be living with that person now.

6 Date of Welfare and Institutions Code section 366.26 hearing: _____
The person in (1) should not file this form with the court until a Welfare and Institutions Code section 366.26 hearing has been scheduled.

7 ☐ The person in (1) is committed to adopting the child.

Child's name: _____ **Case Number:**

8 The person in **1** has *(check all that apply):*

a. ☐ Applied for an adoptive home study.
b. ☐ In a case in which tribal customary adoption is the permanent plan, been identified by the Indian child's tribe as the prospective adoptive parent.
c. ☐ Cooperated with an adoptive home study.
d. ☐ Signed an adoptive placement agreement.
e. ☐ Requested de facto parent status.
f. ☐ Been designated by the juvenile court or the licensed adoption agency as the adoptive parent.
g. ☐ Discussed a postadoption contact agreement with the social worker, child's attorney, child's Court Appointed Special Advocate (CASA) volunteer, adoption agency, or court.
h. ☐ Worked to overcome any impediments that have been identified by the California Department of Social Services or the licensed adoption agency.
i. ☐ Attended any of the classes required of a prospective adoptive parent.
j. ☐ Taken other steps toward adopting the child *(explain):* _____

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

If you need more space, attach a sheet of paper and write "JV-321, Item 8—Steps Toward Adoption" at the top. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the information in items 1 through 8 is true and correct, which means if I lie on this form, I am committing a crime.

Date:

_____ ▶ _____
Type or print your name *Sign your name*

_____ ▶ _____
Type or print your name *Sign your name*

NOTICE

If you are not the child, child's parent, or child's legal guardian, you may have a right to challenge a decision by the juvenile court, but only in very limited circumstances. You may need a court order granting you access to records in the juvenile case file. For more information, please see *Information on Requesting Access to Records for Persons With a Limited Right to Appeal* (form JV-291-INFO). You can get form JV-291-INFO at any courthouse or county law library or online at www.courts.ca.gov/forms.

JV-325 Objection to Removal

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

If you do not agree with the removal, you can request a court hearing by filling out this form. The following people can object to removal: a current caregiver, the child's attorney, the child (if 10 years of age or older), the child's identified Indian tribe or custodian, and the child's CASA program. Bring this form to the clerk of the court. If you want to keep an address or a phone number confidential, fill out Confidential Information—Prospective Adoptive Parent *(form JV-322), and do not write the address or phone number on this form.*

If you are a caregiver or the child and you requested the hearing, the clerk will provide notice of the hearing to you and any other participants.

If you are the child's attorney and you requested the hearing, you must provide notice of the hearing to all other participants.

Fill in court name and street address:

Superior Court of California, County of

Fill in child's name and date of birth:

Child's Name:

Date of Birth:

Fill in case number:

Case Number:

1 Information about the caregiver or caregivers:

a. Name: _____

b. Name: _____

c. Address: _____

d. Phone number: _____

2 If you *(the person objecting to the removal)* are not the caregiver, fill out below.

a. Name: _____

b. I am the ☐ child ☐ child's attorney ☐ child's identified Indian tribe ☐ child's identified Indian custodian ☐ child's CASA program

_____

c. Address: _____

d. Phone number: _____

3 If you are not the child's attorney and you know who the child's attorney is, fill out below.

a. Name of child's attorney: _____

b. Address of child's attorney: _____

c. Phone number of child's attorney: _____

4 ☐ The child is 10 years of age or older. Child's telephone number: _____
☐ Confidential phone number in court file

5 ☐ The child has an identified Indian tribe *(specify tribe):* _____
Phone number of tribe: _____

6 ☐ The child has a Court Appointed Special Advocate (CASA) volunteer.
Phone number of CASA program, if known: _____

7 ☐ The caregiver or caregivers have been designated by the judge as the child's prospective adoptive parent or parents.

Child's name: _____ **Case Number:**

8 ☐ The caregiver or caregivers may meet the definition of prospective adoptive parent or parents. *Request for Prospective Adoptive Parent Designation* (form JV-321), will be filed with this objection and request for hearing.

9 The social worker should not remove the child from the caregiver's home because *(give reasons):*

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

If you need more space, attach a sheet of paper and write "JV-325, Item 9—Reasons to Not Remove Child" at the top. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the information on this form is true and correct, which means that if I lie on this form, I am committing a crime.

Date:

_____ ▶ _____

Type or print your name *Sign your name*

NOTICE

If you are not the child, child's parent, or child's legal guardian, you may have a right to challenge a decision by the juvenile court, but only in very limited circumstances. You may need a court order granting you access to records in the juvenile case file. For more information, please see *Information on Requesting Access to Records for Persons With a Limited Right to Appeal* (form JV-291-INFO). You can get form JV-291-INFO at any courthouse or county law library or online at www.courts.ca.gov/forms.

What if I am deaf or hard of hearing?

Requests for Accommodations

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

JV-569 Proof of Service—Petition for Access to Juvenile Case File

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Fill in case number if known.

Case Number:

1 Your name: _____

Relationship to child *(if any)*: _____

Street address: _____

City: _____ State: _____ Zip: _____

Telephone number: _____

Lawyer *(if any) (name, address, telephone numbers, and State Bar number)*: _____

2 ☐ I was not able to provide notice of this petition to the following because I did not know their names or addresses. If this is a request for the case file of a living child, the clerk must serve a copy of the petition. If this is a request for the case file of a deceased child, the custodian of records must serve a copy of the petition.

a. ☐ County counsel or other attorney representing the child welfare agency if petition filed under section 300
b. ☐ District attorney if petition filed under section 601 or 602
c. ☐ Child
d. ☐ Attorney of record for the child
e. ☐ Child's parent
f. ☐ Child's legal guardian
g. ☐ Probation department if petition filed under section 601 or 602
h. ☐ Child welfare agency/custodian of records if petition filed under section 300
i ☐ Child's identified Indian tribe
j. ☐ Child's CASA volunteer

3 If you checked box 2a, 2b, 2g, or 2h, describe the efforts made to locate those addresses and explain why you are unable to locate the addresses:

4 ☐ Copies of *Petition for Access to Juvenile Case File* (JV-570), *Notice of Petition for Access to Juvenile Case File* (JV-571), and a blank *Objection to Release of Juvenile Case File* (JV-572) have been served personally or placed in a sealed envelope with postage paid and deposited in the United States mail addressed to the following:

a. ☐ County counsel or other attorney representing the child welfare agency if petition filed under section 300 *(name and address)*: _____

☐ Date mailed: _____ or ☐ Personally served on *(date)*: _____

Your name: _____

Case Number:

4 b. ☐ District attorney if petition filed under section 601 or 602 *(name and address)*: _____

☐ Date mailed: _____ or ☐ Personally served on *(date)*: _____

c. ☐ Child *(name and address)*: _____

☐ Date mailed: _____ or ☐ Personally served on *(date)*: _____

d. ☐ Attorney of record for the child *(name and address)*: _____

☐ Date mailed: _____ or ☐ Personally served on *(date)*: _____

e. ☐ Child's parent *(name and address)*: _____

☐ Date mailed: _____ or ☐ Personally served on *(date)*: _____

f. ☐ Child's parent *(name and address)*: _____

☐ Date mailed: _____ or ☐ Personally served on *(date)*: _____

g. ☐ Child's legal guardian *(name and address)*: _____

☐ Date mailed: _____ or ☐ Personally served on *(date)*: _____

h. ☐ Probation department if petition filed under section 601 or 602 *(name and address)*: _____

☐ Date mailed: _____ or ☐ Personally served on *(date)*: _____

i. ☐ Child welfare agency/custodian of records if petition filed under section 300 *(name and address):*

_____

_____

☐ Date mailed: _____ or ☐ Personally served on *(date):* _____

j. ☐ The Indian child's tribal representative *(name and address):* _____

_____

_____

☐ Date mailed: _____ or ☐ Personally served on *(date):* _____

k. ☐ The child's CASA volunteer *(name and address):* _____

_____

_____

☐ Date mailed: _____ or ☐ Personally served on *(date):* _____

5 I declare under penalty of perjury under the laws of the State of California that the information in this form is true and correct. This means that if I lie on this form, I may be guilty of a crime.

Date:

_____ ▶ _____

Type or print your name *Sign your name*

JV-570 Petition for Access to Juvenile Case File

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Fill in case number, if known:

Case Number:

If you are requesting a court order to obtain access to the juvenile case file of a child who is alive, fill out all items on this form, and file it with the juvenile court. You must also fill out and file Proof of Service—Petition for Access to Juvenile Case File *(form JV-569).*

If you are a member of the public requesting the juvenile case file of a child who is deceased, you can:

a. *Fill out items 1–5 and 7 on this form and file it with the juvenile court. You must then provide a copy of this form to the custodian of records of the county child welfare agency, who will then provide notice of this petition.*

Or

b. *Do not complete the form, and instead request the juvenile case file from the child welfare agency under Welfare and Institutions Code section 10850.4.*

1 Your name: _____

Relationship to child *(if any)*: _____

Street address: _____

City: _____ State: _____ Zip: _____

Telephone number: _____

Lawyer *(if any) (name, address, telephone numbers, and State Bar number)*: _____

_____

_____

2 Name of child: _____

3 Child's date of birth *(if known)*: _____

4 a. ☐ A petition regarding the child in (2) has been filed under
- ☐ Welfare and Institutions Code section 300
- ☐ Welfare and Institutions Code section 601
- ☐ Welfare and Institutions Code section 602 or

b. ☐ I believe the child in (2) died as a result of abuse or neglect. Approximate date of death: _____

5 The records I want are: (*Describe in detail. Attach more pages if you need more space. If you are involved in a pending proceeding in an appellate court or you are preparing to participate in such a proceeding, you should describe here the transcripts, reports, and any other evidence considered by the juvenile court at hearings related to the subject of the appeal or writ proceeding. For example, you should describe a report by providing its title (such as "status review report," "jurisdiction/disposition report," or "CASA report") and the date of the hearing when the document was considered.)*

_____

_____

_____

_____

_____

_____

☐ Continued on Attachment 5.

Your name: _____ **Case Number:**

6 The reasons for this petition are:

a. ☐ Civil court case pending in *(name of county)*: _____
Case number: _____ Hearing date: _____

b. ☐ Criminal court case pending in *(name of county)*: _____
Case number: _____ Hearing date: _____

c. ☐ Juvenile court case pending in *(name of county)*: _____
Case number: _____ Hearing date: _____

d. ☐ Family law court case pending in *(name of county)*: _____
Case number: _____ Hearing date: _____

e. ☐ Writ or appeal case pending in *(name of district)*: _____
Case number *(if available)*: _____
Hearing dates related to the juvenile court order being challenged or to be challenged on appeal or by writ:

f. ☐ Other *(specify)*: _____
Case number: _____ Hearing date: _____

7 I need the records because *(describe in detail; attach more pages if you need more space)*:

☐ Continued on Attachment 7.

8 I declare under penalty of perjury under the laws of the State of California that the information in this form is true and correct. This means that if I lie on this form, I am guilty of a crime.

Date:

_____ ▶ _____
Type or print your name *Sign your name*

Note: You must provide a copy of this completed form to all interested parties if you know their names and addresses.

JV-571 **Notice of Petition for Access to Juvenile Case File**

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

RE: Release of Juvenile Case File and Right to File an Objection

You must provide notice to all those listed in item 2 on Proof of Service—Petition for Access to Juvenile Case File *(form JV-569).*

TO *(names):*

_____
_____
_____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 Child's name: _____

2 Information relating to the child named in item 1 is being sought by *(name):* _____
_____
_____

3 The requested information is described in the attached *Petition for Access to Juvenile Case File* (form JV-570).

4 If you object to the release of these records and information, you must fill out *Objection to Release of Juvenile Case File* (form JV-572) and return it to the court listed at the address above within 10 days of the date you received this notice.

Date:

_____ ▶ _____
Type or print your name *Sign your name*

Warning: If you do not object, the court may grant access to the child's case file.

JV-572 Objection to Release of Juvenile Case File

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

Objections to the release of information and records described in the attached Petition for Access to Juvenile Case File *(form JV-570) must be filed with the juvenile court.*

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 Name of child: _____

2 My relationship to the child, if any, is: _____

3 I object to the release of information and records relating to the child named in item 1.

4 I do not want the juvenile court to release the records because *(describe in detail, attach additional pages if necessary):*

Date:

_____ ▶ _____

Type or print your name *Sign your name*

Warning: If you do not object, the court may grant access to the child's case file.

JV-573 Order on Petition for Access to Juvenile Case File

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

The Court finds and orders:

1. ☐ The child is alive and the request is denied.
   - a. ☐ Petitioner has not shown good cause for the release of the requested records.
   - b. ☐ Petitioner has not met the notice requirements of rule 5.552(c) of the California Rules of Court.
   - c. ☐ Request for records is overbroad or records sought are insufficiently identified.
   - d. ☐ Other:

2. ☐ The child is alive and the court sets a hearing on the request. Applicant has shown good cause for release of the juvenile case file, but the court must balance the interests of the applicant, the child, other parties to the juvenile court proceedings, and the public. Clerk to send notice under rule 5.552 of the California Rules of Court.
   Date of hearing: _____
   Time of hearing: _____
   Location: _____

3. ☐ The child is alive and the court will conduct a review of the juvenile case file and any filed objections.

4. ☐ The child is deceased and the court sets a hearing on the request.
   Date of hearing: _____
   Time of hearing: _____
   Location: _____

5. ☐ The child is deceased and the court will conduct a review of the juvenile case file and any filed objections.

6. ☐ Other:

Date:

_____
Judicial Officer

JV-574

Order After Judicial Review on Petition for Access to Juvenile Case File

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 Name of petitioner: _____

The court finds and orders:

2 ☐ After a review of the juvenile case file and review of any filed objections ☐ and a noticed hearing, the court denies the request.

Reason(s) for denial:

a. ☐ Access is not in the child's best interests.
b. ☐ The need for access does not outweigh the privacy rights of the child and the policy considerations favoring confidentiality of the juvenile case file.
c. ☐ Petitioner has not shown by a preponderance of the evidence that the records requested are necessary and have substantial relevance to the legitimate need of the petitioner.
d. ☐ There are no responsive records.
e. ☐ Other: _____

3 ☐ After a review of the juvenile case file and review of any filed objections ☐ and a noticed hearing, the court grants the request. The petitioner has shown by a preponderance of the evidence that access to records is necessary and that records have substantial relevance to the legitimate needs of the petitioner. The court has balanced these needs with the child's best interest. The court finds that the need for access outweighs the policy considerations favoring confidentiality of juvenile records.

a. ☐ The following records may be disclosed: ☐ with redactions

_____

b. ☐ The procedure for providing access is:

_____

c. ☐ See attached.

4 ☐ This child is deceased, and the request is granted.

a. ☐ The court has read and considered the following:

_____

4 b. ☐ There is a presumption under Welfare and Institutions Code section 827(a)(2)(B) in favor of the release of the documents unless a statutory reason for confidentiality is shown to exist. The court has balanced only the interests of the child who is the subject of the juvenile case file and the interests of other children who may be named in the file with _____.

c. ☐ The following records may be disclosed: ☐ with redactions

_____

_____

_____

_____

_____

d. ☐ The procedure for providing access is:

_____

_____

_____

_____

_____

e. Any information that relates to another child or could identify another child, except for information about the deceased, must be redacted.

f. ☐ See attached.

5 ☐ The child is deceased and the request is denied. The court finds by a preponderance of the evidence that access to the juvenile case file or of any portion of it is detrimental to the safety, protection, or physical or emotional well-being of another child who is directly or indirectly connected to the juvenile case that is the subject of the request.

Additional orders:

6 a. ☐ Petitioner may not disseminate the information to anyone who is not specified in Welfare and Institutions Code section 827 or 827.10.

b. ☐ Petitioner may disseminate the disclosed records listed in item 3a only to: _____

_____

☐ as redacted ☐ subject to protective order ☐ additional orders attached

7 ☐ Disclosure subject to protective order *(list orders):* _____

_____

_____

_____

_____

8 ☐ Other:

_____

_____

9 ☐ See attached.

Date:

_____
Judicial Officer

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

— NOTICE —

- You or your attorney **must** fill in items 1 and 2 and sign this form at the bottom of the page. If possible, to help process your appeal, fill in items 6–8 on the reverse of this form.
- Rule 8.406 says that to appeal from an order or judgment, you must file a written notice of appeal within **60** days after rendition of the judgment or the making of the order being appealed or, in matters heard by a referee, within **60** days after the order of the referee becomes final.
- You are advised that if you wish to file an appeal of an order for transfer to a tribal court, you (1) may ask the juvenile court to stay (delay the effective date of) the transfer order and (2) must file the appeal before the transfer to tribal jurisdiction is finalized. Read rule 5.483 and the advisory committee comment.
- If you are not the county welfare department, district attorney, child, child's parent, or child's legal guardian, you may have a right to challenge a decision by the juvenile court, but only in very limited circumstances. You may need a court order granting you access to records in the juvenile case file. For more information, please see *Information on Requesting Access to Records for Persons With a Limited Right to Appeal* (form JV-291-INFO). You can get form JV-291-INFO at any courthouse or county law library or online at www.courts.ca.gov/forms.

1. I appeal from the findings and orders of the court *(specify date of order or describe order):*

2. This appeal is filed by
   a. Appellant *(name):*
   b. Address: c. Phone number:
   d. Name, address, and phone number of person to be contacted *(if different from appellant):*

   e. ☐ Appellant has been granted access to specified records in the juvenile case file, and a copy of the court's order under Welfare and Institutions Code section 827(a)(1)(Q), on *Order After Judicial Review on Petition for Access to Juvenile Case File* (form JV-574), if available, is attached.

3. ☐ I request that the court appoint an attorney on appeal. I ☐ was ☐ was not represented by an appointed attorney in the superior court.

Date:

TYPE OR PRINT NAME

▶ SIGNATURE OF ☐ APPELLANT ☐ ATTORNEY

4. Items 5–7 on the reverse are ☐ completed ☐ not completed.

Form Approved for Optional Use
Judicial Council of California
JV-800 [Rev. September 1, 2020]

Cal. Rules of Court, rules 8.400, 8.401, 8.405, 8.406
Welfare and Institutions Code, §§ 395, 800
www.courts.ca.gov

CHILD'S NAME:	CASE NUMBER:

5. Appellant is the
   a. ☐ child.
   b. ☐ mother.
   c. ☐ father.
   d. ☐ legal guardian.
   e. ☐ de facto parent.
   f. ☐ county welfare department.
   g. ☐ district attorney.
   h. ☐ child's tribe.
   i. ☐ other *(state relationship to child or interest in the case):*

6. This notice of appeal pertains to the following child or children *(specify number of children included):*
   a. Name of child:
      Child's date of birth:
   b. Name of child:
      Child's date of birth:
   c. Name of child:
      Child's date of birth:
   d. Name of child:
      Child's date of birth:
   ☐ Continued in Attachment 6.

7. The order appealed from was made under Welfare and Institutions Code *(check all that apply):*
   a. ☐ **Section 305.5** (transfer to tribal court)
      ☐ Granting transfer to tribal court ☐ Denying transfer to tribal court
      Dates of hearing *(specify):*
   b. ☐ **Section 360** (declaration of dependency) ☐ Removal of custody from parent or guardian ☐ Other orders
      ☐ with review of section 300 jurisdictional findings
      Dates of hearing *(specify):*
   c. ☐ **Section 366.26** (selection and implementation of permanent plan)
      ☐ Termination of parental rights ☐ Appointment of guardian ☐ Planned permanent living arrangement
      Dates of hearing *(specify):*
   d. ☐ **Section 366.28** (order designating a specific placement after termination of parental rights in which a petition for extraordinary writ review that substantively addressed the specific issues to be challenged was timely filed and summarily denied or otherwise not decided on the merits)
      Dates of hearing *(specify):*
   e. ☐ **Section 388** (request to change court order)
      Dates of hearing *(specify):*
   f. ☐ Other appealable orders relating to dependency *(specify):*
      Dates of hearing *(specify):*
   g. ☐ **Section 725** (declaration of wardship and other orders)
      ☐ with review of section 601 jurisdictional findings
      ☐ with review of section 602 jurisdictional findings
      Dates of hearing *(specify):*
   h. ☐ Other appealable orders relating to wardship *(specify):*
      Dates of hearing *(specify):*
   i. ☐ Other *(specify):*

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	**DRAFT** **Not approved by** **the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
NOTICE OF INTENT TO FILE WRIT PETITION AND REQUEST FOR RECORD TO REVIEW ORDER SETTING A HEARING UNDER WELFARE AND INSTITUTIONS CODE SECTION 366.26 **(California Rules of Court, Rule 8.450)**	CASE NUMBER:

NOTICE

The juvenile court has decided it will make a permanent plan for this child that may result in the termination of your parental rights and adoption of the child. If you want a court of appeal to review the juvenile court's decision, you must first tell the juvenile court by filing a Notice of Intent. You may use this form as your Notice of Intent. In most cases, you have only 7 days from the juvenile court's decision to file a Notice of Intent. Please see page 2 for your specific deadline for filing this form.

If you are not the county welfare department, child, child's parent, or child's legal guardian, you may have a right to challenge a decision by the juvenile court, but only in very limited circumstances. You may need a court order granting you access to records in the juvenile case file. For more information, please see *Information on Requesting Access to Records for Persons With a Limited Right to Appeal* (form JV-291-INFO). You can get form JV-291-INFO at any courthouse or county law library or online at www.courts.ca.gov/forms.

1. Petitioner's name:
2. Petitioner's address:
3. Petitioner's phone number:
4. Petitioner is
   a. ☐ parent *(name):*
   b. ☐ legal guardian.
   c. ☐ county welfare department.
   d. ☐ child.
   e. ☐ other *(state relationship to child or interest in the case):*
5. Child's name: Child's date of birth:
6. a. On *(date):* the juvenile court made an order setting a hearing under Welfare and Institutions Code section 366.26. Petitioner intends to file a writ petition to challenge the findings and orders made by the court on that date and requests that the clerk assemble the record.
   b. List all known dates of the hearing that resulted in the order:
7. The hearing under Welfare and Institutions Code section 366.26 is set for *(date, if known):*
8. ☐ Petitioner has been granted access to specified records in the juvenile case file, and a copy of the court's order under Welfare and Institutions Code section 827(a)(1)(Q), on form *Order After Judicial Review on Petition for Access to Juvenile Case File* (form JV-574), if available, is attached.

Date:

TYPE OR PRINT NAME

▶ SIGNATURE OF ☐ PETITIONER ☐ ATTORNEY

The *Notice of Intent to File Writ Petition* must be signed by the person who intends to file the writ petition or by the attorney of record.

PLEASE READ THE BACK OF THIS FORM FOR IMPORTANT INFORMATION AND DEADLINES

Form Approved for Optional Use
Judicial Council of California
JV-820 [Rev. September 1, 2020]

NOTICE OF INTENT TO FILE WRIT PETITION AND REQUEST FOR RECORD TO REVIEW ORDER SETTING A HEARING UNDER WELFARE AND INSTITUTIONS CODE SECTION 366.26
(California Rules of Court, Rule 8.450)

Welfare and Institutions Code, § 366.26;
Cal. Rules of Court, rule 8.450
www.courts.ca.gov

APPELLATE CASE TITLE:	APPELLATE CASE NUMBER:

WHAT WILL HAPPEN AT THE HEARING TO MAKE A PERMANENT PLAN?

- The court may order the termination of parental rights and adoption of the child.
- The court may order a legal guardianship for the child.
- The court may order a permanent plan of placement of the child with a fit and willing relative.
- The court may order another planned permanent living arrangement if the child is 16 years old or older.
- The court may order a permanent plan of placement of the child in a foster home.

The above options are listed in the normal order of preference, because the main goal is to give the child a stable and permanent living situation.

SEE WELF. & INST. CODE, § 366.26 FOR MORE INFORMATION

HOW DO I CHALLENGE THE COURT'S DECISION TO SET A HEARING TO MAKE A PERMANENT PLAN?

- File this Notice of Intent to File Writ Petition and Request for Record in the juvenile court within the time specified below in the next box. This will let the court know you intend to file a writ petition, and the court will prepare the record.
- You will be notified after the record is filed in the Court of Appeal, and you will get copies of the record. **You have 10 days after the record is filed in the Court of Appeal to file and serve your writ petition.**
- You may use the optional Judicial Council form *Petition for Extraordinary Writ* (form JV-825) to complete your writ petition, or, if you have an attorney, your attorney can write the writ petition for you.
- After you file a writ petition in the Court of Appeal, you must send copies of the petition to all of the parties in the case, to the child's CASA volunteer, to the child's present caregiver, and to any de facto parent who has standing to participate in the juvenile court proceedings. With your writ petition, you must file a Proof of Service confirming you have sent a copy of the petition to these people.

SEE WELF. & INST. CODE, § 366.26(*l*); CAL. RULES OF COURT, RULES 8.450–8.452

WHEN DO I HAVE TO FILE MY NOTICE OF INTENT TO FILE WRIT PETITION AND REQUEST FOR RECORD?

- If you were present when the court set the hearing to make a permanent plan, you must file the Notice of Intent within 7 days from the date the court set the hearing.
- If you were not present in court but were given notice by mail of the court's decision to set a hearing to make a permanent plan and you live in California, you must file the Notice of Intent within 12 days from the date the clerk mailed the notification.
- If you were not present in court but were given notice by mail of the court's decision to set a hearing to make a permanent plan and you live in a state other than California, you must file the Notice of Intent within 17 days from the date the clerk mailed the notification.
- If you were not present in court but were given notice by mail of the court's decision to set a hearing to make a permanent plan and you live outside the United States, you must file the Notice of Intent within 27 days from the date the clerk mailed the notification.
- If you are a party in a custodial institution you must give the Notice of Intent to custodial officials for mailing within the time specified in this box.

SEE CAL. RULES OF COURT, RULES 8.450, 5.540(c)

- If the order setting the hearing was made by a referee not acting as a temporary judge, you have an additional 10 days to file the Notice of Intent.

SEE WELF. & INST. CODE, §§ 248–252; CAL. RULES OF COURT, RULES 5.538, 5.540

WHO MUST SIGN THE NOTICE OF INTENT?

- The person who intends to file the writ petition, or
- The attorney of record for the person who intends to file the writ petition

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	**DRAFT** **Not approved by** **the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
NOTICE OF INTENT TO FILE WRIT PETITION AND REQUEST FOR RECORD TO REVIEW ORDER DESIGNATING OR DENYING SPECIFIC PLACEMENT OF A DEPENDENT CHILD AFTER TERMINATION OF PARENTAL RIGHTS **(California Rules of Court, Rule 8.454)**	CASE NUMBER:

NOTICE

The juvenile court has ordered or denied a specific placement for this child. If you want an appeals court to review the juvenile court's decision, you must first tell the juvenile court by filing a Notice of Intent. You may use this form as your Notice of Intent. In most cases, you have only 7 days from the court's placement decision to file a Notice of Intent. Please see page 2 for your specific deadline for filing this form.

If you are not the county welfare department, child, child's parent, or child's legal guardian, you may have a right to challenge a decision by the juvenile court, but only in very limited circumstances. You may need a court order granting you access to records in the juvenile case file. For more information, please see *Information on Requesting Access to Records for Persons With a Limited Right to Appeal* (form JV-291-INFO). You can get form JV-291-INFO at any courthouse or county law library or online at www.courts.ca.gov/forms.

1. Petitioner's name:
2. Petitioner's address:
3. Petitioner's phone number:
4. Petitioner is
   a. ☐ child's caretaker *(specify dates in your care):*
   b. ☐ child.
   c. ☐ county welfare department.
   d. ☐ legal guardian.
   e. ☐ other *(state relationship to child or interest in the case):*
5. Child's name: Child's date of birth:
6. a. On *(date):* the juvenile court terminated parental rights under Welfare and Institutions Code section 366.26.
   b. On *(date):* the court made a specific placement order or denied a specific placement request that the dependent child is to reside in, be retained in, or be removed from a specific placement. Petitioner intends to file a writ petition to challenge the specific placement order or the denial of a specific placement request made by the court on that date and requests that the clerk assemble the record.
7. ☐ Petitioner has been granted access to specified records in the juvenile case file, and a copy of the court's order under Welfare and Institutions Code section 827(a)(1)(Q), on *Order After Judicial Review on Petition for Access to Juvenile Case File* (form JV-574), if available, is attached.

PLEASE READ THE BACK OF THIS FORM FOR IMPORTANT INFORMATION AND DEADLINES

Form Approved for Optional Use
Judicial Council of California
JV-822 [Rev. September 1, 2020]

Welfare and Institutions Code, § 366.28; Cal. Rules of Court, rule 8.454;
www.courts.ca.gov

APPELLATE CASE TITLE:	APPELLATE CASE NUMBER:

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF ☐ PETITIONER ☐ ATTORNEY)

The *Notice of Intent to File Writ Petition* must be signed by the person intending to file the writ petition or, by the attorney of record. See below for more information.

HOW DO I CHALLENGE THE COURT'S PLACEMENT DECISION AFTER TERMINATION OF PARENTAL RIGHTS?

- File this *Notice of Intent to File Writ Petition and Request for Record* in the juvenile court within the time listed below in the next box. This will let the court know you intend to file a writ petition, and the court will prepare the record.
- You will be notified after the record is filed in the Court of Appeal, and you will get a copy of the record. **You have 10 days after the record is filed in the Court of Appeal to file and serve your writ petition.**
- You may use the optional Judicial Council form JV-825 to complete your writ petition, or, if you have an attorney, your attorney can write the writ petition for you.
- After you file a writ petition in the Court of Appeal you must send a copy of the petition to all of the parties in the case, to the child's CASA volunteer, to the child's present caregiver, and to any de facto parent who has standing to participate in the juvenile court proceedings.

SEE CAL. RULES OF COURT, RULES 8.454–8.456

WHEN DO I HAVE TO FILE MY *NOTICE OF INTENT TO FILE WRIT PETITION AND REQUEST FOR RECORD?*

- If you were present when the court granted or denied the specific placement, you must file the *Notice of Intent* within 7 days from the date the court granted or denied the specific placement.
- If you were not present in court but were given notice by mail of the court's decision to grant or deny the specific placement, you must file the *Notice of Intent* within 12 days from the date the clerk mailed the notification.
- If the order granting or denying the specific placement was made by a referee not acting as a temporary judge, you must file the *Notice of Intent* within 17 days from the date the court set the hearing.

WHO MUST SIGN THE *NOTICE OF INTENT?*

- The person who intends to file the writ petition; or
- The attorney of record for the person who intends to file the writ petition

W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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

	Commenter	Position	Comment	DRAFT Committees Response
1.	Advokids by Janet G. Sherwood Deputy Director	NI	The following comments to the proposed rule are submitted by Advokids, a nonprofit organization that advocates for the rights of children in foster care, including the right to safety, security, stability, and timely permanency decisions. These responses to the specific questions posed by the proposal, as well as all other comments, were prepared by a certified child welfare law specialist with over 45 years of experience in the field. She was also a certified appellate law specialist handling dependency appeals until 2015 when she closed her private practice to work full-time with Advokids. Does the Proposal Adequately Address the Stated Purpose? No. Putting the limitations on access to the record in appellate matters in Rule 8.401, without also amending the appellate rules and the rules applicable to statutory writs, will create confusion and delays because of the apparent inconsistencies between those rules and rule 8.401.	The committees appreciate this feedback on the proposal. The committees considered extensive amendments to appellate rules to implement the requirements of section 827(a)(6), as reflected in the proposal that circulated for public comment in spring 2019. This approach however resulted in an increasingly complex system of rules that, in the committees' view, was impractical and unwieldy. The committees concluded that, in attempting to provide detailed procedures and information for litigants and courts, and to account for various situations that could arise, the proposal's scope and complexity expanded beyond what was necessary to implement the legislation, which was narrow in scope and aimed at a situation that

	Commenter	Position	Comment	DRAFT Committees Response
				arises relatively infrequently. Accordingly, the committees determined that the best way to move forward would be a more focused rules proposal to add the juvenile court petition process to the appellate rule on access to records in a juvenile case. The "apparent inconsistencies" are a result of the statute that requires individuals who are not described in section 827(a)(1)(A)-(P) to petition the juvenile court for access to records. One goal of this proposal is to highlight that requirement and advise litigants of it early in the proceedings.
			For example, section 366.28 prescribes the process for prospective adoptive parents to seek appellate court review of a juvenile court's removal decision. The statute itself contemplates that parties to the removal proceedings will be parties to the statutory writ proceedings. (See, Wayne F. v. Superior Court (2006) 145 Cal.App.4th 1331 [prospective adoptive parents, while not parties to the underlying dependency proceedings unless they are also de facto parents, were entitled to "fully participate" in 366.26(n) hearings concerning proposed removal from their home].) The implementing Rule of Court, rule 8.454 requires the clerk to prepare the record and to send it to "counsel of record and any unrepresented party and unrepresented custodian of the dependent child." There is nothing in the rule that requires anyone who is entitled to be served with a copy of the record under the rule to have first filed a	The committees agree that the commenter raises legitimate concerns. However, the scope of this project is to implement section 827(a)(6). Section 827 governs access to the juvenile case file and the Legislature has clarified in section 827(a)(6) that the petition process for access to confidential records applies to appellate court proceedings. A prospective adoptive parent is not listed in section 827(a)(1)(A)-(P), and therefore must obtain a court order for access to records in the juvenile case file. The committees understand that prospective adoptive parents could be considered "parties" in the appellate court under rule 8.454, but this does not change the fundamental statutory mandate that individuals who are not described in section 827(a)(1)(A)-(P) must petition the juvenile court for access to records.

	Commenter	Position	Comment	DRAFT Committees Response
			section 827 petition. (Rule 8.454(i)(2).) The use of the word "parties" in the rule clearly refers to the persons who participated in the juvenile court removal proceedings, not just the parties to the underlying juvenile court case. Stealth amendment of the appellate rules, without reference to the rule that amends the rules being consulted, is unfair to litigants, especially those who are not already familiar with the appellate rules in dependency cases. The proposal also does not adequately address the stated purpose because there are no time limits on how long a juvenile court may take to act on a section 827 petition nor is there any remedy available when the juvenile court wrongfully denies a section 827 petition or fails to act at all, thereby effectively preventing the appeal or writ from being considered. For example, the Los Angeles Superior Court has a practice of refusing to file notices of appeal or notices of intent to file a writ petition from de facto parents as well as persons who are not the parent, the child, or the agency unless that person also files a section 827 petition at the same time the Notice of Appeal is filed. Many of those section 827 petitions then languish for months before they are acted upon. It is also not unheard of for those petitions to be sent for a ruling to the very bench officer whose order is being appealed, even though the	The committees agree that delay is a significant concern. Although section 827(a)(2)(E)-(F) provides a timeline for a juvenile court's decision on a section 827 petition in the case of a deceased child, the statute is silent regarding a timeline for the court's decision in other circumstances. The committees considered including time limits on the petition process, but juvenile courts are already struggling to meet the demands of processing these petitions. The committees concluded that, without additional resources for the juvenile courts, imposing deadlines is simply not feasible. In addition, adding deadlines would be a substantive change to the proposal that, under rule 10.22, would require circulation for public comment again before including the change.

	Commenter	Position	Comment	DRAFT Committees Response
			procedure specified by section 827 requires the presiding judge to make that determination. In the meantime, resolution of issues important to the child's stability, permanency, or well-being are being unnecessarily delayed or thwarted by the court's failure to make a timely decision on the section 827 petition. The absence of time limits on when the juvenile court must act on the section 827 petition must be addressed. The time for filing a valid Notice of Intent is very short. Even if a section 827 petition is filed before the notice of intent, it is likely that it will not have been acted upon before the notice of intent must be filed to preserve the right to file a writ petition. No record will be prepared within the time limits set forth in the rules because the court has not yet acted on the pending section 827 petition. The statutory writ proceedings under sections 366.26(l) and 366.28 were adopted because the Legislature wanted the issues raised by those writ petitions to be re- solved swiftly, usually in no more than in 120 days from the date of the order. If there are no time limits on when the juvenile court must act on a prerequisite section 827 petition and no remedy when such petitions are wrongfully denied, then the purpose of the writ procedures will be completely thwarted by the failure of a juvenile court to make a prompt decision on the section 827 petition.	See response above.

	Commenter	Position	Comment	DRAFT Committees Response
			Imposition of the section 827 process as a prerequisite for preparation of the appellate record builds unconscionable delays into the process of getting issues concerning the safety or stability of a child before an appellate court. For example, while the rule provides for the clerk to serve the petition if the petitioner does not know the identity or address of any of the parties, many clerks' offices routinely refuse to comply with this provision and refuse to file the petition at all because there is no proof of prior service. If a person seeking to file such a petition asks the clerk to supply name and address information so that the petitioner may accomplish the required service, clerks' offices often refuse to supply that information on the ground that it is "confidential."	As mentioned above, section 827 requires that certain persons file a petition for access to records in the juvenile case file. The committees cannot recommend, and the Judicial Council cannot adopt, rules that are inconsistent with statute. (Cal. Const., art. VI, section 6.) The committees acknowledge the concerns raised and agree that there will be difficulties in many instances, but the issues are based in section 827 provisions regarding the confidentiality of juvenile case files.
			An additional problem with the proposal is that it does not address the situation where one of the affected persons is a respondent in the appellate court, rather than the appellant or writ petitioner. For example, if the county agency appeals an order granting de facto parent status or files a writ petition when the juvenile court rules against the agency's attempt to remove a child from an adoptive placement, the de facto parent or prospective adoptive parent should have the right to respond to the agency's claims. It is probable that these individuals will not even be served with the opening brief or writ petition if that person has not already filed a	The committees acknowledge that several rules appear to have been written without consideration of persons who must petition for access to records in the juvenile case file. In this example, the de facto parent or prospective adoptive parent clearly has the right to respond to the agency's claims. Section 827(a)(6) recognizes this. The committees do not agree that it is "probable" that these persons would not be served with the opening brief or writ petition, but the rule is not entirely clear in this situation.

	Commenter	Position	Comment	DRAFT Committees Response
			section 827 because rule 8.401(b)(1) does not permit service of "filed documents" on persons who are not "parties" or attorneys for "parties." ***Suggested alternative***. The proposed procedures provide too many ways in which appellate review to which aggrieved relatives, caregivers, de facto parents, or other interested persons would be otherwise entitled can and will be impeded or prevented by these amendments. A possible and more efficient solution would be to add an item to the JV-180, JV-285, JV-321 and JV-325 forms that requests an order granting access to the juvenile court records relevant to that proceeding pursuant to section 827(a)((1)(Q). The form order for each of these petitions could also be amended include an item for the court to rule on the section 827 request. These additions would streamline the process of giving prior notice of the request for access to interested parties, address the extent of discovery, etc. available to the petitioner in that proceeding, make the relevant documents available for any appeal or statutory writ proceeding, and obviate most of the due process problems presented by the present proposal. **Should the definition of "records in the juvenile case file" in rule 8.401(b) more closely track the definition of "juvenile case file" in rule 5.552(a) or Welfare and Institutions Code section 827(e)?**	The committees appreciate this suggestion. However, including such rules would be a substantive change to the proposal that, under rule 10.22, would require circulation for public comment. The committees will keep the suggestion for consideration in a future cycle.

W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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

	Commenter	Position	Comment	DRAFT Committees Response
			No. The definitions of "juvenile case file" in the rule and the statute are broader than the documents that may properly be included in an appellate record or record on a statutory writ petition. For example, records in possession of the social worker or probation officer that were never filed with the juvenile court or offered or entered into evidence in a contested juvenile court proceeding would not be a proper part of the appellate record. **Does the proposed information sheet, form JV-291-INFO, provide the information necessary for an individual to understand the right to appeal and the process for requesting access to records in the juvenile case file?** **No**. The list of people who might have the right to seek review, includes this language: You might have a right to appeal or file a writ petition if, for example, you are: The child's relative, and the child was removed from your home, *or you requested that the child be placed in your home or that your home be assessed for possible placement, and* the court denied your request for placement *or the placing agency never assessed your home*;	The committees agree with this comment and have modified the definition to include records from the juvenile case file that would be in the court record and thus part of the appellate record. The committees agree that the language should be amended to clarify that a court order is required for there to be a right to appeal. The change has been made.

	Commenter	Position	Comment	DRAFT Committees Response
			The italicized language is misleading. An agency's failure to assess or place, in the absence of judicial review by the juvenile court, would not give rise to the right to appellate review. The first full paragraph in column two states that the petitioner's request can include documents in the possession of the social worker or the probation officer. This is misleading because, as noted above, these documents would not be in the record of the juvenile court proceedings at issue and, therefore, would not be properly part of the appellate record. The reference to this form should not be added to the JV-285 or the JV-290 forms. Including the JV-291-INFO reference on those forms implies that relatives and caregivers may have appellate rights. This is almost never the case for those who have not sought or achieved some kind of party or quasi-party status through other means, such as a 388 petition or a de facto parent re- quest. **Should other information be included?** **Yes**. The information sheet should warn people not to wait to file their 827 petition until after the court has ruled on their section 388 petition, de facto parent request, or prospective adoptive	While a petitioner could request information in the social worker's or probation officer's file unrelated to an appeal, the committees agree that this language should be removed because the focus of the form is on accessing the case file for purposes of appeal, which, as the commenter correctly points out, would not include documents in the social worker's or probation officer's case file. The committees elected to include the notice on these forms because the individuals who use these forms may eventually have a right to appeal or seek writ relief. The committees agree however that most relatives and caregivers will not. The language of the notice and form JV-291-INFO clarifies that these individuals will have a right to appeal or file a writ petition in only very limited circumstances. The committees elected not to include a warning that appellate review may be delayed or denied because of delay in the section 827 petition process. The committees understand that there are no typical time periods for decisions on section

	Commenter	Position	Comment	DRAFT Committees Response
			parent status request and that any appellate review may be unduly delayed or denied because of the necessity of obtaining an 827 order granting access to the juvenile court file before they may have access to the appellate record. **Should rule 5.552 require that the parent and county counsel receive notice if a petition for access is filed by an adult who is a former or current dependent and is seeking access to their case file for the purpose of education, employment, immigration, and/or military enlistment?** **No**. **Rule 5.552 does not require that a parent's attorney of record receive notice when a petition for access is filed. Should the rule require such notice?** Yes. But there should be an exception in cases where parental rights have been terminated for both parents.	827 petitions, as each court is different in how these petitions are handled. Such a warning could also deter someone from filing the petition. The committees have elected to continue to require notice to the parent and county counsel in these situations because their input on confidential information in the case file is essential. The committees elected not to change the notice requirements of rule 5.552. The committee anticipates that a parent's or guardian's attorney will be notified if the parent or guardian cannot be located.
2.	Appellate Defenders, Inc. By Linda Fabian Staff Attorney San Diego, California	NI	1. The Proposed JV-570 Process Causes Undue Delay. The proposed JV-570 procedure for producing a record for the appellant who is not the child, or	The committees appreciate these comments. The committees acknowledge the concerns regarding delay caused by the petition process and

	Commenter	Position	Comment	DRAFT Committees Response
			the child's parent or guardian will likely result in significant delays in the appellate process. We find a majority of the appellants in these cases in the Fourth Appellate District are relatives or de facto parents challenging placement decisions (removal, denial of placement). Almost all of these individuals do not have counsel representing them in the juvenile court. They will likely find the JV-570 process difficult to navigate and may be unable to comply with the deadlines for completing and submitting the petition for filing. All dependency appeals in two of our three Divisions (San Diego, Orange and Imperial Counties) are subject to fast-track rules. (Cal. Rules of Court, rule 8.416(a)(B)(I).) The courts endeavor to decide the appeal in these cases within 250 days. The JV-570 process creates significant delay in preparing the appellate record. The JV-570 process will delay preparation of the appellate record for several months at a minimum. The court must offer notice to the parties and an opportunity to object to the release of the record. (§ 827 (3)(B).) Anybody objecting to the request may do so within 15 days. The petitioning party has another 10 days within which to reply to the objection. The juvenile court must set the matter for hearing no later than 60 days from the date the petition is	that it is a challenging process for self-represented litigants. The purpose of the notice on a number of forms and the new information sheet is to raise awareness of the process and provide guidance for navigating it. Ideally, litigants will petition for access to records during the proceedings in the juvenile court rather than waiting until an order is challenged on appeal. The committees acknowledge that delay in preparing the appellate record often results from the petition process, but the process is required by the statute.

	Commenter	Position	Comment	DRAFT Committees Response
			served. The court then has another 30 days after the hearing within which to render its decision. (§ 827 (2)(E).) The proposed rules do not assign a deadline for the superior court clerk's preparation of the appellate record. As a result, the process to obtain an appellate record order can take at least four months, likely longer. (See Appendix, time lines for two cases that went through this process). A colleague who works in the Second Appellate District (where a procedure very similar to the proposal as been in effect for a few years) shared that in some cases it took eight months for an order to issue on the JV-570 petition to begin preparation of the appellate record. As noted, most of these appeals are from adverse placement decisions. Meaningful appellate review of placement decisions require prompt review because the juvenile dependency case continues to progress. The child's circumstances change and they develop attachments to new caretakers. Appellate review of a placement decision that occurred a year ago robs the court of the ability to correct a mistake. "Meaningful redress for past mistakes may not be possible, but we cannot unwind the clock." (*In re R.T.* (2015) 232 Cal.App.4th 1284, 1308 [recognizing the court is likely unable to correct the placement mistake made two and one-half years prior, due to the intervening change in the	The committees acknowledge this difficulty for litigants. The committees appreciate this feedback and acknowledge that time is of the essence in juvenile dependency matters.

	Commenter	Position	Comment	DRAFT Committees Response
			child's circumstances].) Unless an effort is made in the juvenile court to expedite these appellate related JV-570 petitions, appellants will suffer a true case of "justice delayed is justice denied." We understand the need to protect the interests of the children in maintaining the confidentiality of their case. But the proposed process treats these appellants the same as a stranger to the case, where the expectation of confidentiality is substantially greater. These relatives and former caretakers are likely very familiar with the circumstances that required intervention, the child's circumstances pre- and/or post-juvenile court intervention. The proposal should seek to protect only information that is actually confidential. If the appellant has been present at the case hearings, the juvenile court has implicitly granted them access to those proceedings under section 827. 2. If Appellate Counsel is Appointed to Represent the Appellant, the Juvenile Court Should Have the Option of Ordering Counsel Be Provided a Full Record With a Protective Order. The concerns outlined above with respect to an adequate record and delay could be resolved by providing a full copy of the record to appellate counsel for the third-party who has been	The statute requires that all parties who are not the parent, guardian or child, or otherwise listed in section 827(a)(1)(A)-(P), must follow the petition process. The committees recognize that these individuals are often relatives and former caretakers who may be very familiar with the circumstances of the case. However, the Judicial Council is not authorized to adopt rules that are inconsistent with statute. It is not clear that such a procedure would be consistent with the language of the statute.

	Commenter	Position	Comment	DRAFT Committees Response
			appointed by the Court of Appeal. The Juvenile Court can issue a protective order prohibiting counsel from turning over any portion of the record to the client not authorized by an 827 order. The JV-570 petition could include this option for appellate counsel to complete. 3. It is Unlikely the JV-570 Process Will Produce an Adequate Record. As noted the majority of these appellants do not have representation in the trial court. Completing the JV-570 petition process will be daunting for the lay person. While they are petitioning for access to the juvenile court record, they are also designating the record on appeal. Unlike the civil litigant, they cannot review the court's file to determine which documents they will need for their appeal. They are being asked to designate a record without access to the record. Forcing this process on pro-per appellants will result in preparation of an inadequate record to present their claim. These two published cases, *Isabella G*. (2016) 246 Cal.App.4th 708, and *In re R.T.*, *supra*, 232 Cal.App.4th 1284, demonstrate a relatively full record is essential to effectively prosecuting relative placement claims in these cases. The *Isabella G*. court cited evidence the minor missed her grandmother, was happy to be with her,	The committees acknowledge this concern and the difficulty an individual would have in trying to designate the record/request access to records in the juvenile case file without knowing what those records are. The JV-570 form asks the petitioner to describe the records (rather than provide titles, for example), but the committees recognize that this is not easily done and that it has resulted in an inadequate record being prepared. The committees thank the commenter for providing these examples.

	Commenter	Position	Comment	DRAFT Committees Response
			requested more contact with her, and the caregiver thought the minor should be placed with Grandmother, as relevant to show prejudice from the court's failure to apply the relative placement criteria. (*In re Isabella G.*, supra, 246 Cal.App.4th at p.724.) We believe the proposed JV-570 form is too general to assist the lay person in this endeavor. The form serves as the appellant's only means of designating the appellate record. It makes sense to devote a portion of the form to this purpose. A section of the form could be reserved for appellants and request very specific information that assists them with designating the record on appeal. At a minimum, the JV-570 petition should be modified to ask the petitioner to list the juvenile court hearing dates at which the court allowed them to be present. Not only will this approach assist the appellant, it will likely prove helpful to the juvenile court in eliciting more specificity. It will help insure more uniformity in record preparation. The information we propose be included in this new "appeal" section of the JV-570 form is found on the last page of the Appendix. Appendix Delay in Utilizing the 827 Petition Process: Two Case Examples	The committees appreciate the specific suggestions for improving the JV-570 form. The committees believe that including the items listed in the appendix to this comment on the JV-570 form would encourage petitioners to check all the boxes listed and the petition would therefore lack the specificity required under rule 5.552(b)(1) and encourage requests for access to records that the petitioner does not know exist. This would create an undue burden for the juvenile court reviewing the petition. The committee has however elected to amend item 5 of form JV-570 to provide more guidance to the petitioner by giving instructions to include the type of report by name and date. The committees appreciate receiving these two case examples.

W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	DRAFT Committees Response
			1. D073770: the Court of Appeal ordered the non-party appellant to obtain an 827 order from the Juvenile Court which sets forth the record to which she can have access. This appellant is an attorney who was able to navigate this process much better than a lay person. The 827 process took more than three months: – Court of Appeal's order to seek 827 order issued November 29th 2018; – 827 petition filed in Juvenile Court December 3, 2018; – 827 order rendered by the Juvenile Court February 1, 2019; – Court of Appeal ordered limited record prepared February 27, 2019; – Limited record filed in the Court of Appeal March 11, 2019.	No further response required.
			2. D073296: This fast-track case took 10 months to decide, 6 months to order the limited record: Mother – appellant: NOA filed 12/28/17 – appointed counsel 1/9/18 Maternal great aunt & 388 NOA filed 12/28/17 – appointed counsel 2/16/18 Minors W. & J (RB) Counsel appointed on court's own motion – 4/13/18 (apptd. 4/18/18) Minors M & Je (RB) appointed counsel – 1/25/18 de facto father (RB, retained counsel) de facto mother (RB, retained counsel) Record filed 1/19/18	No further response required.

W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	DRAFT Committees Response
			Augment by mother (denied) 2/2/18 De facto 827 motion 3/29/18 Oppo to 827 motion by mother & aunt 4/2/18 Mother & aunt file AOB 4/4/18 County counsel do not oppo release 4/5/18 (since aunt already has record) Oppo to release by minors M & J 5/25/18 Court orders limited record 6/6/18 – attorneys ordered not to provide the record to the aunt or de facto De facto father files augment 6/8/18 Mother & aunt oppose 6/14/18 Court orders augment considered w/appeal 6/19/18 RB by de facto father filed 7/27/18 County RB filed after 17B notice 7/31/18 De facto father requests judicial notice 8/1/18 – post-appeal info re: resolution of 1 issue – ordered to be considered w/appeal 8/16/18 minors' letter brief of W & J 8/23/18 Court's request for further briefing 8/30/18 – statutory interp. for relative placement issue ARB filed by mother 9/4/18 ARB filed by aunt 9/4/18 Mother's, aunt's, minors W & J's, agency's, de facto father's – supplemental briefs filed 9/14/18 minors M & J filed supplemental brief 9/17/18 case fully briefed 9/17/18 case submitted 10/23/18 opinion filed 10/23/18 remittitur issued 1/2/19	

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	DRAFT Committees Response
			INFORMATION TO ADD TO JV-570 For use by appellants who are requesting access to the Juvenile case file as described in Rules 5.552 and 8.401(b)). The records I want are: (Check all that apply.) o All reports, documents and orders the judge expressly stated were considered or were admitted as evidence in making the challenged order. (List, if known.) _____ _____ _____ _____ _____ _____ o The reporter's transcript from each hearing Petitioner attended. The dates are: _____ _____ _____ _____ o All reports and attachments prepared by the county agency and/or the CASA containing information about the placement history of the child/children. o All reports and attachments prepared by the county agency and/or the CASA containing information about Petitioner's visitation and/or request for visitation with the child/children.	The committees thank the commenter for the specific suggestions for form JV-570. Please response above.

W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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

	Commenter	Position	Comment	DRAFT Committees Response
			o All reports and attachments prepared by the county agency and/or the CASA containing information about interviews or conversations with Petitioner. o All reports and attachments prepared by the county agency and/or the CASA containing information about interviews or conversations with any parties or collateral contacts discussing Petitioner's request for placement and/or visitation. o Other: (Describe in detail any records that are not covered above.) _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____	
3.	California Appellate Project Los Angeles By Stephanie G. Miller Staff Attorney	AM	Reconsider placing burdens for designation of the record, and service of JV-570 Request, on the third party appellant (i.e., a person who is not the parent, child, or guardian) now found in Local Rules Court of Appeal Second District Rule 8 and the proposed changes to Judicial Council Form JV-570.	The committees note the commenter's agreement with the proposal if modified.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

	Commenter	Position	Comment	DRAFT Committees Response
			Suggest: Shift burden for both tasks to the judicial officer who heard the dependency case. Direct the juvenile court clerk to file the timely third party appeal and refer it with the JV-570 form to the judicial officer for completion and return to the juvenile court appellate desk within 14 days after the filing of the notice of appeal. CAP/LA's experience with the implementation of Local Rule 8 is that most third party appellants are not represented by counsel in the juvenile court and are laypersons with a limited ability to identify the necessary record for presentation and consideration of the appeal, and with limited means and knowledge to serve notice of the JV-570. It is also CAP/LA's experience that the judicial officer reviewing the JV-570 petition completed by the third party appellant often is not knowledgeable about the necessary content of an appellate record, and his/her designation of the appellate record for the third party appeal is inadequate. The Proposal partially tracks the process in Local Rule 8. But, the local rule, although an improvement, has not resulted in the timely filing of an adequate record for a third party appeal. One example of the persisting substantial delay in deciding the appeal of a third party appellant is *In re O.R.* et al [B290446; unpub. opn. fld.	Shifting the responsibility for designating the record and serving form JV-570 would be a major departure from the standard practice of parties designating the record. The committees appreciate the feedback and suggestions for revising procedures. The suggested changes exceed the scope of the proposal and, under rule 10.22, would need to circulate for public comment. The committees will retain the suggestions for future consideration.

	Commenter	Position	Comment	DRAFT Committees Response
			11/26/19]. In that case, maternal aunt's notice of appeal from the denial of her Section 388 petition was filed in February 2018, but not decided until approximately 21 months later. Securing an adequate record for presentation and consideration of the appeal delayed decision. In order to obtain an adequate record, appellate counsel turned to the reviewing court and filed a petition for writ of mandate. (*R.F.* v. *Superior Court of Los Angeles County* [B296683; rem. to sup. ct. w/directions 4/26/19].) Requiring the judicial officer to timely designate the proposed record for a third party appeal, serve the parties with the proposed designation, consider any objection, and finally designate the appellate record would facilitate the preparation of the record for the third party appeal, now delayed, in part, by the third party's inability to adequately do so on his or her own. Secondly, with the third party notice of appeal in hand identifying the order that is the subject of the appeal, the judicial officer is best able to identify the necessary record, guided by the existing statewide rule defining the normal appellate record for an appeal by a parent, guardian, child or social services agency, the limited scope of the third party appeal, and the goal to protect the child's confidentiality. Those guidelines should produce an adequate appellate record at the outset.	See response above.

W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	DRAFT Committees Response
			To date, the appellate record in most third party appeals is not timely filed or adequate. Although the Proposal contemplates that a second JV-570 Request filed in the juvenile court may be necessary in order for a third party appellant to reply to another party's brief, it should also anticipate the likely need to complete the record before briefing begins. Thus far, there is no direction in this area found in the proposed rules implementing Section 827, subdivision (a)(6). That absence of direction led to the filing in the Court of Appeal of the petition for writ of mandate in *R.F. v. Superior Court of Los Angeles County*, *supra*. Second Comment Received The Proposal to implement Welfare and Institutions Code section 827, subdivision (a)(6) is similar to existing Local Rules Court of Appeal Second District Rule 8 applicable to a notice of appeal filed by a person who is not the parent, child, or guardian in the dependency case. (Hereafter, third party appeal.) Although now in use for several years, Local Rule 8 has yet to achieve the timely identification, preparation, and filing of the appellate record in a third party appeal. Many third party appeals are not perfected and reach a decision on the merits.	The committees note the commenter's concerns regarding the adequacy of the appellate record that is produced as a result of the petition process. The committees appreciate these additional comments providing further explanation, and for bringing these issues to the committees' attention. As noted above, the suggestions for improving the section 827 petition process are beyond the scope of the present proposal and would need to circulate for public comment. The committees will retain these suggestions for future consideration. See response above.

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	Commenter	Position	Comment	DRAFT Committees Response
			In the Second District, the majority of third party appellants are unrepresented lay persons for whom the challenge to complete and serve the JV-570 request for access to the juvenile court file is a daunting one, often not completed, resulting in default and the dismissal of the appeal. (See Local Rule 8.) Secondly, if the JV-570 request is filed, preparation of the appellate record is further delayed by allowance for objection by the parties to the third party's access to the record identified in the JV-570, and by the tremendous press of other juvenile court cases. Third, the record approved after judicial review by the juvenile court for distribution to the third party appellant in his or her appeal is rarely adequate for presentation and consideration of the appellate issues. Consideration should be given to including in the Proposal a mechanism for seeking completion of the inadequate record filed in the Court of Appeal, prior to briefing. Filing a second JV-570 in the juvenile court in the quest for an additional record will undoubtedly result in further significant delay.	The committees appreciate this concern. To address this concern the committees created a preamble to item 5 of JV-570 giving instructions when the petition relates to an appeal or writ. The preamble tells petitioners to include in their request "the transcripts, reports, and any other evidence considered by the juvenile court at hearings related to the subject of the appeal or writ proceeding." In addition, item 6d requires petitioners to provide the hearing dates of the juvenile court order being challenged. The committees understand there may still be instances where a second JV-570 will need to be filed. See response above.

W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	DRAFT Committees Response
			Consideration should also be given to shifting the burden for completion and service of the JV-570 from the third party appellant to the judicial officer who presided over the dependency case; imposing reasonable, mandatory time frames for designation of the proposed contents of the juvenile court record for access by the third party appellant and circulation among the parent, guardian, child and social services agency, submission of comments and objections thereto, and finalization of the content of the record designated for the third party appeal. The content of the third party notice of appeal, the judicial officer's familiarity with the case, statewide rules defining the "normal" record in a dependency appeal, and the statutory protection of the confidentiality of the child are ready guidelines to inform the juvenile court's timely, noticed, designation of the juvenile court record accessible to the third party appellant.	
4.	California Lawyers Association By Leah Spero, Chair Committee on Appellate Courts and Saul Bercovitch Director of Governmental Affairs	AM	The Committee on Appellate Courts supports this proposal. In response to the Request for Specific Comments, the Committee provides the following: Should the definition of "records in the juvenile case file" in rule 8.401(b) more closely track the definition of "juvenile case file" in rule 5.552(a) or Welfare and Institutions Code section 827(e)?	The committees note the commenter's support for the proposal and appreciate the responses to the requests for specific comments.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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

	Commenter	Position	Comment	DRAFT Committees Response
			The Committee believes the definition of "records in the juvenile case file" in rule 8.401(b) should more closely track the definition of that term as provided in section 827(e), rather than the definition as provided in rule 5.552(a). Many of the items contemplated by rule 5.552(a) are never presented to the juvenile court itself (such as "[d]ocuments made available to . . . social workers"). Those items therefore could not properly be presented in connection with the appellate review process, and permitting parties to access such items would only serve to increase the risk of public disclosure or provide access to otherwise irrelevant material.	The committees agree that the definition should not include the items mentioned in rule 5.552. The rule has been amended to reflect this.
			Relatedly, the Committee is concerned that the definition in the proposed amendment to rule 8.401(b) is ambiguous. As presently drafted, "records in the juvenile case file" would only encompass "a document, paper, . . . or other thing filed in the juvenile court." It is therefore susceptible to an interpretation that a successful petitioner could access only those materials formally "filed" with the juvenile court. However, Welfare & Institutions Code section 827(e) contemplates access to all things "filed in that case or made available to. . . and thereafter retained" by the court. Section 827(a)(6) similarly seems to contemplate access to all "records in a juvenile case file"— regardless of	The committees agree and have modified the definition to include lodged materials.

	Commenter	Position	Comment	DRAFT Committees Response
			whether they were formally filed, or merely lodged or retained. That is, the statute contemplates access to lodgings or other documents which were reviewed and retained by the court, and which might therefore be made part of the record on appeal, but which were never officially docketed or "filed" with the court. The Committee therefore recommends that the proposed rule be modified to address this ambiguity. Does the proposed information sheet, form JV-291-INFO, provide the information necessary for an individual to understand the right to appeal and the process for requesting access to records in the juvenile case file? Should other information be included? The Committee believes that JV-291-INFO provides the necessary information regarding appeals by persons who are not children, parents, or legal guardians. For additional clarity, the information sheet could also describe the presumptions applicable to children, parents, or legal guardians. However, the information sheet is relatively clear as drafted, and information for children, parents, and legal guardians is available from other sources. The Committee therefore does not believe this additional guidance is affirmatively necessary.	The committees note this suggestion and agree with the commenter that it could be helpful. However, the information sheet already contains a lot of information. The committees concluded that it would be better not to add non-essential content.

	Commenter	Position	Comment	DRAFT Committees Response
			Should rule 5.552 require that the parent and county counsel receive notice if a petition for access is filed by an adult who is a former or current dependent and is seeking access to their case file for the purpose of education, employment, immigration, and/or military enlistment? The Committee does not believe that Rule 5.552 should further specify circumstances under which a parent or county counsel must receive notice. Rule 5.552(c)(1) already specifies that parents and county counsel are generally entitled to receive notice whenever a petition for access has been filed. Moreover, while public policy supports notifying a parent or county counsel of documents filed in connection with minor children, public policy does not seem to support notifying parents of their adult children's requests. Rather, it would seem to favor the adult petitioner's right to privacy. Rule 5.552 does not require that a parent's attorney of record receive notice when a petition for access is filed. Should the rule require such notice? The Committee believes that Rule 5.552 should specify that notice must be given to attorneys of record whenever petitions for access are filed. Juvenile proceedings generally require that attorneys be notified of any filing relevant to	The committees agree that the notice requirements in rule 5.552 should not be changed. The committees have elected to require notice to the parent and county counsel in these situations because their input on confidential information in the case file is essential. The committees elected not to change the notice requirements of rule 5.552. The committee anticipates that a parent's or guardian's attorneys will be notified if the parent or guardian cannot be located.

W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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

	Commenter	Position	Comment	DRAFT Committees Response
			their client. (See Rule 5.502(27).) The Committee sees no reason to depart from this general rule.	
5.	California Lawyers Association Executive Committee of the Family Law Section (FLEXCOM) by Justin M. O'Connell FLEXCOM Legislation Chair and Saul Bercovitch Director of Governmental Affairs	A	[No specific comment provided.]	The committees note the commenter's agreement with the proposal.
6.	Joint Rules Subcommittee (JRS) of the Trial Court Presiding Judges Advisory Committee (TCPJAC) and the Court Executives Advisory Committee (CEAC)	AM	The JRS notes that the proposal is required to conform to a change of law. The JRS also notes the following impact to court operations: • Results in additional training, which requires the commitment of staff time and court resources. • Increases court staff workload. • JV-569 – Proof of Service-Petition to Access to a Juvenile Case File o The duplicated item #4 should be renumbered to #5. The existing #5 should be renumbered to #6. • JV-574 – Order After Judicial Review on Petition for Access to Juvenile Case File o In section 2d, it is recommended that the sentence be updated to read, "There are no records that can be released in response to the	The committees note the commenter's agreement with the proposal if modified. The committees appreciate this feedback on the impact to court operations and the commenter's responses to specific questions presented in the invitation to comment. Item 4 continues onto page 2 of the form. Repeating the item number at the top of the next page is a form convention. The committees agree that this item should be clarified.

	Commenter	Position	Comment	DRAFT Committees Response
			petitioner's request." This may make it easier for individuals to understand the reason for the denied request. Does the proposed information sheet, form JV-291-INFO, provide the information necessary for an individual to understand the right to appeal and the process for requesting access to records in the juvenile case file? o Yes, the proposed form provides the necessary information to individuals. The proposed information sheet provides sufficient information; however, it could be formatted differently to make it easier for individuals to comprehend. Section #2 is a block of information. It may be more beneficial to provide questions and answers similar to the JV-060-INFO.	Reformatting the information sheet to a question-and-answer format is beyond the scope of changes that can be made at this time. The committees will retain this suggestion for consideration in a future rules cycle.
			• Would the proposal provide a cost savings? o The proposal would not provide a cost savings. The approved form, JV-291-INFO, would require additional printing and court time to disseminate to individuals.	Noted. No further response required.
			• What would the implementation requirements be for courts? o Communication would be needed to judicial officers and staff. Procedures may require revisions and updates would be needed to the case management system.	Noted. No further response required.

W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	DRAFT Committees Response
			• Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? o Yes, three months would be sufficient time to implement.	Noted. No further response required.
7.	Orange County Bar Association by Scott B. Garner, President Newport Beach, California	A	Does the proposal appropriately address the stated purpose? Yes. Should the definintion of "records in the juvenile case file" in rule 8.401(b) more closely track the definition of "juvenile case file" in rule 5.552(a) or Welfare and Institutions Code section 827(e)? The definition of "juvenile case file" in rule 5.552(a) is preferable to the statutory definition. Notably, it clearly states that the rule of confidentiality extends to transcripts of juvenile court proceedings, a point left ambiguous by section 827(e). Does the proposed information sheet, form JV-291-INFO, provide the information necessary for an individual to understand the right to appeal and the process for requesting access to records in the juvenile case file? Should other information be included?	The committees note the commenter's agreement with the proposal and appreciate the responses to specific questions. The committees have modified the definition in rule 8.401 to include lodged materials. Noted. No further response required.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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

	Commenter	Position	Comment	DRAFT Committees Response
			The information provided by the form in clear, easy to understand and complete. Should rule 5.552 require that the parent and county counsel receive notice if a petition for access if filed by an adult who is a former or current dependent and is seeking access to their case file for the purpose of education, employment, immigration, and/or military history? With respect to records actually in the court file, section 827 would provide the person with access without notice to their own records but for the fact that they have reached the age of majority and in the case of non-minor dependents, they nevertheless retain access under section 362.5. It makes little sense to require notice now that the person is an adult in light of the fact that they are the one whose confidential interest is at stake. However, as a pratical matter, especially when the petition for access seeks records covered under Penal Code section 11164 et seq that did not result in a court filing, county counsel may be involved in reviewing the records sought and notice may expedite that process. Rule 5.552 does not require that a parent's attorney of record receive notice when a petition for access is filed. Should the rule require such notice?	The committees elected not to change the notice requirements of rule 5.552. The committees have elected to require notice to the parent and county counsel in these situations because their input on confidential information in the case file is essential.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

	Commenter	Position	Comment	DRAFT Committees Response
			The statute requires notice on all "interested parties." The attorney for a party is not a party. Currently, the rule, along with Form JV-569 require service only on three types of attorneys—County Counsel in a dependency case, the District Attorney in a delinquency or truancy case, and the minor's attorney, as they are either the petitioner in the proceedings or the attorney representing the interests of the child. Expanding notice to require service on parent's counsel goes beyond the call of the statute. However, it is not uncommon in dependency proceedings for parents to absent themselves. In that situation, parent's counsel do their best to protect their clients' rights and interests. In such a situation, those interests can only be protected by service on the attorney.	The committees elected not to change the notice requirements of rule 5.552. The committee anticipates that a parent's or guardian's attorneys will be notified if the parent or guardian cannot be located.
8.	San Diego County Bar Association by Helen Irza, Chair Appellate Practice Section	AM	The Appellate Practice Section of the San Diego County Bar Association appreciates the opportunity to review and comment on the proposed amendments to the California Rules of Court that govern access to records in juvenile cases. After canvassing our membership and forming a subcommittee to discuss the proposed changes, we respectfully submit the following comments. Specific Comments:	The committees note the commenter's agreement with the proposal if modified.

W20-02

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

	Commenter	Position	Comment	DRAFT Committees Response
			The Invitation to Comment requests comments on five specific topics. Our section's input is provided below. 1. Does the proposal adequately address the stated purpose? The Executive Summary of the Invitation to Comment states that the purpose of the proposed rule and form changes is to implement the recent Judicial Council-sponsored legislation that amends the statute that governs access to records in juvenile cases. Our understanding is that the changes are intended to help expedite the review process and to provide notice about the requirements for accessing confidential records to individuals who seek review. Our section supports the proposed changes to the rules and the proposed new forms. Below we offer specific feedback and a few suggestions to increase awareness and make the forms easier for laypersons to understand.	The committees note the commenter's support for the proposed rule and form changes and appreciate the additional comments and suggestions.
			Rule amendments: Rule 5.552 Our section strongly supports the proposed replacement of the terms "disclosure" and "disclosed" with "access to" and "released." We agree that the proposed changes will further the purpose of the new legislation by clarifying the scope and limits of a petitioner's access to confidential juvenile court records.	Noted. No further response required.

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W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	DRAFT Committees Response
			New and revised forms: Notice on JV forms	
			Our section supports the addition of the proposed notice on the forms specified in the Invitation to Comment, namely JV-285, JV-290, JV-295, JV-321, JV-325, JV-800, JV-820 and JV-822, and we agree that the proposed change will help foster awareness that petitioners and appellants must file a petition in order to access confidential records in a juvenile case file.	Noted. No further response required.
			We propose, however, that the notice should also be included on these additional forms: Request To Change Court Order (form JV-180); Court Order on Form JV-180 (form JV-183); and Order After Hearing On Form JV-180 (form JV-184).	Modifying additional forms exceeds the scope of the present proposal, but the Family and Juvenile Law Advisory Committee will retain this suggestion for future consideration.
			As noted in the background section of the Invitation to Comment, one purpose of the proposed changes is to provide notice about the petition process to litigants who are authorized to participate in juvenile proceedings and who either have a right to seek review of certain orders or to respond to an appeal of such orders. This group of litigants includes individuals who file a petition under Welfare and Institutions Code, section 388, to change, modify, or set aside a juvenile court order. The form created for filing such a petition under section 388 is form JV-180.	The committees appreciate this discussion of the benefit of adding the notice to these three additional forms.

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W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	DRAFT Committees Response
			Forms JV-183 and JV-184 are typically used by the court for orders served on the appellant after the Request to Change Court Order has been denied. It is our understanding that most appeals occur after a denial, For this reason, including the notice on these forms in addition to the JV-180 would further the purpose of informing appellants about the need to request a record to prepare for an appeal.	No further response required.
			Our section submits that adding the proposed notice to forms JV-180, JV-183 and JV-184 would expedite the process of creating an appellate record that includes confidential documents for those individuals who subsequently need to access them for an appeal. We believe this will assist in preventing delays in creating the record in juvenile dependency appeals which, under rule 8.416(e), must be determined within 250 days after the notice of appeal is filed.	No further response required.
			New and revised forms: Revisions to notice of appeal and notice of intent to file writ petition forms	
			Our section supports the proposed revisions to the notice of appeal and notice of intent to file writ petition forms that will allow litigants who have been granted access to confidential records by the juvenile court to attach the authorizing	The committees appreciate this feedback.

	Commenter	Position	Comment	DRAFT Committees Response
			order to these forms. The proposal, in our view, furthers the stated goal of implementing the new legislation and preventing delay in cases governed by rule 8.416(e). We anticipate that the ability to provide notice of an existing order in this simple and straightforward manner to the court clerks who prepare appellate records will reduce delays in the preparation of the appellate record. 2. Should the definition of "records in the juvenile case file" in rule 8.401(b) more closely track the definition of "juvenile case file" in rule 5.552(a) or Welfare and Institutions Code section 827, subd. (e)? After reviewing both rules, in our view, the definition of "records in the juvenile case file" should more closely track rule 5.552(a). We suggest that rule 5.552(a) is more appropriate because it includes documents that are typically used in both juvenile delinquency and dependency appeals. Section 827, subdivision (e), defines a "juvenile case file" to mean documents filed by or used by the probation officer in making a probation officer's report. (§ 827, subd. (e).) By contrast, rule 5.552(a) defines a "juvenile case file" to include all documents filed in a juvenile court case, including reports by probation officers, social workers of child welfare services	The committees agree and have modified the definition to include lodged materials.

	Commenter	Position	Comment	DRAFT Committees Response
			programs and CASA volunteers, transcripts, and documents submitted as evidence. (Rule 5.552(a).) Notably, probation officer reports are typical in delinquency cases, but are only rarely prepared in dependency cases, which most often rely on social worker reports. Also, juvenile case files frequently include other confidential documents (e.g., *Marsden* hearing transcripts) in addition to the probation and social worker reports. For these reasons, we believe the definition in rule 5.552(a) is the better one to track as it will make it clear to individuals who request access to confidential records that all confidential documents, including those typically used in dependency appeals, are subject to the new legislation. 3. Does the proposed information sheet, form JV-291-INFO, provide the information necessary for an individual to understand the right to appeal and the process for requesting access to records in the juvenile case file? Should other information be included? In our view, the proposed information sheet provides the information that is necessary for an individual to understand the process for requesting access to confidential records with one caveat. We suggest that it would be helpful to tell petitioners that the typical processing	The committees elected not to include a warning that the section 827 petition process can delayed or denied based on the venue. The committees do not believe that there are typical time periods for decisions on section 827 petitions, as each venue is different in how these petitions are handled, and

	Commenter	Position	Comment	DRAFT Committees Response
			time for a petition may be weeks or months. The provision of this information would increase awareness of the need to file petitions at the very beginning of the appellate process, and it would be especially helpful for unrepresented parties who do not have an attorney to advise them that they must make a timely request for access. 4. Should rule 5.552 require that the parent and county counsel receive notice if a petition for access is filed by an adult who is a former or current dependent and is seeking access to their case file for the purpose of education, employment, immigration and/or military enlistment? In our view, rule 5.552 should require notice to the parent and county counsel for the purpose of allowing those parties to advocate for redactions to the requested records. In dependency cases, it is important for parents and county counsel to be notified about a request for access even if the case is final. Juvenile dependency case files often include confidential information about the parent and parties other than the subject dependent, such as psychological evaluations and social security numbers. In the typical appellate record from a dependency case, such documents are sealed and labeled "confidential." They are not	such a warning could have the potential of deterring someone from filing the petition. The committees elected not to change the notice requirements of rule 5.552. The committees have elected to require notice to the parent and county counsel in these situations because their input on confidential information in the case file is essential.

	Commenter	Position	Comment	DRAFT Committees Response
			provided to counsel for the dependent minor on appeal. After an appellate case has closed, the former or current dependent (including non-minor dependents) should still be prohibited from accessing this type of private and sensitive information. Requiring notification to the parent and county counsel that a petition for access has been filed would provide an opportunity for affected parties to notify the juvenile court of the need to redact confidential information that should remain protected. Our section is aware that the judge who reviews a petition to access confidential records has the ability restrict access to a redacted copy. However, it is the parent and county counsel who are familiar with the case file and what needs to be protected. A rule that requires notice of a request for access will allow the parent and county counsel to assist the court with locating information that should be redacted or otherwise protected from disclosure. Such a rule would accordingly assist with the protection of the parties' private information and also save judicial resources. 5. Rule 5.552 does not require that a parent's attorney of record receive notice when a petition for access if filed. Should the rule require such notice?	

	Commenter	Position	Comment	DRAFT Committees Response
			It is the position of our section that the rule should require notice to a parent's attorney of record when a petition for access is filed. The current rule provides that a parent must be notified. However, it is often difficult to locate parents who may have moved or become homeless. Requiring notification to parent's counsel would enhance the likelihood that such parents will be located and provided with an opportunity to advocate for redaction to the requested files. In addition, for those parents whose whereabouts are known, the attorney of record may nevertheless be the person who is most informed about the existence of confidential information that needs to be protected.	The committees elected not to change the notice requirements of rule 5.552. The committee anticipates that a parent's or guardian's attorneys will be notified if the parent or guardian cannot be located.
9.	Superior Court of California, County of Los Angeles	AM	See attached recommended changes to proposed forms. Does the proposal adequately address the stated purpose? No. Consider these circumstances: A non-party petitioner previously requested access to the juvenile records by filing a JV570. Court granted access to records with redactions. If the petitioner later files an appeal or writ, are they required to file a new JV570 outlining the records/documents needed for the appeal or writ or do they have access to the prior records	The committees note the commenter's support for the proposal if modified and have made several of the suggested modifications to the forms. The non-party petitioner in this example would not have to file a new JV-570 form. The amendment to section 827 provides that the person would be entitled to the same access to records in the appellate court as was granted in the superior court.

W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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

	Commenter	Position	Comment	DRAFT Committees Response
			requested as previously redacted? This is currently not clear. Records requested should only be related to hearing or petition appealing.	
			Rules should clearly reflect that whenever there is an appeal or writ filed by a non-party participant that a JV570 be required at the time of the filing of the appeal or writ.	The non-party participant may have already filed the form JV-570 petition during juvenile court proceedings. Based on feedback that filing a form JV-570 should not be a prerequisite for filing a notice of appeal or petition for writ, the committees decline to make this change.
			Updates to JV569 and 570 need to be made for further clarification to non-party appellants/petitions.	The committees thank the commenter for providing specific suggestions for these forms.
			• Should the definition of "records in the juvenile case file" in rule 8.401(b) more closely track the definition of "juvenile case file" in rule 5.552(a) or Welfare and Institutions Code section 827(e)?	
			Juvenile Case File in rule 5.552 (a).	The committees have modified the definition to include lodged materials.
			• Does the proposed information sheet, form JV-291-INFO, provide the information necessary for an individual to understand the right to appeal and the process for requesting access to records in the juvenile case file?	
			Yes. This is very helpful.	Noted. No further response required.
			Should other information be included?	

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	DRAFT Committees Response
			Yes. Notice requirement for party to give notice to "interested parties." How is this possible when non-party appellants do not have access to case information, party names or mailing addresses? Must the Court be responsible for giving notice on all non-party petitions? These petitioners are not represented. They do not have access to party names, types and addresses. (See recommendations for changes to form JV569 and 570) Court will have to fill out form JV569. Forms should be fillable. • Should rule 5.552 require that the parent and county counsel receive notice if a petition for access is filed by an adult who is a former or current dependent and is seeking access to their case file for the purpose of education, employment, immigration, and/or military enlistment? No. If parent's rights have been terminated they should not receive notice. If youth is 18 years old or older, no notice to parents should be required unless court orders notice to child/adult. • Rule 5.552 does not require that a parent's attorney of record receive notice when a petition	Rule 5.552(c)(3) requires the clerk to provide service if the petitioner does not know the identify or address of any of the parties required to receive notice. The forms will be fillable. The committees elected not to change the notice requirements of rule 5.552. The committees have elected to require notice to the parent and county counsel in these situations because their input on confidential information in the case file is essential. The committees agree that the rule should clarify that notice is not required if parental rights have been terminated. The suggested change has been made.

W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	DRAFT Committees Response
			for access is filed. Should the rule require such notice? Yes, for children under 18 years. The advisory committees also seek comments from courts on the following cost and implementation matters: • Would the proposal provide cost savings? If so, please quantify. No. Non-party appeals or writs require a lot of additional resources to review, notice and process the appeals/writs. Redactions of the record are required for both the Clerk's and Reporter's record on appeal. Costly to order reporter's transcripts, original after review. Order to redact must require the court reporter to file a new original transcript with redacted information. • 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 committees elected not to change the notice requirements of rule 5.552. The committee anticipates that a parent's or guardian's attorneys will be notified if the parent or guardian cannot be located. The committees acknowledge the additional court resources required for these appeals and writs, and appreciate this insight. The committees appreciate this information on the implementation requirements.

W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	DRAFT Committees Response
			Training on the process, redaction software and training, new forms would require the addition of event codes in CMS. • Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Los Angeles already has implemented a similar process. Besides the new forms, the required noticing of the petition and the time consuming redactions of records, the changes could be implemented within 3 months. Proposed changes to the forms must be completed prior to implementation.	Noted. No further response required.
10.	Superior Court of California, County of Orange Family Law and Juvenile Court	NI	Comments □ JV-569 – Proof of Service-Petition to Access to a Juvenile Case File □ The duplicated item #4 should be renumbered to #5. The existing #5 should be renumbered to #6. □ JV – 571 - Notice of Petition for Access to Juvenile Case File □ It is recommended to revise the top portion “TO: (names)” to “TO (names of parties being served)” □ JV-574 – Order After Judicial Review on Petition for Access to Juvenile Case File	The committees appreciate the comments and responses to the requests for specific comments. See response to JRS. Because notice under rule 5.552 is required for a CASA volunteer who is not considered a party, the committees have elected not to make this change. See response to JRS.

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W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	DRAFT Committees Response
			□ In section 2d, it is recommended that the sentence be updated to read, "There are no records that can be released in response to the petitioner's request." This may make it easier for individuals to understand the reason for the denied request. Request for Specific Comments □ Does the proposed information sheet, form JV-291-INFO, provide the information necessary for an individual to understand the right to appeal and the process for requesting access to records in the juvenile case file? □ Yes, the proposed form provides the necessary information to individuals. □ Does the proposed information sheet, form JV-291-INFO, provide the information necessary for an individual to understand the right to appeal and the process for requesting access to records in the juvenile case file? □ The proposed information sheet provides sufficient information; however, it could be formatted differently to make it easier for individuals to comprehend. Section #2 is a block of information. It may be more beneficial to provide questions and answers similar to the JV-060-INFO. □ Would the proposal provide a cost savings?	Noted. See response to JRS. See response to JRS.

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Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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

	Commenter	Position	Comment	DRAFT Committees Response
			□ The proposal would not provide a cost savings. The approved form, JV-291-INFO, would require additional printing and court time to disseminate to individuals. □ What would the implementation requirements be for courts? □ Communication would be needed to judicial officers and staff. Procedures may require revisions and updates would be needed to the case management system. □ Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? □ Yes, three months would be sufficient time to implement.	See response to JRS. See response to JRS.
11.	Superior Court of California, County of San Diego by Mike Roddy Executive Officer	AM	• Does the proposal adequately address the stated purpose? Yes. • Should the definition of "records in the juvenile case file" in rule 8.401(b) more closely track the definition of "juvenile case file" in rule 5.552(a) or Welfare and Institutions Code section 827(e)? No. • Does the proposed information sheet, form JV-291-INFO, provide the information necessary for an individual to understand the right to appeal and the process for requesting access to	The committees note the commenter's support for the proposal if modified. The committees have modified the definition to include lodged materials.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

	Commenter	Position	Comment	DRAFT Committees Response
			records in the juvenile case file? Should other information be included? Please see suggested revisions below. • Should rule 5.552 require that the parent and county counsel receive notice if a petition for access is filed by an adult who is a former or current dependent and is seeking access to their case file for the purpose of education, employment, immigration, and/or military enlistment? No. An "adult who is a former or current dependent" need not file a petition for access in the first place (see WIC § 827(a)(1)(C)) unless he or she seeks to disseminate the juvenile case file, or any portion thereof, to a person or agency not authorized to receive documents under WIC § 827 (see § 827(a)(4)). Assuming the adult former or current dependent is filing a petition solely for the purpose of further dissemination, there is no underlying policy reason to protect the confidentiality of the parent(s), the county child welfare agency, or the county probation department. As noted in the proposal, the confidentiality provided by WIC § 827 "is intended to protect the privacy rights of the child who is the subject of the juvenile court proceedings," (Invitation to Comment W20-02,	Noted. The committees elected not to change the notice requirements of rule 5.552. The committees have elected to require notice to the parent and county counsel in these situations because their input on confidential information in the case file is essential.

	Commenter	Position	Comment	DRAFT Committees Response
			p. 2), not the privacy rights of other adults involved in the child's case. (See also WIC § 300.2 ["the provisions of this chapter ensuring the confidentiality of proceedings and records are intended to protect the privacy rights of the child"].) On the other hand, if the juvenile court file contains information identifying other former or current dependents (e.g., the petitioner's sibling(s)), they or their counsel should receive notice. • Rule 5.552 does not require that a parent's attorney of record receive notice when a petition for access is filed. Should the rule require such notice? San Diego has a local rule that requires notice to the parent's attorney if there is an open dependency case. • Would the proposal provide cost savings? Probably, to the extent the workload of court clerks is reduced by the proposed procedures for providing the record on appeal to nonparty appellants and the new item 3 proposed for form JV-569. • What would the implementation requirements be for courts—for example, training	The committees elected not to change the notice requirements of rule 5.552. The committees anticipate that in some venues parent's and guardian's attorneys will still be noticed, as is the case in San Diego. Noted. No further response required.

	Commenter	Position	Comment	DRAFT Committees Response
			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 of clerks (and their supervisors) who process appeals and writ petitions and clerks who process WIC § 827 petitions. Revision of local rules, local forms, local protocols and procedures. Possible need to collaborate with Fourth District, Division One, Court of Appeal to ensure efficiency and compliance with new rules. • Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Three months probably is insufficient for larger counties who process a large number of appeals/writ petitions and WIC § 827 petitions. Revision of our local rules is a long process that only happens once each year, so that might not happen within three months. General comments This is an issue we have already been addressing here in San Diego. It will be helpful to have more clarity in the rules and forms.	The committees appreciate this information regarding implementation requirements for the court. The committees acknowledge that three months may not be enough time to have local rules and procedures fully in place, but are proceeding with the September 1, 2020, effective date because the statute has been in effect since January 2019. The committees appreciate this feedback.

W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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

	Commenter	Position	Comment	DRAFT Committees Response
			Overall, this proposal makes more sense than the one circulated last spring. Change to names of forms: "Access" is more accurate than "disclosure" but this change will require us to update our local policy document, local rules, and web site with the new names of the forms. CRC 8.401(b)(2) Access to records in the juvenile case file, including any such records made part of the record on appeal or the record on a writ petition, is governed by Welfare and Institutions Code section 827. Persons who are not described in subdivision (a)(1)(A)-(P) ~~and have petitioned the juvenile court under subdivision (a)(1)(Q)~~ may not inspect ~~and~~ or receive copies of ~~copy only those~~ records from ~~in~~ the juvenile case file unless ~~to which~~ that person ~~and have~~ has petitioned the juvenile court under subdivision (a)(1)(Q) and was granted access by order of the juvenile court. JV-291-INFO, paragraph 1 Under very limited circumstances, a person who is not the child, parent, or legal guardian in a dependency or ~~delinquency~~ juvenile justice case has the right to seek review of decisions made by the juvenile court by filing an appeal or writ	The committees acknowledge the effort required to implement this change. The committees agree and have made these edits to the rule. The committees agree and have made these changes to the form.

	Commenter	Position	Comment	DRAFT Committees Response
			petition in the Court of Appeal. Such a~~n individual~~ person, however, is typically not entitled to access records from the juvenile court case file that will be considered by the Court of Appeal ~~on appeal from the juvenile court case file for purposes of an appeal or writ proceeding~~ unless the person gets approval from the juvenile court. The purpose of this information sheet is to inform those ~~individuals~~ persons who are not the child, parent, or legal guardian, and who may have the right to seek appellate review, of the requirement to file a Petition for Access to Juvenile Case File (form JV-570) to have access to certain records in the juvenile case file during an appeal or writ. JV-291-INFO, item 2 Comment: In certain cases, a non-party appellant or petitioner might already be authorized to access certain documents in the juvenile case file before they file a notice of appeal or notice of intent to file a writ petition, e.g., where the trial court granted the non-party access under WIC § 827 during the proceedings below which are being challenged. Perhaps the first sentence in this item can be revised to read: "If the juvenile court has not already authorized you to access records in the juvenile case file, to ~~To~~ have access to such records ~~in the juvenile~~	The committees agree and have made these changes.

	Commenter	Position	Comment	DRAFT Committees Response
			~~case file~~ for an appeal or writ proceeding, you must request access from the juvenile court." Suggested addition to first paragraph: You will need to serve a copy of this form on all interested parties to the case, if you know their names and addresses, including the child, parents, social worker, and probation officer. (See *Notice of Petition for Access to Juvenile Case File* (form JV-571). Query: In the second paragraph, should "request" be replaced with "petition" to be consistent with the proposed change in the title of the JV-570? Suggested revision to third paragraph (unless the original of the JV-574 order is desired): When you file a notice of appeal or a notice of intent to file a writ petition, you should attach a copy of the court's order on the JV-574, if you have one. Doing so will alert the clerk that you are authorized to access records in the case file and will ensure that a record will be prepared for you. JV-321, item 8i.	The committees agree with calling the reader's attention to this mandatory form and have made changes to this paragraph. The committees agree with replacing several instances of "request" with "petition" to be consistent. The committees agree and have made this change. The correction has been made.

	Commenter	Position	Comment	DRAFT Committees Response
			Attended any of the classes required of a prospective adoptive parent. JV-569, item 3 Comment: Is there a reason to limit that to attorneys? In San Diego, we publish those addresses in our local policy on the court web site and expect even unrepresented litigants to serve those agencies. JV-570, item 5 If you are ~~an individual~~ involved in a pending proceeding in an appellate court or you are preparing to participate in such a proceeding, you should describe here ~~in this Petition for Access~~ the transcripts, reports, and any other evidence considered by the juvenile court at hearings related to the subject of the appeal or writ proceeding. For example, you should describe a report by providing its title (such as, "status review report," "jurisdiction/disposition report," or "CASA report") and the date of the hearing when the document was considered.) JV-570, item 6d Insert blank line after "(name of district): _____" JV-572, item 3	The committees agree that this item should not be limited to only attorneys and have modified the language. The committees have made these edits. The correction has been made. The correction has been made.

W20-02

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 5.552 and 8.401; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV–325, JV-569, JV-570, JV-571, JV-572, JV-573, JV-574, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	DRAFT Committees Response
			I object to the release of information and records relating to the child named in item 1. JV-573 and JV-574, left footer Delete "828" from statutes cited. JV-574, item 2c Change for consistency with language in CRC 5.552(d)(6): Petitioner has not shown by a preponderance of the evidence that the records requested are necessary and have ~~a~~ substantial relevance to the legitimate need of the petitioner. JV-574, item 3 Move checkbox after "noticed" to after "objections": After a review of the juvenile case file and review of any filed objections ☐ and a noticed ~~☐~~ hearing, the court grants the request. JV-800, item 2e (unless the original of the JV-574 order is desired) Appellant has been granted access to specified records in the juvenile case file, and a copy of	This correction has been made on both forms. The edit has been made. The committees have made this correction. The committees have made this correction.

	Commenter	Position	Comment	DRAFT Committees Response
			the court's order under Welfare and Institutions Code section 827(a)(1)(Q), on Order After Judicial Review on Petition for Access to Juvenile Case File (form JV-574) if available, is attached. JV-800, item 7 Insert colon after "(check all that apply)." JV-800, item 7a Query: Should a check box be added for "**Denying** transfer to tribal court"? JV-820, page 2, last box section, WHO MUST SIGN THE NOTICE OF INTENT? ~~Must be signed by the~~ The person who intends to file the writ petition, or ~~By the~~ The attorney of record for the person who intends to file the writ petition JV-822, item 7 (unless the original of the JV-574 order is desired) Petitioner has been granted access to specified records in the juvenile case file, and a copy of the court's order under Welfare and Institutions Code section 827(a)(1)(Q), on Order After Judicial Review on Petition for Access to	This correction has been made. The suggested change has been made. The committees agree and have made this change. The committees have made this change.

	Commenter	Position	Comment	DRAFT Committees Response
			Juvenile Case File (form JV-574) if available, is attached. JV-822, page 2, second boxed section The *Notice of Intent to File Writ Petition* must be signed by the person intending to file the writ petition or~~,~~ by the attorney of record <u>for that person</u>. See below for more information. JV-822, page 2, last box section, WHO MUST SIGN THE NOTICE OF INTENT? ~~Must be signed:~~ ~~By the~~ The person who intends to file the writ petition, or ~~By the~~ <u>The</u> attorney of record <u>for the person who intends to file the writ petition</u>	The committees have made this change. The committees agree and have made these changes.

SPR19-06

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 8.400, 8.401, 8.405, 8.407–8.410, 8.412, 8.416, 8.450, 8.452, 8.454, and 8.456; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV-325, JV-570, JV-800, JV-820, and JV-822)

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

	Commenter	Position	Comment	Committee Response
1.	Advokids By Janet G. Sherwood, J.D., CWLS Deputy Director		The following comments to the proposed rule are submitted by Advokids, a nonprofit organization that advocates for the rights of children in foster care, including the right to safety, security, stability, and timely permanency decisions. These responses to the specific questions posed by the proposal and as well as all other comments were prepared by a certified child welfare law specialist with over 40 years of experience in the field. She was also a certified appellate law specialist until she closed her private practice in 2016 to work full-time with Advokids. **Does the proposal adequately address the stated purpose?** **No**. It needlessly creates a barrier to timely appeals by appearing to require juvenile court approval of a Welfare and Institutions Code section 8271 petition before either the appeal can be filed or the record prepared. It is not entirely clear from the proposal when the 827 petition must be filed. It can be read to say that the only documents that may be included in the record are those for which the juvenile court granted an 827 petition *during* the juvenile court proceedings	

	Commenter	Position	Comment	Committee Response
			resulting in the order being appealed and that the petition must have been granted before the appeal or notice of intent can be filed. (See, e,g., JV-291-INFO ["When you file a notice of appeal or a notice of intent to file a writ petition, you will need to attach the juvenile court's order indicating the records to which it granted you access."] The proposal also does not adequately address the stated purpose because there are no time limits on how much time a juvenile court can take to act on a section 827 petition nor is there any remedy available when the juvenile court wrongfully denies a section 827 petition, thereby effectively preventing the appeal or writ from being considered. For example, the Los Angeles Superior Court has a practice of refusing to file notices of appeal or notices of intent to file a writ petition from de facto parents as well as persons who are not the parent, the child, or the agency unless that person also files a section 827 petition. Those section 827 petitions then languish for months and months before they are acted upon. It is also not unheard of for those petitions to be sent for a ruling to the judge whose order is being appealed, even though the procedure	

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	Commenter	Position	Comment	Committee Response
			specified by section 827 requires the presiding judge to make that determination. In the meantime, resolution of issues important to the child's stability, permanency, or well-being are being unnecessarily delayed or not decided at all. If the proposal requires a ruling on the section 827 petition before a notice of appeal or notice or intent can be filed, then the absence of time limits on when the juvenile court must act on the section 827 petition must be addressed. The time limits for filing a Notice of Intent are very short. Even if a section 827 petition is filed before the notice of intent, it will not have been acted upon before the notice of intent must be filed to preserve the right to file a writ petition after the record is prepared and no record will be prepared because the court has not yet acted on the pending section 827 petition. The statutory writ proceedings under sections 366.26(*l*) and 366.28 were adopted because the Legislature wanted the issues raised by these writ petitions to be resolved swiftly, usually in no more than in 120 days from the date of the order. If there are no time limits on when the juvenile court must act on a prerequisite section 827	

	Commenter	Position	Comment	Committee Response
			petition and no remedy when such petitions are wrongfully denied, then the purpose of the writ procedures can be completely thwarted by the failure of a juvenile court to make a prompt decision on the section 827 petition. **Should other rules apply to preparing, sending, and using a limited record?** **Yes.** There are a number of proceedings in juvenile court for which a formal section 827 petition is not considered or granted for access to the pleadings or other documents during that proceeding but from which a writ petition or appeal may appropriately be taken by a party to that proceeding who is not also a party to the entire juvenile court case. The most prominent examples are 388 petitions filed by relatives or other interested persons for modification of an existing juvenile court order, de facto parent requests that are denied, and writ petitions filed under section 366.28 after the court has made a prospective adoptive parent determination under section 366.26, subdivision (n) or otherwise granted or denied a change in adoptive placement. In those cases, if the appellate review is sought by someone who is not otherwise a	

	Commenter	Position	Comment	Committee Response
			party to the entire section 300 proceeding, the appropriate record would include the documents before the court for that specific proceeding and reporter's transcripts, if any, of those proceedings. Generally speaking, if the juvenile court grants access to social worker reports or other documents during those proceedings, it does not do so by employing the formal 827 process. It makes a ruling authorizing access in response to a discovery request or similar motion in the course of the proceeding, usually because due process requires that the information be made available to ensure a fair opportunity to be heard and to defend against any adverse information in those reports. (See, e.g., *In re Matthew P.* (1999) 71 Cal.App.4th 841, 850-851 [denial of due process to decide section 388 petition without permitting cross-examination of social worker regarding information in the social worker's report adverse to the de facto parents].) Aside from the due process problems that arise when an appellant or writ petitioner is barred from having access to the same documents as the other parties to the appeal or writ proceeding, the notion that the	

	Commenter	Position	Comment	Committee Response
			documents employed in the proceedings from which appellate review is sought are confidential from the persons who either filed or had access to those very same documents when they participated in the juvenile court proceeding is illogical and ridiculous. The notion that a person who was present at and participated in a hearing must file a section 827 hearing to obtain a reporter's transcript of that same hearing is likewise ridiculous. Adding the completely unnecessary step of requiring a section 827 petition before the person who filed the documents in the trial court or participated in the hearing can see documents or a reporter's transcript of that hearing in the appellate record would be a huge waste of resources for both the juvenile courts and the courts of appeal. A better way to address this issue would be to consider any access afforded the petitioner during the proceedings by the juvenile court to be the equivalent of a section 827(a)(1)(Q) order even though no separate section 827 petition was filed and granted.	

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			People who petition the juvenile court under section 388 or section 366.26(n) or who were denied de facto parent status are all granted limited standing, by statute or rule of court, to participate in specified juvenile court proceedings covered by the rule or statute. It would be quite reasonable to recognize those people as "parties" to those specified proceedings. (See. e.g., *Wayne F. v. Superior Court* (2006) 145 Cal.App.4th 1331, [prospective adoptive parents, while not parties to the underlying dependency proceedings unless they are also de facto parents, were entitled to "fully participate" in 366.26(n) hearings concerning proposed removal from their home].) Under the exceptions listed in new section 827(a)(6), their attorneys should be given access to the documents submitted to the juvenile court and the transcripts of those proceedings under section 827(a)(1)(E) (attorneys for parties) without having to waste a lot of time and resources, including the court's resources, seeking a section 827 order. It would make more sense to modify the appellate rules concerning preparation of the record to specify that something other than the "normal record" is to be prepared when the appeal or notice of intent is filed	

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			by persons who requested de facto parent status or who were parties to a 388 petition or a section 366.26(n) prospective adoptive parent proceeding or adoptive placement decision, but who are not parties to the entire juvenile court proceeding. In those cases, the rules should specify that only the documents filed in connection with the proceedings resulting in the order being challenged, any other documents to which access was granted by the court, and the reporter's transcripts of those proceedings should be included in the appellate record. Any questions about documents other than those listed should be resolved by the courts of appeal in the context of a motion to augment the record, not by the juvenile court in the context of a section 827 petition. **Does the proposed notice on the JV forms adequately alert individuals of the requirement to request access to records in the juvenile case file by filing a petition under section 827(a)(1)(Q)?** **No**. It is confusing and incomplete. The information is incomplete because it excludes de facto parents, who are parties to the juvenile court proceedings and, as such,	

	Commenter	Position	Comment	Committee Response
			are entitled to appeal a juvenile court decision that adversely affects their interests. It is interesting to note that 8.409(c)(1) and the proposed amendment to rule 8.409 (f)(2)(A) specify that the record on appeal must be sent to any Indian tribe that has intervened (making the tribe a party) but does not mention de facto parents. **Should the notice be included on forms that may not typically relate to an appeal, such as Relative Information (form JV-285) and Caregiver Information Form (form JV-290)?** **No**. The notice is confusing and inaccurate to the extent it excludes de facto parents from the list of people who will have the right to file an appeal or a writ petition. Although they are required by law to do so, most counties do not actually send either of these forms to relatives or caregivers. In addition, those forms are designed for the purpose of providing a vehicle for relatives and caregivers to provide information about the child to the court without having to make a court appearance. Including the proposed language might be read as suggesting that relatives and caregivers who	

	Commenter	Position	Comment	Committee Response
			file the forms have appellate rights that they do not actually have. **Does the proposed information sheet, form JV-291-INFO, provide the information necessary for an individual to understand the right to appeal and the process for requesting access to records in the juvenile case file? Should other information be included? Should other scenarios be listed in item 1 to describe when someone not entitled to access the juvenile case file would have a right to appeal?** **No.** The second to the last paragraph states that the person seeking review "will need to attach the juvenile court's order indicating the records to which the court has granted you access." This suggests that the person must have the order in hand before the notice of appeal or notice of intent may be filed. As noted above, if a granted section 827 petition is a prerequisite to filing the notice of appeal or a notice of intent, many people will be deprived of any review at all. Because there are no time limits on how long the juvenile court has to act on a section 827 petition, the section 827 petition may still be undecided when the time limits	

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			for filing a notice of intent (7 days) or a notice of appeal (60 days) have run. Attempting to list all possible scenarios is fraught with peril. The first example--a relative who requested placement but the placing agency did not assess their home for placement before a hearing to terminate parental right—may be read to suggest that these people may file an appeal even though there is no juvenile court order denying them placement. The fourth—the child's sibling who requested visitation or an exception to adoption—is at best questionable. Siblings who are juvenile court dependents have the right to notice of and the right to be present and represented by counsel at each other's hearings. (Welf. & Inst. Code §349.) This arguably makes them parties to each other's cases. If a sibling has participated in a hearing which results in a request for appellate review, that sibling's appellate counsel should have the same access to the appellate record as all other appellate counsel. Thank you for your consideration of these comments.	

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2.	Appellate Defender's, Inc. by Elaine Alexander Executive Director San Diego		**Summary of Provisions**. The proposed rules create a new method of preparing the appellate record when the appellant is an individual who is not entitled to access the juvenile court record under the provisions section 827. (Rule 8.405.) The proposal refers to these individuals as the "designated person." (Rule 8.400(b)(1).) The proposal envisions the creation of two appellate records: a limited record for the designated person and a regular, full record for the court, the petitioning agency, the parents and minor(s). (Rules 8.400(b)(2); 8.407(f).) The limited record is to be paginated separately from the full record. (Rule 8.409(b)(2).) The proposal provides that counsel for the designated person may receive only the limited record. (Rule 8.409(f)(3)(A) & (B).) The limited record contains only the material to which the designated person has been granted access by the juvenile court pursuant to a section 827 petition for disclosure they must file. (Rule 8.400(b)(2).) The proposal includes a	

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			revision to the 827 petition, form JV-570. Several other forms are proposed to notify the designated person of the need to file a petition for access to the file pursuant to section 827. (Pages 48-63 of the Invitation to Comment package.) If the other parties to the appeal cite to material that is not in the limited record, the proposal allows the designated person to file another 827 petition to request the juvenile court give them access to this additional material. (Rule 8.412 (a)(5).) They may also request an extension from the COA. (*Ibid*.) Provisions almost identical to those described above are proposed for the statutory writ records. (Rules 8.450-8.456.) **Our analysis**. **1. The Limited Record Raises Due Process Concerns.** We have a fundamental concerns about appellate issues being raised and considered from two different records, which essentially infringes on an appellant's right to appeal.	

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			– The designated person working from the limited record is at a distinct disadvantage. They are unable to discern and cite to favorable evidence supporting their position in the case record that is omitted from the limited record. – The court (and other parties) will rely on the entire case record to determine 388 issues (most relative placement issues are raised in 388 petitions). (See *In re Justice P.* (2004) 123 Cal.App.4th 181, 189, [court can rely on entire case record when determining whether a section 388 petition makes a prima facie showing].) – The proposed instruction sheet given to the designated person explaining the need to obtain the 827 order **instructs** them to request a very limited record from the juvenile court. The form, "Right to Appeal for a Nonparty– Requirement to Request Access to Juvenile Record" (JV-291-INFO, found at page 48 of the packet), states: "You should indicate (on the 827 application) you are requesting the record and transcripts relating to the dates of the hearing related to	

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			the issue you are appealing, and that you are requesting transcripts as well." Omitted from this narrow request are matters that are relevant and not necessarily confidential: social worker interviews with the nonparty and references in the reports to them; visitation between the nonparty and the minor(s); any assessments of the nonparty regarding placement or visitation; statements the minor makes about the designated person; descriptions of the minor's visits with the designated person. This information is relevant to a request for placement per the statutory factors the court must consider (section 361.3) and as demonstrated by the case *Isabella G.* (2016) 246 Cal.App.4th 708, 724 [evidence the minor missed her grandmother, was happy to be with her, requested more contact with her, the caregiver thought the minor should be placed with Grandmother, was relevant to show prejudice from the court's failure to apply the relative placement	

	Commenter	Position	Comment	Committee Response
			criteria). This information is also relevant to requests for visitation. If the designated person was present at any other hearings (besides the hearing from which the appeal is taken), those proceedings are arguably not confidential as to this individual. The ability of the designated person to obtain this more extensive information through a juvenile court 827 order would begin to address the due process concerns. In item 4, below, we are proposing modifications to the 827 application for records designed to illicit this relevant information. **2. Counsel for the Designated Person Should Have a Full Record.** The due process concerns outlined above could be alleviated by providing a full copy of the record to counsel for the designated party. The designated person's access to the record can be circumscribed by the 827 order; counsel will not turn over any portion of the record to the client not authorized by the 827 order.	

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			It is highly unlikely counsel for the designated person will cite to material that isn't relevant to the issue raised. And it is very likely this material will be cited by either the respondent or the court. The designated person is allowed to apply to see material cited in other parties' briefs through another section 827 petition per Rule 8.412(a)(5). Providing the full record to appellate counsel for the designated person eliminates the need for the second (or third) 827 petition, and eliminates a big source of delay in these fast track cases. Rule 8.401 (b) (2) would presumably address the case of a pro per designated persons, and instruct them to obtain a section 827 order from the juvenile court. We propose Rule 8.401(b) read as follows (new provisions italicized) **8.401** **(a)** . . . . **(b) Access to filed documents** (1) Except as limited in (2) or as provided in (2) (3) (4), the record on appeal and documents filed by the parties in proceedings under this chapter	

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			may be inspected only by the reviewing court and appellate project personnel, the parties including their attorneys, *the appellate attorneys for the designated persons, although not the designated persons themselves, except as provided in (b)*, and other persons the court may designate. **3. Separately Paginated Records**: Separately paginating the limited record will prove cumbersome, as the court and other parties will be working from two different records. The respondent's brief will certainly cite to material beyond the limited record. The designated person is able to request access to cited material outside the limited record through another 827 petition. This process will create additional delay. Two or more 827 petitions have to be processed in juvenile court to facilitate the direct appeal. The designated person will be citing to two different records in the reply brief. Would a sort of Marsden type approach work better? The respondent has to	

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			notify the court that its briefing referred to matters beyond the limited record. This then provides cause for an 827 order to be issued granting the designated person access? We think the better approach is to provide the designated person a redacted record. Everyone will be working from the same page citations. **4. Delay Concerns** There are multiple ways in which the proposed process creates delay: – The initial 827 process. (See Appendix, time lines for two cases that went through this process); – The subsequent 827 process to obtain material cited in other parties'briefs. Example: If a parent or minor is a co-appellant with the designated person, the entire appeal can be delayed: the record won't be filed until the initial 827 process is completed. If the co-appellant parent cites to material not in the limited record, the designated person can request it via another 27 petition. (Rule 8.412(a)(5).) And with yet another 827 petition if the respondent's brief cites to	

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			additional material not in the limited record. **5. More Specificity in the application for an 827 order**. We believe the proposed form, JV-570 (found at p. 58 of the packet) is too general and not very helpful to the lay person. A check-the-box format will likely prove helpful to the juvenile court in eliciting more specificity from the applicant. A proposed attachment to form JV-570 is found in the Appendix. **6. Clarify the JV-291 Information Form:** The form presently suggests that obtaining the 827 order is a condition of being able to file an NOA. It states: "When you file the notice of appeal . . . you will need to attach the court's order indicating which records the court has granted you access." Our concern is the 60-day appeal period will expire before the 827 order is obtained. At a minimum, the information form should indicate the NOA must be filed before 60-day appeal period expires and it can be filed before the 827 order is issued.	

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			Appendix **Delay in Utilizing the 827 Petition Process: Two Case Examples** **1. D073770**: the Court of Appeal ordered the non-party appellant to obtain an 827 order from the Juvenile Court which sets forth the record to which she can have access. This appellant is an attorney who was able to navigate this process much better than a lay person. The 827 process took more than three months: – Court of Appeal's order to seek 827 order issued November 29th 2018; – 827 petition filed in Juvenile Court December 3, 2018; – 827 order rendered by the Juvenile Court February 1, 2019; – Court of Appeal ordered limited record prepared February 27, 2019; – Limited record filed in the Court of Appeal March 11, 2019. **2. D073296**: This fast-track case took 10 months to decide, 6 months to order the limited record:	

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			Mother – appellant: NOA filed 12/28/17 – appointed counsel 1/9/18 Maternal great aunt & 388 NOA filed 12/28/17 – appointed counsel 2/16/18 Minors W. & J (RB) Counsel appointed on court's own motion – 4/13/18 (apptd. 4/18/18) Minors M & Je (RB) appointed counsel – 1/25/18 de facto father (RB, retained counsel) de facto mother (RB, retained counsel) Record filed 1/19/18 Augment by mother (denied) 2/2/18 De facto 827 motion 3/29/18 Oppo to 827 motion by mother & aunt 4/2/18 Mother & aunt file AOB 4/4/18 County counsel do not oppo release 4/5/18 (since aunt already has record) Oppo to release by minors M & J 5/25/18 Court orders limited record 6/6/18 – attorneys ordered not to provide the record to the aunt or de facto De facto father files augment 6/8/18 Mother & aunt oppose 6/14/18 Court orders augment considered w/appeal 6/19/18 RB by de facto father filed 7/27/18	

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			County RB filed after 17B notice 7/31/18 De facto father requests judicial notice 8/1/18 – post-appeal info re: resolution of 1 issue – ordered to be considered w/appeal 8/16/18 minors' letter brief of W & J 8/23/18 Court's request for further briefing 8/30/18 – statutory interp. for relative placement issue ARB filed by mother 9/4/18 ARB filed by aunt 9/4/18 Mother's, aunt's, minors W & J's, agency's, de facto father's – supplemental briefs filed 9/14/18 minors M& J filed supplemental brief 9/17/18 case fully briefed 9/17/18 case submitted 10/23/18 opinion filed 10/23/18 remittitur issued 1/2/19 **ATTACHMENT TO JV-570** For use by appellants who are designated persons with access to a limited record as described in Rule 8.400(b). The records I want are: (Check all that apply.)	

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			o All reports, documents and orders the judge expressly stated were considered or were admitted as evidence in making the challenged order. (List, if known.) _____ _____ _____ _____ _____ _____ o The reporter's transcript from each hearing Petitioner attended. The dates are: _____ _____ _____ _____ o All reports and attachments prepared by the county agency and/or the CASA containing information about the placement history of the child/children. o All reports and attachments prepared by the county agency and/or the CASA containing information about Petitioner's visitation and/or request for visitation with the child/children. o All reports and attachments prepared by the county agency and/or the CASA containing information about interviews or conversations with Petitioner.	

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			o All reports and attachments prepared by the county agency and/or the CASA containing information about interviews or conversations with any parties or collateral contacts discussing Petitioner's request for placement and/or visitation. o Other: (Describe in detail any records that are not covered above.) _____ _____ _____ _____ _____ _____ _____ _____ _____ _____	
3.	Executive Committee of the Family Law Section of the California Lawyers Association (FLEXCOM) By Saul Bercovitch Director of Governmental Affairs	A	No specific comment.	
4.	First District Appellate Project by Jonathan Soglin Executive Director Oakland	NI	The notice of appeal (NOA) form (JV-800) and notice of intent forms (JV-820 and JV-822) are frequently used forms serving parties in a variety of delinquency and	

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			dependency proceedings. Usually (e.g. for most delinquency and many dependency appeals) the form is used when there is no need for a limited-record. We are concerned that the some aspects of the modifications increase the complexity of the forms in a way that will create confusion without the anticipated benefits. For these reasons, we suggest a change that might strike a balance between helpful information for the clerk and reducing potential confusion. On one hand, we suggest retaining the proposed new boxes requiring the filing party to state whether they are "not the department, child, parent, or legal guardian," and whether they were granted access to specified records. This will be useful to the clerk and it is information the filing party should have at hand. On the other hand, we recommend omitting the line asking the filing party to identify whether the appeal or writ involves "a respondent who is not the department, child, parent, or legal guardian" (item 4 on the NOA and item 8 or 9 on the notices of intent). It is no simple matter to determine	

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			who is a "respondent" in a dependency appeal or writ. These proceedings frequently involve a multitude of interested persons whose interests can align or be opposed in patterns that are not easy to predict, even for the filing party. This is particularly difficult for the many pro per parties who file NOAs and notices of intent, but it also problematic in a counseled case. For these reasons, the inclusion of the item asking the filing party to predict who might be a respondent seems unlikely to assist the superior court appellate clerks in determining who must receive a limited record and, worse, it could add confusion for parties and counsel. Accordingly, we recommend omitting from the forms item 4 on form JV-800, item 9 on JV-820, and item 8 on JV-822.	
5.	Stephanie Miller	NI	Thank you for this opportunity to comment. The Committees' Proposal seeks "to balance the policy considerations favoring confidentiality of juvenile case files against designated persons' need for access to these record to effectuate their right to participate in appellate proceedings in these cases." (Invitation to Comment, p. 3 [IC].) The Committees recognize that	

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			"these individuals were already privy to the record in the juvenile court proceedings . . ." (Ibid.) This is an important point. To some extent, the nonrelated caretaker of the child who seeks de facto parent status is "privy" to the dependency case as a result of the child's placement in the caretaker's home. In many instances, the caretaker is the monitor for parental visits, thus a relationship between the caretaker and the parent is established. To a greater extent, a close relative of the child who seeks relative placement or petitions for modification of the juvenile court orders may be intimately aware of the circumstances requiring juvenile court intervention as a result of the relative's preexisting relationship with the child and/or the child's parents. The social worker's assessment of a relative for the child's placement may result in disclosure of confidential information in the course of an interview to determine whether the relative was aware of the circumstances requiring juvenile court intervention, but had failed to protect the child. (Welf. & Inst. Code, § 361.3, subd. (a)(7)(D).) Thus, the child's and/or the parent's expectation of confidentiality in the dependency case may be affected and reduced by the reality	

	Commenter	Position	Comment	Committee Response
			of family relationships preceding juvenile court intervention (grandparents, aunts and uncles, siblings, etc.) or by the substitute caregiver relationships created as a result of that intervention (foster parent or de facto parent/child). The Proposal should seek to protect only information which is actually confidential, i.e., information that has not previously been disclosed to the designated person, in- or outside of the courtroom. Not addressed in the Proposal is the potential obstacle to confidentiality presented by the request of a designated person who is a party in the appeal or writ proceeding to be served with a party's brief. Currently, the court rules do not require service on a "designated person." (Cal. Rules of Ct., rule 8.412(e).) But, the proposed Rule 8.412(a)(4) contemplates that the designated party will be served with the brief filed by a party. Although the parties are required to refer to the parent, guardian, and child by their initials if necessary to protect their privacy, the contents of the briefs filed by the party who is not a designated person will likely reveal more of the juvenile court record than the juvenile court previously allowed the	

	Commenter	Position	Comment	Committee Response
			designated person to access. (Cal. Rules of Ct., rule 8.401(a).) Thus, service alone of the party's brief on the designated person could result in the disclosure of confidential information. One method of addressing the access of persons other than the parent, child, or guardian to the confidential juvenile court record is to limit the access of those persons (hereafter, designated persons) to the courtroom in the first instance, with the following exceptions: (1) a relative who has filed a petition for modification of orders; (2) a caregiver who has filed an application for de facto parent status. Those filings are appropriate actions necessary to confer the petitioner or applicant with the status of a party in the dependency case. (See In re Joseph G. (2000) 83 Cal.App.4th 712, 725.) Upon the first appearance of the petitioner or applicant, the judicial officer can then direct him or her to complete and deliver to the courtroom clerk then and there the JV-570 form. The 388 petitioner or de facto parent applicant, or the courtroom clerk should then and there complete the JV-570 form to designate the date of the first appearance,	

	Commenter	Position	Comment	Committee Response
			and the record of those proceedings, as the approved record in the event of an appeal. As indicated in the Proposal, the juvenile court clerk should thus begin the creation of a separate file for the designated person. The separate file can also include the minute order for each hearing at which the designated person/party is present. Thereafter, at each appearance made by the designated person who has acquired party status, the judicial officer can direct him or her to complete a new JV-570 form. The additional JV-570 form and the minutes should be added to the separate file created for the designated person. In this manner, the record accessible to the designated person can be "marked" as it is made. Also, any objections to disclosure of that portion of the juvenile court record to the designated person can be entertained each time a designated person appears in court. If and when the designated person files a notice of appeal, the portions of the confidential juvenile court record will be readily identifiable by the previously completed JV-570 forms and the minutes orders. In this manner, the separate file created for the designated person can timely identify the record to which that individual	

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Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 8.400, 8.401, 8.405, 8.407–8.410, 8.412, 8.416, 8.450, 8.452, 8.454, and 8.456; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV-325, JV-570, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	Committee Response
			was previously given access by the juvenile court, and after notice to the other party. In order to address the parties' right to confidentiality and the right of designated persons to appellate review, several years ago the Second District adopted Local Rule 8. (Local Rules Court of Appeal Second District Rule 8 [Filing of an appeal in a dependency matter by a person who is not the parent, child or guardian].) It is the experience of the California Appellate/Los Angeles that while the local rule has served to protect the right of the parties to confidentiality, it has not served the right of a designated person to review. Pursuant to Local Rule 8, the designated person is required to complete and file a JV-570 form and file it with the notice of appeal, or within 10 days after receipt of the juvenile court clerk's request for that form. The delay in the preparation of the appellate record for the designated person occurs between the filing of the JV-570 form, with the notice of appeal, and the judicial officer's designation of the portions of the confidential record which will comprise the appellate record for the designated	

	Commenter	Position	Comment	Committee Response
			person. The record designation process takes many months. I hope that my comments are useful to the Committees. I appreciate their work.	
6.	Office of the County Counsel County of Los Angeles by Alyssa Skolnick Principal Deputy County Counsel Monterey Park	AM	1. I believe the intent is that when the appeal/writ proceeding involves a designated person (as defined under the proposed court rules), the designated person (or his/her attorney of record) will receive a limited record, while everyone else who is entitled to access the records will receive both (1) limited record; (2) normal/complete record. However, the fact the normal/complete record (in addition to limited record) will be provided to all parties entitled to access needs to be clarified. (See California Rule of Court, rule 8.409, et seq.) 2. The proposed changes to the California Rules of Court do not address whether the non-designated persons (those who are entitled to the normal/complete record) should serve the designated persons with their briefs (redacted or un-redacted), which will almost certainly include significant	

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Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 8.400, 8.401, 8.405, 8.407–8.410, 8.412, 8.416, 8.450, 8.452, 8.454, and 8.456; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV-325, JV-570, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	Committee Response
			information that the designated person is not entitled to access. This has been a significant issue historically. If the appellant/respondent/petitioner etc. is a "designated person," which briefs are they entitled to access and be served with? This is a significant concern because once the designated person is served with an un-redacted brief, they have all the information in the record that they were not previously privy to. We have historically struggled with this and the Court of Appeal has not been consistent with respect to whether it wants our office to serve redacted or un-redacted briefs on those who were not entitled to access under WIC 827 and are being referred to as "designated persons" in the proposed rules. The California Rules of Court need to directly address which briefs (Writ Petition, Appellant's Opening Brief, Respondent's Brief/Answer/Reply Brief etc.) the designated person is entitled to because unless the designated party was given access to the entire case file, the briefs from the other parties will always contain information that the designated person has not been granted access to.	

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Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 8.400, 8.401, 8.405, 8.407–8.410, 8.412, 8.416, 8.450, 8.452, 8.454, and 8.456; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV-325, JV-570, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	Committee Response
			The only hint of this issue in the proposed rules is proposed amended California Rule of Court, rule 8.412(a)(5), which states, "If an appeal involves a designated person, and the brief of a party who is not a designated person refers to juvenile case records that are not in the limited record, the designated person may petition the juvenile court for access to those records and may petition the juvenile court for access to those records …" Does this assume that the designated person is to be served with un-redacted briefs that necessarily included case history and records that the designated person was not previously granted access to? It is our office's practice to only serve the party who is not entitled to access the records (referred to as "designated person in the proposed rules) with heavily redacted briefs that omit all the information they are not privy to unless otherwise ordered by the Court of Appeal. 3. Proposed amendments to California Rules of Court, rules 8.405 and 8.450(e(1) state that if the appellant/party seeking writ review is aware that a party to the appeal is an individual not authorized to access the	

	Commenter	Position	Comment	Committee Response
			juvenile case file without petition pursuant to WIC 827(A)(1)(Q), the appellant/party seeking writ review must indicate this on the notice of appeal. However, the (a) proposed amended Notice of Appeal (JV-800) and (b) Notice of Intent to File a Writ Petition (JV-820) do not include a section for this information or notice of the requirement – they only include a box indicating that the appellant/person seeking writ review is not a child, legal guardian or parent – it does not include a box to indicate a different party is not authorized to access the case file. 4. The California Rules of Court should clarify that the designated person's attorney of record is not entitled to any documents/records that the designated party is not entitled to. This has come up with respect to California Rule of Court, rule 8.452 and 8.456 Petitions/Answers. 5. The admonishment language from the proposed JV-291-Info form that has been added (proposed) to various other forms states "In the vast majority of cases, only the child, parent, or guardian have the right to appeal a juvenile court ruling." This is	

	Commenter	Position	Comment	Committee Response
			inaccurate in that it does not include CPS as a party having a right to appeal. It also does not reference writ proceedings.	
7.	Orange County Bar Association By Deirdre Kelly President Newport Beach	A	No specific comment.	
8.	Superior Court of Los Angeles County	AM	**Proposed Modifications** **Rule 8.405 (b)(1)(B), Rule 8.450 (h)(1) and h(2), and Rule 8.454 (h)(1) and (h)(2)** The requirement to immediately notify each court reporter by telephone should be updated by either eliminating the telephone requirement or changing it to an email requirement. Change: "immediately notify each court reporter by telephone" to: "immediately notify each court reporter." **Request for Specific Comments** **Does the proposal adequately address the stated purpose?** Yes, the proposal adequately addresses the stated purpose. **What is the most effective way to communicate that people should request access to records in the juvenile case file**	

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Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 8.400, 8.401, 8.405, 8.407–8.410, 8.412, 8.416, 8.450, 8.452, 8.454, and 8.456; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV-325, JV-570, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	Committee Response
			before the commencement of appellate court proceedings? The most effective communication is by written notice. **What is the best way to alert the clerk that the appeal or writ proceeding involves a limited record, particularly when the limited record is required for a party who is not the appellant or the petitioner?** The most effective way to alert the clerk is by written notification. **Should other rules apply to preparing, sending, and using a limited record?** No, other rules should not apply. **Should the rules further address the situation of a designated person responding to a brief or memorandum by a party who is using the normal record and referring to matters in documents to which the designated person has not been granted access?** Yes, the rules should address this. **Does the proposed notice on the JV forms adequately alert individuals of the requirement to request access to records in the juvenile case file by filing a petition under section 827(a)(1)(Q)? Should the notice be included on forms that may not**	

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Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 8.400, 8.401, 8.405, 8.407–8.410, 8.412, 8.416, 8.450, 8.452, 8.454, and 8.456; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV-325, JV-570, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	Committee Response
			typically relate to an appeal, such as Relative Information (form JV-285) and Caregiver Information Form (form JV-290)? Yes, the proposed notice adequately alerts individuals of the requirement and should be included on the other forms. **Does the proposed information sheet, form JV-291-INFO, provide the information necessary for an individual to understand the right to appeal and the process for requesting access to records in the juvenile case file? Should other information be included? Should other scenarios be listed in item 1 to describe when someone not entitled to access the juvenile case file would have a right to appeal?** Yes, the proposed information sheet provides the information necessary. **Would the proposal provide cost savings? If so, please quantify.** No. **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**	

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Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 8.400, 8.401, 8.405, 8.407–8.410, 8.412, 8.416, 8.450, 8.452, 8.454, and 8.456; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV-325, JV-570, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	Committee Response
			management systems, or modifying case management systems? Implementation requirements include training, procedure updates, and changes to event codes in the Case Management System. **Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?** Yes, three months would be sufficient.	
9.	Superior Court of San Diego County by Mike Roddy Executive Officer	AM	"Designated person" is defined in rule 8.400(b), but it is still confusing in the context of some of the other rules. For example, rule 8.401(b)(1) allows access by a person designated by the Court of Appeal, but then in subdivision (b)(2) "designated person" is a person designated by the juvenile court, not the Court of Appeal. Preparation of both a full record and a limited record seems like double work. However, this is probably the most efficient way. CRC 8.409(b)(2): "must be designated as a limited clerk's transcript and a limited reporter's transcript."	

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Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 8.400, 8.401, 8.405, 8.407–8.410, 8.412, 8.416, 8.450, 8.452, 8.454, and 8.456; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV-325, JV-570, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	Committee Response
			Proposed revisions to Form JV-291-INFO: 1) Add "or probation officer" in item 2 to the list of those who must be served. 2) Add "legal" before guardian throughout. 3) It should be stated clearly that there is a deadline to seek review by writ or appeal and that deadline is not extended to seek access to records. (The JV-570 process can take a long time and I foresee people missing the appeal deadline while they wait for a resolution to their JV-570.) Proposed revisions to Form JV-570: 1) The proposed change in item 5 is confusing and unnecessary. Why call out just one type of request when there are so many reasons a person could file a JV-570? 2) The proposed change in item 6 is good. Proposed revisions to Forms JV-800, 820, 822: "department" is unclear. It is believed to mean county welfare department and our court recommends it be spelled out. Change "County Welfare Agency" to "county	

SPR19-06

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings (Amend Cal. Rules of Court, rules 8.400, 8.401, 8.405, 8.407–8.410, 8.412, 8.416, 8.450, 8.452, 8.454, and 8.456; approve form JV-291-INFO; revise forms JV-285, JV-290, JV-295, JV-321, JV-325, JV-570, JV-800, JV-820, and JV-822)

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	Commenter	Position	Comment	Committee Response
			welfare department" on the JV-820 for consistency with the other two forms. Proposed revision to Form JV-800, item 7: Change Attachment 5 to Attachment 7 to match the new item number. Proposed revision to Form JV-822, page 2: 1) 1st box: See ~~the back of this form~~ below for more information. (Or delete sentence completely.) 2) 3rd box, 1st 2 bullet points: Change "specified placement" to "specific placement." 3) 4th box, 3rd bullet point: change CRC citation to 8.454(e)(3).	

Item number: 03

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 9, 2019

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Appellate Procedure: Technical Revisions to Forms to Use Gender-Neutral Language
Revise forms APP-004, APP-014, APP-016-GC/FW-016-GC, APP-104, APP-109-INFO, APP-150-INFO, CR-135, CR-143, and JV-810

Committee or other entity submitting the proposal:
Appellate Advisory Committee

Staff contact (name, phone and e-mail): Christy Simons, 415-865-7694, christy.simons@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 10/28/2019
Project description from annual agenda: Review forms within the committee's purview to identify gender terms or questions. Propose revisions to those forms to replace gender terms with neutral terms or eliminate the questions. Project requested by RUPRO. Subcommittee: Rules.

If requesting July 1 or out of cycle, explain:

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

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.:
For business meeting on May 14–15, 2020

Title
Appellate Procedure: Technical Revisions to Forms to Use Gender-Neutral Language

Rules, Forms, Standards, or Statutes Affected
Revise forms APP-004, APP-014, APP-016-GC/FW-016-GC, APP-104, APP-109-INFO, APP-150-INFO, CR-135, CR-143, and JV-810

Recommended by
Appellate Advisory Committee
Hon. Louis R. Mauro, Chair

Agenda Item Type
Action Required

Effective Date
January 1, 2021

Date of Report
April 1, 2020

Contact
Christy Simons, 415-865-7694
christy.simons@jud.ca.gov

Executive Summary

As requested by the Rules Committee, the Appellate Advisory Committee reviewed the Judicial Council forms within its purview to identify any containing gender identity questions or gender terms. The committee identified several forms containing gender terms and recommends that they be revised to use gender-neutral language. The committee also recommends correcting the numbering and lettering of items on one of these forms to be consistent with standard formatting.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2021, revise:

1. *Civil Case Information Statement* (form APP-004), the box at the top of page 4, to replace "a party to the appeal may not perform the mailing or delivery himself or herself" with "the mailing or delivery must be performed by someone who is not a

party to the appeal," and Parts 1 and 2, to correct the numbering and lettering of items to be consistent with standard formatting;

2. *Appellant's Proposed Settled Statement* (form APP-014), item 3a, to replace "his or her" with "the party's," and item 5a, to replace "he or she" with "the judge";

3. *Order on Court Fee Waiver* (form APP-016-GC/FW-016-GC), item 6b(2), to replace "he or she" with "the (proposed) ward or conservatee";

4. *Proposed Statement on Appeal* (form APP-104), item 7d, to replace "what that witness said in his or her testimony" with "the witness's testimony";

5. *What Is Proof of Service?* (form APP-109-INFO), item 4, to replace "he or she" with "the party";

6. *Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases* (form APP-150-INFO), item 6, to replace "he or she" with "the person" and item 18c, to replace "he or she" with "the petitioner";

7. *Proposed Statement on Appeal* (form CR-135), item 7e, to replace "what that witness said in his or her testimony" with "the witness's testimony";

8. *Proposed Statement on Appeal* (form CR-143), item 6e, to replace "what that witness said in his or her testimony" with "the witness's testimony"; and

9. *Recommendation for Appointment of Appellate Attorney for Child* (form JV-810) to replace "his or her" with "the child's" in items 3b, 3c(2), and 3d, and "he or she" with "the child" in item 3c.

The revised forms are attached at pages 4–55.

Relevant Previous Council Action

Although the Judicial Council has acted on these forms previously, this proposal recommends minor language updates unrelated to any prior action.

Analysis/Rationale

The Judicial Council's Rules Committee, through its chair, Justice Harry E. Hull, Jr., asked all advisory committees it oversees to identify forms within the committees' purview that have gender identity questions or terms, and to indicate on each committee's annual agenda whether the committee proposed to revise forms to address gender (1) as revisions are needed in the future due to legislative or other changes, or (2) as a set of form revisions solely to address the gender question or term. The Appellate Advisory Committee proposes the latter. Though not required by legislation, the form revisions are consistent with California's Gender Recognition Act of 2017 (Act) (SB 179).

Policy implications

The revisions are noncontroversial and technical in nature. Any policy implications derive from the Act, which contains findings and declarations regarding the fundamentally personal nature of gender identification and the need for options on state-issued identification documents to ensure that gender is accurately reflected.

Comments

This proposal did not circulate for public comment because the updates to language on the forms are technical revisions and therefore within the Judicial Council's purview to adopt without circulation. (See Cal. Rules of Court, rule 10.22(d)(2).)

Alternatives considered

The committee considered making these modifications as each form is revised as part of a separate proposal.[1] However, there is no way to know when or if revisions to the forms will take place for other reasons. Therefore, the committee recommends that the forms be revised now to replace all outdated language in a timely manner.

Fiscal and Operational Impacts

The committee expects operational impacts to be minor. The proposed revisions may result in reproduction costs if courts provide hard copies of any of these forms. Because the proposed changes are technical corrections, case management systems are unlikely to require updating for implementation.

Attachments

1. Forms APP-004, APP-014, APP-016-GC/FW-016-GC, APP-104, APP-109-INFO, APP-150-INFO, CR-135, CR-143, and JV-810, at pages 4–55

[1] This alternative is being followed in one instance. One of the forms the committee identified, *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO), is part of a spring proposal: *Appellate Procedure: Use of an Appendix in Limited Civil Appeals*. In addition to substantive changes regarding the use of an appendix, the committee is proposing that a reference to "he or she" be replaced with "the appellant" in item 24(c) of that form. If approved, that revised form would take effect January 1, 2021.

COURT OF APPEAL, _____ APPELLATE DISTRICT, DIVISION _____	COURT OF APPEAL CASE NUMBER *(if known)*:
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	***FOR COURT USE ONLY*** **DRAFT** **03-10-2020** **Not approved by the Judicial Council**
APPELLANT: RESPONDENT:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
JUDGES *(all who participated in case)*:	SUPERIOR COURT CASE NUMBER:

CIVIL CASE INFORMATION STATEMENT

NOTE TO APPELLANT: You must file this form with the clerk of the Court of Appeal within 15 days after the clerk mails you the notification of the filing of the notice of appeal required under rule 8.100(e)(1). You must attach to this form a copy of the judgment or order being appealed that shows the date it was entered (see Cal. Rules of Court, rule 8.104 for definition of "entered"). A copy of this form must also be served on the other party or parties to this appeal. (CAUTION: An appeal in a limited civil case (Code Civ. Proc., § 85) may be taken ONLY to the appellate division of the superior court (Code Civ. Proc., § 904.2) or to the superior court (Code Civ. Proc., § 116.710 [small claims cases]).

PART I – APPEAL INFORMATION

1. APPEALABILITY
   a. Appeal is from:
      - ☐ judgment after jury trial.
      - ☐ judgment after court trial.
      - ☐ default judgment.
      - ☐ judgment after an order granting a summary judgment motion.
      - ☐ judgment of dismissal under Code Civ. Proc., § 581d, 583.250, 583.360, or 583.430.
      - ☐ judgment of dismissal after an order sustaining a demurrer.
      - ☐ an order after judgment under Code Civ. Proc., § 904.1(a)(2).
      - ☐ an order or judgment under Code Civ. Proc., § 904.1(a)(3)–(13).
      - ☐ Other *(describe and specify code section that authorizes this appeal):*

   b. Does the judgment appealed from dispose of all causes of action, including all cross-actions between the parties?
      ☐ Yes ☐ No (*If no, please explain why the judgment is appealable*):
2. TIMELINESS OF APPEAL *(Provide all applicable dates.)*
   a. Date of entry of judgment or order appealed from:
   b. Date that notice of entry of judgment or a copy of the judgment was served by the clerk or by a party under California Rules of Court, rule 8.104:
   c. Was a motion for new trial, for judgment notwithstanding the verdict, for reconsideration, or to vacate the judgment made and denied?
      ☐ Yes ☐ No *(If yes, please specify the type of motion):*
      Date notice of intention to move for new trial (if any) filed:
      Date motion filed: Date motion denied: Date denial served:
   d. Date notice of ☐ appeal or ☐ cross-appeal filed:
3. BANKRUPTCY OR OTHER STAY
   Is there a related bankruptcy case or a court-ordered stay that affects this appeal? ☐ Yes ☐ No
   (If yes, please attach a copy of the bankruptcy petition [without attachments] and any stay order.)

APPELLATE CASE TITLE:	APPELLATE COURT CASE NUMBER:

4. APPELLATE CASE HISTORY *(Provide additional information, if necessary, on attachment 4.)* Is there now, or has there previously been, any appeal, writ, or other proceeding related to this case pending in any California appellate court?
☐ Yes ☐ No (If yes, insert name of appellate court):

Appellate court case no.: Title of case:

Name of trial court: Trial court case no.:

5. SERVICE REQUIREMENTS

Is service of documents in this matter, including a notice of appeal, petition, or brief, required on the Attorney General or other nonparty public officer or agency under California Rules of Court, rule 8.29 or a statute?
☐ Yes ☐ No *(If yes, please indicate the rule or statute that applies)*

☐ Rule 8.29 (e.g., constitutional challenge; state or county party)
☐ Bus. & Prof. Code, §16750.2 (Antitrust)
☐ Bus. & Prof. Code, § 17209 (Unfair Competition Act)
☐ Bus. & Prof. Code, § 17536.5 (False advertising)
☐ Civ. Code, § 51.1 (Unruh, Ralph, or Bane Civil Rights Acts; antiboycott cause of action; sexual harassment in business or professional relations; civil rights action by district attorney)
☐ Civ. Code, § 55.2 (Disabled access to public conveyances, accommodations, and housing)
☐ Code Civ. Proc., § 1355 (Escheat)
☐ Gov. Code, § 946.6(d) (Actions against public entities)
☐ Gov. Code, § 4461 (Disabled access to public buildings)
☐ Gov. Code, § 12656(a) (False Claims Act)
☐ Health & Saf. Code, § 19954.5 (Accessible seating and accommodations)
☐ Health & Saf. Code, § 19959.5 (Disabled access to privately funded public accommodations)
☐ Pub. Resources Code, § 21167.7 (CEQA)
☐ Other (specify statute):

NOTE: The rule and statutory provisions listed above require service of a copy of a party's notice of appeal, petition, or brief on the Attorney General or other public officer or agency. Other statutes requiring service on the Attorney General or other public officers or agencies may also apply.

PART II – NATURE OF ACTION

1. Nature of action *(check all that apply):*

a. ☐ Conservatorship
b. ☐ Contract
c. ☐ Eminent domain
d. ☐ Equitable action (1) ☐ Declaratory relief (2) ☐ Other *(describe):*
e. ☐ Family law
f. ☐ Guardianship
g. ☐ Probate
h. ☐ Real property rights (1) ☐ Title of real property (2) ☐ Other *(describe):*
i. ☐ Tort
   (1) ☐ Medical malpractice (2) ☐ Product liability
   (3) ☐ Other personal injury (4) ☐ Personal property
   (5) ☐ Other tort *(describe):*
j. ☐ Trust proceedings
k. ☐ Writ proceedings in superior court
   (1) ☐ Mandate (Code Civ. Proc., § 1085) (2) ☐ Administrative mandate (Code Civ. Proc., § 1094.5)
   (3) ☐ Prohibition (Code Civ. Proc., § 1102) (4) ☐ Other *(describe):*
l. ☐ Other action (describe):

2. ☐ This appeal is entitled to calendar preference/priority on appeal *(cite authority):*

APPELLATE CASE TITLE:	APPELLATE COURT CASE NUMBER:

PART III – PARTY AND ATTORNEY INFORMATION

In the spaces below or on a separate page or pages, list all the parties and all their attorneys of record who will participate in the appeal. For each party, provide all of the information requested on the left side of the page. On the right side of the page, if a party is self-represented please check the appropriate box and provide the party's mailing address, telephone number, fax number, and e-mail address. If a party is represented by an attorney, on the right side of the page, check the appropriate box and provide all of the requested information about that party's attorney.

☐ Responses to Part III are attached instead of below

Name of Party: Appellate court designation: ☐ Appellant ☐ Respondent Trial court designation: ☐ Plaintiff ☐ Defendant ☐ Other *(specify):*	☐ Represented by attorney ☐ Self-represented Name of attorney: State Bar no: Firm name: Mailing address: Telephone no.: Fax no: Email address:
Name of Party: Appellate court designation: ☐ Appellant ☐ Respondent Trial court designation: ☐ Plaintiff ☐ Defendant ☐ Other *(specify):*	☐ Represented by attorney ☐ Self-represented Name of attorney: State Bar no: Firm name: Mailing address: Telephone no.: Fax no: Email address:
Name of Party: Appellate court designation: ☐ Appellant ☐ Respondent Trial court designation: ☐ Plaintiff ☐ Defendant ☐ Other *(specify):*	☐ Represented by attorney ☐ Self-represented Name of attorney: State Bar no: Firm name: Mailing address: Telephone no.: Fax no: Email address:
Name of Party: Appellate court designation: ☐ Appellant ☐ Respondent Trial court designation: ☐ Plaintiff ☐ Defendant ☐ Other *(specify):*	☐ Represented by attorney ☐ Self-represented Name of attorney: State Bar no: Firm name: Mailing address: Telephone no.: Fax no: Email address:

☐ Additional pages attached

Date:

This statement is prepared and submitted by: ▶ ______________________________

(SIGNATURE OF ATTORNEY OR SELF-REPRESENTED PARTY)

APPELLATE CASE TITLE:	APPELLATE COURT CASE NUMBER:

NOTICE TO PARTIES: A copy of this form must be served on the other party or parties to this appeal. If served by mail or personal delivery, THE MAILING OR DELIVERY MUST BE PERFORMED BY SOMEONE WHO IS NOT A PARTY TO THE APPEAL. Electronic service is authorized only if ordered by the court or if the party served has agreed to accept electronic service. A person who is at least 18 years old must complete the information below and serve all pages of this document. When all pages of this document have been completed and a copy served, the original may then be filed with the court.

PROOF OF SERVICE

☐ **Mail** ☐ **Personal Service** ☐ **Electronic Service**

1. At the time of service I was at least 18 years of age.
2. My residence or business address is *(specify):*

3. I mailed, personally delivered, or electronically served a copy of the *Civil Case Information Statement (Appellate)* as follows *(complete a, b, or c):*
   a. ☐ **Mail.** I am a resident of or employed in the county where the mailing occurred and am not a party to this legal action.
      (1) I enclosed a copy in an envelope **and**
         (a) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
         (b) ☐ **placed** the envelope for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
      (2) The envelope was addressed and mailed as follows:
         (a) Name of person served:
         (b) Address on envelope:
         (c) Date of mailing:
         (d) Place of mailing *(city and state):*
   b. ☐ **Personal delivery.** I am not a party to this legal action. I personally delivered a copy as follows:
      (1) Name of person served:
      (2) Address where delivered:
      (3) Date delivered:
      (4) Time delivered:
   c. ☐ **Electronic service.** My electronic service address is *(specify):*
      I electronically served a copy as follows:
      (1) Name of person served:
      (2) Electronic service address of person served:
      (3) On *(date):*

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

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF DECLARANT)

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		**DRAFT**
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	**03-10-2020**
TELEPHONE NO.:	FAX NO.:	
E-MAIL ADDRESS:		**Not approved by the Judicial Council**
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
PLAINTIFF/PETITIONER:		
DEFENDANT/RESPONDENT:		
OTHER PARENT/PARTY:		SUPERIOR COURT CASE NUMBER:
APPELLANT'S PROPOSED SETTLED STATEMENT (UNLIMITED CIVIL CASE)		
Re: Appeal filed on *(date):*		COURT OF APPEAL CASE NUMBER *(if known)*:

Notice: Please read *Information Sheet for Proposed Settled Statement* (form APP-014-INFO) before completing this form. You must file this form in the superior court, not in the Court of Appeal.

1. **PRELIMINARY INFORMATION**
   a. I am appealing *(check one):* ☐ an order filed on ☐ a judgment entered on *(date):*
   b. On *(date):* , I filed a notice of appeal. A copy of the judgment or order I am appealing is attached.
   c. On *(date):* , *(check the one that applies):*
      (1) ☐ I filed a notice designating the record on appeal, choosing to use a settled statement.
      (2) ☐ The court sent me ☐ I was served with an order granting my request to use a settled statement.
   d. ☐ On *(date):* , the court ordered me to modify or correct my proposed settled statement.

2. **REASONS FOR YOUR APPEAL**
   (Check all that apply and describe the error or errors you believe were made that are the reasons for this appeal.)
   a. ☐ ***No substantial evidence***. There was no substantial evidence that supported the judgment or order that I am appealing.
   (Explain why you think the judgment or order was not supported by substantial evidence.)

☐ Attachment 2a

   b. ☐ ***Errors***. The following error or errors about either the law or court procedure affected the outcome of the case
   (Describe each error.)

☐ Attachment 2b

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER PARENT/PARTY:	SUPERIOR COURT CASE NUMBER: COURT OF APPEAL CASE NUMBER *(if known)*:

3. **SUMMARY OF THE PARTIES' TESTIMONY AND OTHER EVIDENCE**

a. Did any of the parties testify at the trial or hearing? ☐ No ☐ Yes

(Specify the name of the party who testified and the date on which the party testified. Then write a complete and accurate summary of what each party said that is relevant to the reasons you gave in item 2 for this appeal (for example, what the party said in response to questions asked by the party's own attorney, the other party (or the attorney), and/or the court). Include only what was actually said; do not comment or give your opinion about what was said.)

(1) Name of party: testified on *(date):* .

Summary:

☐ Attachment 3a(1)

(a) Did a party (or attorney) make an objection to this party's testimony? ☐ No ☐ Yes *(Specify in item 3b.)*

(b) During this party's testimony, were any exhibits (documents, records, or other materials) relevant to the appeal presented that the judge allowed to be used as evidence to support or disprove this party's testimony? ☐ No ☐ Yes *(Specify in item 3c.)*

(c) During this party's testimony, were any exhibits (documents, records, or other materials) relevant to the appeal presented that the judge *did not* allow to be used as evidence to support or disprove this party's testimony? ☐ No ☐ Yes *(Specify in item 3d.)*

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER PARENT/PARTY:	SUPERIOR COURT CASE NUMBER: COURT OF APPEAL CASE NUMBER *(if known)*:

3. a. (2) Name of party: testified on *(date):* .

Summary:

☐ Attachment 3a(2)

(a) Did a party (or attorney) make an objection to this party's testimony? ☐ No ☐ Yes *(Specify in item 3b.)*

(b) During this party's testimony, were any exhibits (documents, records, or other materials) relevant to the appeal presented that the judge allowed to be used as evidence to support or disprove this party's testimony? ☐ No ☐ Yes *(Specify in item 3c.)*

(c) During this party's testimony, were any exhibits (documents, records, or other materials) relevant to the appeal presented that the judge *did not* allow to be used as evidence to support or disprove this party's testimony? ☐ No ☐ Yes *(Specify in item 3d.)*

(3) Was there testimony from other parties? ☐ No ☐ Yes

(If you answered yes, fill out and attach to this form Other Party and Nonparty Witness Testimony and Evidence Attachment *(form APP-014A).)*

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER PARENT/PARTY:	SUPERIOR COURT CASE NUMBER: COURT OF APPEAL CASE NUMBER *(if known)*:

3. b. **Objections to a party's testimony relevant to the appeal**
(Indicate which party's testimony was objected to and specify the objection. Also indicate whether the court "sustained the objection" (prevented the party from saying something) or "overruled the objection" (allowed the party to make a statement) and include any explanation given by the court.)

☐ Attachment 3b

c. **Exhibits (documents, records, or other materials) relevant to the appeal allowed to be used as evidence to support or disprove a party's testimony.** (*Write a complete and accurate summary of the exhibits presented by each party. Include any objections and the court's ruling on those objections. Do not comment or give your opinion about the exhibits.)*

☐ Attachment 3c

d. **Exhibits (documents, records, or materials) relevant to the appeal *not* allowed to be used as evidence to support or disprove a party's testimony.** *(Write a complete and accurate summary of the exhibits. Include any objections and the court's ruling on those objections. Do not comment or give your opinion about the items.)*

☐ Attachment 3d

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER PARENT/PARTY:	SUPERIOR COURT CASE NUMBER: COURT OF APPEAL CASE NUMBER *(if known)*:

4. **SUMMARY OF NONPARTY WITNESS TESTIMONY AND OTHER EVIDENCE**

Was there testimony from another party or nonparty witnesses that is relevant to the reasons for the appeal?

☐ No *(skip to Item 5)* ☐ Yes *(Fill out and attach to this form* Other Party and Nonparty Witness Testimony and Evidence Attachment *(form APP-014A).)*

5. **TRIAL COURT'S FINDINGS**

a. Did the judge make findings at the hearing or trial in the case? ☐ No ☐ Yes *(Complete item 5b.)*
(A judge makes a "finding" when the judge decides that something is a fact, is true, or is relevant.)

b. What are the findings that the judge made that are relevant to the reasons for the appeal?

☐ Attachment 5

6. **SUMMARY OF MOTIONS**

a. Are any of your reasons for appeal based on your disagreement with the court's ruling on a motion or motions?
☐ Yes *(Fill out b.)* ☐ No *(Skip to item 7.)*

b. Describe the motion. *(State which party made the motion. Then, write a complete and accurate summary of what was said (any testimony and arguments) and what the court decided (whether the court granted or denied the motion).)*

☐ Attachment 6

7. **SUMMARY OF JURY INSTRUCTIONS**

a. Are any of your reasons for appeal based on your disagreement with the court's ruling on a jury instruction or instructions?
☐ Yes *(Fill out b.)* ☐ No *(Skip to item 8.)*

b. Identify the jury instruction and the party that requested it. *(Summarize what the parties said (arguments or objections) and what the court decided (whether the court gave the instruction to the jury, refused to give the instruction to the jury, or modified it before giving it to the jury). Describe any modifications the court made to the instruction.)*

☐ Attachment 7

8. **ORDER OR JUDGMENT YOU ARE APPEALING**

Attach a copy of the order or judgment you are appealing.

Date:

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

APP-016-GC/FW-016-GC

Order on Court Fee Waiver (Court of Appeal or Supreme Court) (Ward or Conservatee)

Clerk stamps date here when form is filed.

DRAFT

03-10-2020

Not approved by the Judicial Council

Fill in court name and street address:

Court of Appeal or Supreme Court Case Number:

1 (Proposed) guardian or conservator who asked the court to waive court fees for (proposed) ward or conservatee:

Name: _____

Street or mailing address: _____

City: _____ State: ____ Zip: _____

Telephone: _____

2 Lawyer, if person in 1 has one:

Name: _____ State Bar No: _____

Firm or Affiliation: _____

Street or mailing address: _____

City: _____ State: ____ Zip: _____

Email: _____ Telephone: _____

3 (Proposed) ward or conservatee:

Name: _____

Street or mailing address: _____

City: _____ State: ____ Zip: _____

Telephone: _____

4 Ward's or Conservatee's Lawyer, if any: Name: _____

Firm or Affiliation: _____ State Bar No.: _____

Address: _____ Telephone: _____

City: _____ State: _____ Zip: _____ Email: _____

5 On *(date):* _____, you filed a *Request to Waive Court Fees* (form FW-001-GC).

6 The court reviewed your request and makes the following order:

a. ☐ The court **grants** your request and waives the (proposed) ward's or conservatee's court fees and costs listed below. You do not have to pay fees for the following:

- Filing notice of appeal, petition for writ, or petition for review

☐ Other *(specify):*

_____

_____

b. ☐ The court **denies** your request for the following reasons:

(1) ☐ Your request is incomplete. You have **10 days** from the date this notice was sent to:

- Pay the (proposed) ward's or conservatee's fees and costs, or
- File a new revised request that includes the items listed below *(specify incomplete items):*

_____

_____

_____

_____

_____

Warning! If you miss the deadline for paying the (proposed) ward's or conservatee's fees and costs or providing the additional items required by the court and you are the appellant, your appeal may be dismissed.

6 b. (2) ☐ The information you provided on the request shows that the (proposed) ward or conservatee is not eligible for the fee waiver you requested for the following reasons *(specify):*

You have **10 days** from the date this notice was sent to:
- Pay the (proposed) ward's or conservatee's fees and costs, or
- File more information that shows that the (proposed) ward or conservatee is eligible for a fee waiver.

(3) ☐ The court finds there is substantial question regarding the (proposed) ward's or conservatee's eligibility *(describe issue(s) regarding eligibility):*

You have **10 days** from the date this notice was sent to:
- Pay the (proposed) ward's or conservatee's fees and costs, or
- File the following additional documents to support your request:

c. ☐ The court needs more information. **You must go to court** on the date below.

Hearing Date → Date: _____ Time: _____ Dept.: _____

Name and address of court if different from page 1:

☐ Bring the following proof to support your request, if it is reasonably available:

Warning! If item 6 c. is checked and you do not go to court on the hearing date, the court will deny your request to waive court fees for the (proposed) ward or conservatee and you will have **10 days** to pay those fees. If you are the appellant and you do not pay the filing fees, your appeal may be dismissed.

Date: _____

_____

Signature of (check one): ☐ *Judicial Officer* ☐ *Clerk, Deputy*

APP-104 Proposed Statement on Appeal (Limited Civil Case)

Clerk stamps date here when form is filed.

DRAFT

03-10-2020

Not approved by the Judicial Council

Instructions

- This form is only for preparing a proposed statement on appeal in a **limited civil case.**
- Before you fill out this form, read *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO) to know your rights and responsibilities. You can get form APP-101-INFO at any courthouse or county law library or online at *www.courts.ca.gov/forms*.
- This form can be attached to your *Appellant's Notice Designating Record on Appeal (Limited Civil Case)* (form APP-103). If it is not attached to that notice, this form must be filed **no later than 20 days after you file that notice. If you have chosen to prepare a statement on appeal and do not file this form on time, the court may dismiss your appeal.**
- Fill out this form and make a copy of the completed form for your records and for each of the other parties.
- Serve a copy of the completed form on each of the other parties and keep proof of this service. You can get information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*
- Take or mail the original completed form and proof of service on the other parties to the clerk's office for the same court that issued the judgment or order you are appealing. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

a. Name of Appellant *(the party who is filing this appeal):*

Name: _____

b. Appellant's contact information *(skip this if the appellant has a lawyer for this appeal):*

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different):* _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ Email: _____

c. Appellant's lawyer *(skip this if the appellant does not have a lawyer for this appeal):*

Name: _____ State Bar number: _____

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different):* _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ Email: _____

Fax: _____

Information About Your Appeal

(2) On *(fill in the date):* _____, I/my client filed a notice of appeal in the trial court case identified in the box on page 1 of this form.

(3) On *(fill in the date):* _____, I/my client filed a notice designating the record on appeal, electing to use a statement on appeal.

Proposed Statement

(4) Reasons for Your Appeal

Remember, in an appeal, the appellate division can only review a case for whether certain kinds of legal errors were made (read form APP-101-INFO to learn about these legal errors):

- *There was not "substantial evidence" supporting the judgment, order, or other decision you are appealing.*
- *A "prejudicial error" was made during the trial court proceedings.*

The appellate division:

- *Cannot retry your case or take new evidence.*
- *Cannot consider whether witnesses were telling the truth or lying.*
- *Cannot consider whether there was more or stronger evidence supporting your position than there was supporting the trial court's decision.*

(Check all that apply and describe the legal error or errors you believe were made that are the reason for this appeal.)

a. ☐ There was not substantial evidence that supported the judgment, order, or other decision that I/my client indicated in the notice of appeal is being appealed in this case. *(Explain why you think the judgment, order, or other decision was not supported by substantial evidence):* _____

b. ☐ The following error or errors about either the law or court procedure was/were made that caused substantial harm to me/my client. *(Describe each error and how you were/your client was harmed by that error.)*

(1) *Describe the error:* _____

Describe how you were/your client was harmed by the error: _____

4 b. (2) *Describe the error:* _____

Describe how you were/your client was harmed by the error: _____

(3) *Describe the error:* _____

Describe how you were/your client was harmed by the error: _____

☐ *Check here if you need more space to describe these or other errors and attach a separate page or pages describing the errors. At the top of each page, write "APP-104, item 4."*

5 The Dispute

a. In the trial court, I/my client was the *(check one):*

☐ Plaintiff (the party who filed the complaint in the case).

☐ Defendant (the party against whom the complaint was filed).

b. The plaintiff's complaint in this case was about *(briefly describe what was claimed in the complaint filed with the trial court):* _____

c. The defendant's response to this complaint was *(briefly describe how the defendant responded to the complaint filed with the trial court):* _____

☐ *Check here if you need more space to describe the dispute and attach a separate page or pages describing it. At the top of each page, write "APP-104, Item 5."*

6 Summary of Any Motions and the Court's Order on the Motion

a. Were any motions (requests for the trial court to issue an order) made in this case that are relevant to the reasons you gave in 4 for this appeal?

☐ Yes *(fill out b)* ☐ No *(skip to 7)*

b. *In the spaces below, describe any motions (requests for orders) that were made in the trial court that are relevant to the reasons you gave in 4 for this appeal. Write a complete and accurate summary of what was said at any hearings on these motions and indicate how the trial court ruled on these motions.*

(1) *Describe the first motion:* _____

The motion was filed by the ☐ plaintiff ☐ defendant.

There ☐ was ☐ was not a hearing on this motion.

If there was a hearing on this motion, write a complete and accurate summary of what was said at this hearing: _____

The trial court ☐ granted this motion ☐ did not grant this motion.

☐ Other *(describe any other action the trial court took concerning this motion):* _____

☐ *Check here if you need more space to describe this motion and attach a separate page or pages describing this motion. At the top of each page, write "APP-104, Item 6b(1)."*

(2) *Describe the second motion:* _____

The motion was filed by the ☐ plaintiff ☐ defendant.

There ☐ was ☐ was not a hearing on this motion.

If there was a hearing on this motion, write a complete and accurate summary of what was said at this hearing: _____

The trial court ☐ granted this motion. ☐ did not grant this motion.

6 b. (2) ☐ Other *(describe any other action the trial court took concerning this motion):* _____

☐ *Check here if you need more space to describe this motion and attach a separate page or pages describing this motion. At the top of each page, write "APP-104, item 6b(2)."*

(3) ☐ Check here if any other motions were filed that are relevant to the reasons you gave in 4 for this appeal and attach a separate page describing each motion, identifying who made the motion and whether there was a hearing on the motion, summarizing what was said at the hearing on the motion, and indicating whether the trial court granted or denied the motion. At the top of each page, write "APP-104, item 6b(3)."

7 Summary of Testimony and Other Evidence

a. Was there a trial in your case?

☐ No *(skip items b, c, d, and e and go to item 8)*

☐ Yes *(check (1) or (2) and complete items b, c, d, and e)*

(1) ☐ Jury trial

(2) ☐ Trial by judge only

b. Did you/your client testify at the trial?

☐ No

☐ Yes *(Write a complete and accurate summary of the testimony you/your client gave that is relevant to the reasons you gave in 4 for this appeal. Include only what you actually said; do not comment or give your opinion about what was said. Please indicate whether any objections were made concerning your/your client's testimony or any exhibits you/your client asked to present and whether these objections were sustained.):* _____

☐ *Check here if you need more space to summarize your/your client's testimony and attach a separate page or pages summarizing this testimony. At the top of each page, write "APP-104, Item 7b."*

c. Were there any other witnesses at the trial whose testimony is relevant to the reasons you gave in 4 for this appeal?

☐ No

☐ Yes *(complete items (1), (2), and (3)):*

(1) The witness's name is *(fill in the witness's name):* _____

(2) The witness testified on behalf of the *(check one):* ☐ plaintiff ☐ defendant.

7 c. (3) This witness testified that *(Write a complete and accurate summary of the witness's testimony that is relevant to the reasons you gave in 4 for this appeal. Include only what the witness actually said; do not comment on or give your opinion about what the witness said. Please indicate whether any objections were made concerning this witness's testimony or any exhibits this witness asked to present and whether these objections were sustained.):* _____

☐ *Check here if you need more space to summarize this witness's testimony and attach a separate page or pages summarizing this testimony. At the top of each page, write "APP-104, Item 7c."*

d. ☐ Check here if any other witnesses gave testimony at the trial that is relevant to the reasons you gave in 4 for this appeal. Attach a separate page or pages identifying each witness and who the witness testified for, summarizing the witness's testimony that is relevant to the reasons you gave in 4 for this appeal, and indicating whether any objections were made concerning this witness's testimony or any exhibits the witness asked to present and whether these objections were sustained. At the top of each page, write "APP-104, Item 7d."

e. Summarize the evidence, other than testimony, that was given during the trial that is relevant to the reasons you gave in 4 for this appeal. *(Write a complete and accurate summary of the evidence given by both you and the respondent. Include only the evidence given; do not comment on or give your opinion about this evidence.):*

☐ *Check here if you need more space to describe the evidence and attach a separate page or pages describing the evidence. At the top of each page, write "APP-104, Item 7e."*

8 The Trial Court's Findings

Did the trial court make findings in the case?

☐ No

☐ Yes *(describe the findings made by the trial court):* _____

☐ *Check here if you need more space to describe the trial court's findings and attach a separate page or pages describing these findings. At the top of each page, write "APP-104, Item 8."*

9 The Trial Court's Final Judgment

The trial court issued the following final judgment in this case *(check all that apply and fill in any required information):*

a. I/My client was required to:

☐ pay the other party damages of *(fill in the amount of the damages):* $ _____

☐ do the following *(describe what you were ordered to do):* _____

_____

_____

_____

b. The other party was required to:

☐ pay me/my client damages of *(fill in the amount of the damages):* $ _____

☐ do the following *(describe what the other party was ordered to do):* _____

_____

_____

c. ☐ Other *(describe):* _____

_____

_____

☐ *Check here if you need more space to describe the trial court's judgment or order and attach a separate page or pages describing this judgment or order. At the top of each page, write "APP-104, Item 9."*

Date: _____

_____ ▶ _____

Type or print your name *Signature of appellant or attorney*

APP-109-INFO What Is Proof of Service?

GENERAL INFORMATION

What does this information sheet cover?

This information sheet tells you how to fill out *Proof of Service (Appellate Division*) (form APP-109*)* or *Proof of Electronic Service (Appellate Division)* (form APP-109E). This information sheet is not part of the proof of service and does not need to be copied, served, or filed.

1 What is "serving" a document?

"Serving" a document on a person means having the document delivered to that person. The general requirements for serving documents are set out in California Code of Civil Procedure sections 1010.6–1013a (you can get a copy of these laws at any county law library or online at *www.leginfo.ca.gov.calaw.html)*. There are three main ways to serve documents: (1) by mail, (2) by personal delivery, or (3) by electronic service.

When a document is served by mail, it must be put in a sealed envelope or package that is addressed to the person who is being served and that has the postage fully prepaid. The envelope then has to be deposited with the U.S. Postal Service by leaving it at a U.S. Postal Service office or mail drop or at an office or business mail drop where the person serving the document knows the mail is picked up every day and deposited with the U.S. Postal Service.

When a document is personally delivered to a party who is represented by an attorney, the document must either be given directly to the attorney representing that party or the document can be placed in an envelope or package addressed to the attorney and left with the receptionist at the attorney's office or with a person who is in charge of the attorney's office. When a document is personally served on a party who is not represented by an attorney, the document must either be given directly to the party or the document can be given to someone who is at least 18 years old at the party's residence between the hours of eight in the morning and six in the evening.

You may be able to serve a document electronically if the person being served has agreed to accept electronic service or if the court has ordered the person to accept electronic service. The requirements for electronic service are set out in California Code of Civil Procedure section 1010.6.

When a document is electronically served, it must be served either by electronic transmission or by electronic notification. "Electronic transmission" means sending the document to the person's electronic service address, an email address the person has given the court and the other parties to the case for this purpose. "Electronic notification" means sending a notice to the person with the exact name of the document and a hyperlink—a link to a web address—at which the document may be viewed and downloaded.

2 What documents have to be served?

Rule 8.817 of the California Rules of Court requires that before you file any document with the court in a case in the appellate division of the superior court, you must serve one copy of the document on each of the other parties in the case and on anyone else when required by law (statute or rule of court). Other rules require that certain documents in cases in the appellate division be served, including the notice of appeal and the notice designating the record on appeal in appeals in limited civil cases and briefs in all appeals. (For more information about appeals in general and about these documents, read *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO), *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO), and *Information on Appeal Procedures for Infractions* (form CR-141-INFO).)

3 Who can serve a document?

State law (the Code of Civil Procedure) says that a document in a court case can only be served by a person who is over 18 years old. Service by mail or by personal delivery must be by someone who is not a party in the case; electronic service may be performed directly by a party.

If you are a party in a case and wish to serve documents by mail or by personal delivery, **you must have someone else who is over 18 and who is not a party in your case serve any documents in your case for you.** You will need to give the person who is serving the document for you (the server) the names and addresses of all the people who need to be served with that document. You will also need to give the server one copy of each document that needs to be served for each person who is being served.

If you are serving documents electronically, you can do so yourself or have another person over 18 do it for you. The person doing the serving (the server) will need the names and electronic service addresses of everyone who must be served, as well as the document to be served in a form that allows it to be electronically transmitted or made available by hyperlink.

4 What is proof of service?

A "proof of service" shows the court that a document was served as required by the law. Rule 8.817 also requires a party who is filing a document with the court in a case in the appellate division to attach a proof of service to the document the party wants to file. You can use *Proof of Service (Appellate Division*) (form APP-109) or *Proof of Electronic Service (Appellate Division)* (form APP-109E) to give the court this proof of service in any case in the appellate division of the superior court. The server should follow the instructions below for completing the *Proof of Service (Appellate Division*) (form APP-109) or *Proof of Electronic Service (Appellate Division)* (form APP-109E). If another person is serving the documents for you–as is required if the document will be served by mail or personal delivery–tell the server to give you the original form when it is filled out and signed. You will need to attach the original proof of service to the document you want to file.

If you are electronically filing the document, the proof of service may also be filed electronically. However, the original signed proof of service must be kept by the party filing the document and produced upon request.

INFORMATION FOR THE SERVER

5 Who fills out the *Proof of Service* or *Proof of Electronic Service*?

If you are the server (the person who serves a document for a party in a court case), you must prepare and sign the proof of service. If you served the document by mail or personal delivery, you can use *Proof of Service (Appellate Division*) (form APP-109) to prepare this proof of service in any case in the appellate division. If you served the document electronically, you can use *Proof of Electronic Service (Appellate Division)* (form APP-109E) to prepare the proof of service.

6 How do I fill out the *Proof of Service*?

These instructions are for *Proof of Service (Appellate Division)* (form APP-109), if you are serving the document by mail or personal delivery. If you are serving the document electronically, please see 7 below, for instructions on how to fill out *Proof of Electronic Service (Appellate Division)* (form APP-109E).

You can fill out most of the information on *Proof of Service (Appellate Division)* (form APP-109) by copying the information from the document you are serving before you serve that document. However, you should not sign and date the form until after you have finished serving the document. **By signing form APP-109, you are swearing, under penalty of perjury, that the information that you put in the form is true and correct.**

When you fill out the *Proof of Service (Appellate Division*) (form APP-109), you should print neatly or use a typewriter. If you have Internet access, you can fill out the form online at *www.courts.ca.gov/forms* (use the "fillable" version of the form).

Filling in the top section of form APP-109:

First box, right side of form: Leave this box blank for the court's use.

Second box, right side of form: Fill in the name of the county in which the case is filed and the street address of the court. You can copy this information from the first page of the document that you are serving. If the document you are serving is another Judicial Council form, this information will be in the second box on the right-hand side of the form.

Third box, right side of form: Fill in the trial court case name and number. You can copy this information from the first page of the document that you are serving. If the document you are serving is another Judicial Council form, this information will be in the third box on the right-hand side of the form.

Fourth box, right side of form: Fill in the appellate division case number, if you know it. If this number is available, it will be on the first page of the document that you are serving. If the document you are serving is

another Judicial Council form, this number will be in the fourth box on the right-hand side of the form.

Filling in items 1–5:

Items 1 and 2: You are stating, under penalty of perjury, that you are over the age of 18 and that you are not a party in this court case.

Item 3: Check one of the boxes and provide your home or business address. This information is important because, if you serve the document by mail, you must live or work in the county from which the document was mailed.

Item 4: Check or fill in the name of the document that you are serving. If the document you are serving is another Judicial Council form, the name of the document is located on both the top and the bottom of the first page of the form. If the document you are serving is not a Judicial Council form, the name of the document should be on the top of the first page of the document.

a. Check box 4a if you are serving the document by mail. BEFORE YOU SEAL AND MAIL THE ENVELOPE WITH THE DOCUMENT YOU ARE SERVING, fill in the following parts of the form.

   (1) You are stating, under penalty of perjury, that you are putting one copy of the document you identified in item 4 in an envelope addressed to each person listed in 4a(2), sealing the envelope, and putting first-class postage on the envelope.

   (2) Fill in the name and address of each person to whom you are mailing the document. You can copy this information from the list of people to be served or the envelopes provided by the party for whom you are serving the document. If you need more space to list names and addresses, check the box under item 4a(2) and attach a page listing them. At the top of the page, write "APP-109, Item 4a."

   (3) Fill in the date you are mailing the document and the city and state from which you are mailing it. REMEMBER: You must live or work in the county from which the document is mailed.

      (a) Check box 4a(3)(a) if you are personally depositing the document with the U.S. Postal Service, such as at a U.S. Post Office or U.S. Postal Service mailbox.

      (b) Check box 4a(3)(b) if you are putting the document in the mail at your place of business.

   Once you have finished filling out these parts of the form, make one copy of *Proof of Service (Appellate Division)* (form APP-109) with this information filled in for each person you are serving by mail. Put this copy of *Proof of Service (Appellate Division)* (form APP-109) in the envelope with the document you are serving. Seal the envelope and mail it as you have indicated on the *Proof of Service*.

b. Check box 4b. If you personally delivered the documents. Remember, when a document is personally delivered to a party who is represented by an attorney, the document must either be given directly to the party's attorney or the document can be placed in an envelope or package addressed to the attorney and left with the receptionist at the attorney's office or with a person who is in charge of the attorney's office. When a document is personally served on a party who is not represented by an attorney, the document must either be given directly to the party or the document can be given to someone who is at least 18 years old at the party's residence between the hours of eight in the morning and six in the evening.

   For each person to whom you personally delivered the document, fill in:

   (a) The person's name.

   (b) The address at which you delivered the document to this person.

   (c) The date on which you delivered the document to this person.

   (d) The time at which you delivered the document.

   If you need space to list more names, addresses, and delivery dates and times, check the box

under 4b. and attach a page listing this information. At the top of the page, write "APP-109, Item 4b."

Item 5: At the bottom of the form, type or print your name, sign the form, and fill in the date that you signed the form. **By signing this form, you are stating under penalty of perjury that all the information you filled in on *Proof of Service (Appellate Division)* (form APP-109) is true and correct.**

After you have finished serving the document and filled in, signed, and dated *Proof of Service (Appellate Division)* (form APP-109), give the original completed form to the party for whom you served the document.

7 How do I fill out the *Proof of Electronic Service*?

You can fill out most of the information on *Proof of Electronic Service* (*Appellate Division*) (form APP-109E) by copying the information from the document you are serving before you serve that document. However, you should not sign and date the form until after you have finished serving the document. **By signing form APP-109E you are swearing under penalty of perjury that the information you have put in the form is true and correct.**

You can fill out the *Proof of Electronic Service* (*Appellate Division*) (form APP-109E) online at *www.courts.ca.gov/forms* (use the "fillable" version of the form), or you can print it out and fill it in, printing neatly or using a typewriter.

Filling in the top section of form APP-109E:

First box, right side of form: Leave this box blank for the court's use.

Second box, right side of form: Fill in the name of the county in which the case is filed and the street address of the court. You can copy this information from the first page of the document that you are serving. If the document you are serving is another Judicial Council form, this information will be in the second box on the right-hand side of that form.

Third box, right side of form: Fill in the trial court case number and name. You can copy this information from the first page of the document that you are serving. If the document you are serving is another Judicial Council form, this information will be in the third box on the right-hand side of that form.

Fourth box, right side of form: Fill in the appellate division case number, if you know it. If this number is available, it will be on the first page of the document that you are serving. If the document you are serving is another Judicial Council form, this information will be in the fourth box on the right-hand side of that form.

Filling in items 1–5:

Item 1: You are stating, under penalty of perjury, that you are over the age of 18.

Item 2:
a. Check one of the boxes and provide your home or business address.

b. Fill in your electronic service address. This is the address at which you have agreed to accept electronic service, usually an email address.

Item 3: Check or fill in the name of the document that you are serving. If the document you are serving is another Judicial Council form, the name of the document is located on both the top and the bottom of the first page of the form. If the document you are serving is not a Judicial Council form, the name of the document should be on the top of the first page of the document.

Item 4: Fill in the name of each person served, and the name or names of the parties represented, if the person served is an attorney. For each person served, fill in that person's electronic service address and the date you served the person. If you need more space to list additional persons served, check the box under item 4 b. and attach a page listing them, with their electronic service addresses and the date each person was served. At the top of the page, write "APP-109E, Item 4."

When you have filled in the information in items 1–4, create an electronic copy of the *Proof of Electronic Service* (*Appellate Division*) (form APP-109E) with this

information filled in. Transmit the filled-in form with the document you are serving to each person served.

Item (5): At the bottom of the form, type or print your name, sign the form, and fill in the date that you signed the form. **By signing this form, you are stating under penalty of perjury that all the information you filled in on the *Proof of Electronic Service* (*Appellate Division*) (form APP-109E) is true and correct.** If you are not the party for whom the documents are served, give the original completed *Proof of Electronic Service* (*Appellate Division*) (form APP-109E) to the party for whom you served the document.

If you are electronically filing the document that is served, the proof of service may also be filed electronically. However, the original signed proof of service must be kept by the party filing it and produced upon request.

APP-150-INFO Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases

GENERAL INFORMATION

1 What does this information sheet cover?

This information sheet tells you about **writ proceedings**—proceedings in which a person is asking for a writ of mandate, prohibition, or review—in misdemeanor, infraction, and limited civil cases, and in certain small claims cases. Please read this information sheet before you fill out *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151). This information sheet does not cover everything you may need to know about writ proceedings. It is only meant to give you a general idea of the writ process. To learn more, you should read rules 8.930–8.936 of the California Rules of Court, which set out the procedures for writ proceedings in the appellate division. You can get these rules at any courthouse or county law library or online at *www.courts.ca.gov/rules.*

This information sheet does NOT provide information about appeals or proceedings for writs of supersedeas or habeas corpus, or for writs in certain small claims cases.

- For information about appeals, please see the box on the right side of this page.
- For information about writs of habeas corpus, please see rules 4.550–4.552 of the California Rules of Court and *Petition for Writ of Habeas Corpus* (form MC-275).
- For information about writs of supersedeas, please see rule 8.824 of the California Rules of Court. This information sheet applies to writs relating to *postjudgment enforcement actions* of the small claims division. For information about writs relating to other actions by the small claims division, see rules 8.930–8.936 of the California Rules of Court and *Petition for Writ (Small Claims)* (form SC-300).
- For information about writs relating to actions of the superior court on small claims appeals, see rules 8.485–8.493 of the California Rules of Court.

You can get these rules and forms at any courthouse or county law library or online at *www.courts.ca.gov/rules* for the rules or *www.courts.ca.gov/forms* for the forms.

2 What is a writ?

A writ is an order from a higher court telling a lower court to do something the law says the lower court must do or not to do something the law says the lower court does not have the power to do. In writ proceedings in the appellate division, the lower court is the superior court that took the action or issued the order being challenged.

For information about appeal procedures, see:

- *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO);
- *Information on Appeal Procedures for Infractions* (form CR-141-INFO); and
- *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO).

You can get these forms at any courthouse or county law library or online at *www.courts.ca.gov/forms*.

In this information sheet, we call the lower court the "trial court."

3 Are there different kinds of writs?

Yes. There are three main kinds of writs:

- Writs of mandate (sometimes called "mandamus"), which are orders telling the trial court to do something.
- Writs of prohibition, which are orders telling the trial court not to do something.
- Writs of review (sometimes called "certiorari"), which are orders telling the trial court that the appellate division will review certain kinds of actions already taken by the trial court.

There are laws (statutes) that you should read concerning each type of writ: see California Code of Civil Procedure sections 1084–1097 about writs of mandate, sections 1102–1105 about writs of prohibition, and sections 1067–1077 about writs of review. You can get copies of these statutes at any county law library or online at *leginfo.legislature.ca.gov/faces/codes.xhtml.*

4 Is a writ proceeding the same as an appeal?

No. In an **appeal,** the appellate division *must* consider the parties' arguments and decide whether the trial court made the legal error claimed by the appealing party and whether the trial court's decision should be overturned based on that error (this is called a "decision on the merits"). In a **writ proceeding,** the appellate division is *not* required to make a decision on the merits; even if the trial court made a legal error, the appellate division can decide not to consider that error now, but to wait and consider the error as part of any appeal from the final judgment. Most requests for writs are denied without a decision on the merits (this is called a "summary denial"). Because of this, appeals are the ordinary way that decisions made by a trial court are reviewed and writ proceedings are often called proceedings for "extraordinary" relief.

Appeals and writ proceedings are also used to review different kinds of decisions by the trial court. Appeals can be used only to review a trial court's final judgment and a few kinds of orders. Most rulings made by a trial court before it issues its final judgment cannot be appealed right away; they can only be appealed after the trial court case is over, as part of an appeal of the final judgment. Unlike appeals, writ proceedings can be used to ask for review of certain kinds of important rulings made by a trial court before it issues its final judgment.

5 Is a writ proceeding a new trial?

No. **A writ proceeding is NOT a new trial**. The appellate division will not consider new evidence, such as the testimony of new witnesses. Instead, if it does not summarily deny the request for a writ, the appellate division reviews a record of what happened in the trial court and the trial court's ruling to see if the trial court made the legal error claimed by the person asking for the writ. When it conducts its review, the appellate division presumes that the trial court's ruling is correct; the person who requests the writ must show the appellate division that the trial court made the legal error the person is claiming.

6 Can a writ be used to address *any* errors made by a trial court?

No.

Writs can only address certain legal errors. Writs can only address the following types of legal errors made by a trial court:

- The trial court has a legal duty to act but:
  - Refuses to act;
  - Has not done what the law says it must do; or
  - Has acted in a way the law says it does not have the power to act.
- The trial court has performed or says it is going to perform a judicial function (like deciding a person's rights under law in a particular case) in a way that the court does not have the legal power to do.

There must be no other adequate remedy. The trial court's error must also be something that can be fixed only with a writ. The person asking for the writ must show the appellate division that there is no adequate way to address the trial court's error other than with the writ (this is called having "no adequate remedy at law"). As mentioned above, appeals are the ordinary way that trial court decisions are reviewed. If the trial court's ruling can be appealed, the appellate division will generally consider an appeal to be good enough (an "adequate remedy") unless the person asking for the writ can show the appellate division that the person will be harmed in a way that cannot be fixed by the appeal if the appellate division does not issue the writ (this is called "irreparable" injury or harm).

Statutory writs: There are laws (statutes) that provide that certain kinds of rulings can or must be challenged using a writ proceeding. These are called "statutory writs." Here is a list of some of the most common rulings that a statute says can or must be challenged using a writ:

- A ruling on a motion to disqualify a judge (see California Code of Civil Procedure section 170.3(d))
- Denial of a motion for summary judgment (see California Code of Civil Procedure section 437c(m)(l))
- A ruling on a motion for summary adjudication of issues (see California Code of Civil Procedure section 437c(m)(l))

- Denial of a stay in an unlawful detainer matter (see California Code of Civil Procedure section 1176)
- An order disqualifying the prosecuting attorney (see California Penal Code section 1424)

You can get copies of these statutes at any county law library or online at *leginfo.legislature.ca.gov/faces /codes.xhtml.* You will need to check whether there is a statute providing that the specific ruling you want to challenge can or must be reviewed using a writ proceeding. (Note that just because there is a statute requiring or allowing you to ask for a writ to challenge a ruling does not mean that the court must grant your request; the appellate division can still deny a request for a statutory writ.)

Common law writs: Even if there is not a statute specifically providing for a writ proceeding to challenge a particular ruling, most trial court rulings other than the final judgment can potentially be challenged using a writ proceeding if the trial court made the type of legal error described above and the petitioner has no other adequate remedy at law. These writs are called "common law" writs.

7 Can the appellate division consider a request for a writ in *any* case?

No. Different courts have the power (called "jurisdiction") to consider requests for writs in different types of cases. The appellate division can only consider requests for writs in limited civil, misdemeanor, and infraction cases, and certain small claims cases. A limited civil case is a civil case in which the amount claimed is $25,000 or less (see California Code of Civil Procedure sections 85 and 88). Misdemeanor cases are cases in which a person has been charged with or convicted of a crime for which the punishment can include jail time of up to one year but not time in state prison (see California Penal Code sections 17 and 19.2). (If the person was also charged with or convicted of a felony in the same case, it is considered a felony case, not a misdemeanor case.) Infraction cases are cases in which a person has been charged with or convicted of a crime for which the punishment can be a fine, traffic school, or some form of community service but cannot include any time in jail or prison (see California Penal Code sections 17 and 19.8). Examples of infractions include traffic tickets or citations for violations of some city or county ordinances. (If a person was also charged with or convicted of a misdemeanor in the same case, it is considered a misdemeanor case, not an infraction case.) You can get copies of these statutes at any county law library or online at *leginfo.legislature.ca.gov/faces /codes.xhtml.* The appellate division can consider requests for writs in small claims actions relating to postjudgment enforcement orders.

The appellate division does NOT have jurisdiction to consider requests for writs in either unlimited civil cases (civil cases in which the amount claimed is more than $25,000) or felony cases (cases in which a person has been charged with or convicted of a crime for which the punishment can include time in state prison). Requests for writs in these cases can be made in the Court of Appeal. The appellate division also does NOT have jurisdiction to consider requests for writs of habeas corpus; requests for these writs can be made in the superior court.

Requests for writs relating to actions of the small claims division *other* than postjudgment enforcement orders are considered by a single judge in the appellate division. (See form SC-300-INFO.) Requests for writs relating to superior court actions in small claims cases on appeal may be made to the Court of Appeal.

8 Who are the parties in a writ proceeding?

If you are asking for the writ, you are called the PETITIONER. You should read "Information for the Petitioner," beginning on page 4.

The court the petitioner is asking to be ordered to do or not to do something is called the RESPONDENT. In appellate division writ proceedings, the trial court is the respondent.

Any other party in the trial court case who would be affected by a ruling regarding the request for a writ is a REAL PARTY IN INTEREST. If you are a real party in interest, you should read "Information for a Real Party in Interest," beginning on page 10.

9 Do I need a lawyer to represent me in a writ proceeding?

You do not *have* to have a lawyer; you are allowed to represent yourself in a writ proceeding in the appellate division. But writ proceedings can be very complicated

and you will have to follow the same rules that lawyers have to follow. If you have any questions about the writ procedures, you should talk to a lawyer. In limited civil cases and infraction cases, you must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding a lawyer on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-lowcosthelp.htm.*

INFORMATION FOR THE PETITIONER

This part of the information sheet is written for the petitioner—the party asking for the writ. It explains some of the rules and procedures relating to asking for a writ. The information may also be helpful to a real party in interest. There is more information for a real party in interest starting on page 10 of this information sheet.

10 Who can ask for a writ?

Only a party in the trial court proceeding—the plaintiff or defendant in a civil case or the defendant or prosecuting agency in a misdemeanor or infraction case—can ask for a writ challenging a ruling on a motion to disqualify a judge (see California Code of Civil Procedure section 170.3(d)). Parties are also usually the only ones that ask for writs challenging other kinds of trial court rulings. However, in most cases, a person who was not a party does have the legal right to ask for a writ if that person has a "beneficial interest" in the trial court's ruling. A "beneficial interest" means that the person has a specific right or interest affected by the ruling that goes beyond the general rights or interests the public may have in the ruling.

11 How do I ask for a writ?

To ask for a writ you must serve and file a petition for a writ (see below for an explanation of how to "serve and file" a petition). A petition is a formal request that the appellate division issue a writ. A petition for a writ explains to the appellate division what happened in the trial court, what legal error you (the petitioner) believe the trial court made, why you have no other adequate remedy at law, and what order you are requesting the appellate division to make.

12 How do I prepare a writ petition?

If you are represented by a lawyer, your lawyer will prepare your petition for a writ. If you are not represented by a lawyer, you must use *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151) to prepare your petition. You can get form APP-151 at any courthouse or county law library or online at *www.courts.ca.gov/forms.* This form asks you to fill in the information that needs to be in a writ petition.

a. Description of your interest in the trial court's ruling

Your petition needs to tell the appellate division why you have a right to ask for a writ in the case. As discussed above, usually only a person who was a party in the trial court case—the plaintiff or defendant in a civil case or the defendant or prosecuting agency in a misdemeanor or infraction case—asks for a writ challenging a ruling in that case. If you were a party in the trial court case, say that in your petition. If you were not a party, you will need to describe what "beneficial interest" you have in the trial court's ruling. A "beneficial interest" means that you have a specific right or interest affected by the ruling that goes beyond the general rights or interests the public may have in the ruling. To show the appellate division that you have a beneficial interest in the ruling you want to challenge, you must describe how the ruling will affect you in a direct and negative way.

b. Description of the legal error you believe the trial court made

Your petition will need to tell the appellate division what legal error you believe the trial court made. Not every mistake a trial court might make can be addressed by a writ. You must show that the trial court made one of the following types of legal errors:

- The trial court has a legal duty to act but:
  - Refuses to act;
  - Has not done what the law says it must do; or

  - Has acted in a way the law says it does not have the power to act.

- The trial court has performed or says it is going to perform a judicial function (like deciding a person's rights under law in a particular case) in a way that the court does not have the legal power to do.

To show the appellate division that the trial court made one of these legal errors, you will need to:

- Show that the trial court has the legal duty or the power to act or not act in a particular way. You will need to tell the appellate division what legal authority—what constitutional provision, statute, rule, or published court decision—establishes the trial court's legal duty or power to act or not act in that way.
- Show the appellate division that the trial court has not acted in the way that this legal authority says the court is required to act. You will need to tell the appellate division exactly where in the record of what happened in the trial court it shows that the trial court did not act in the way it was required to.

c. Description of why you need the writ

One of the most important parts of your petition is explaining to the appellate division why you need the writ you have requested. Remember, the appellate division does not have to grant your petition just because the trial court made an error. You must convince the appellate division that it is important for it to issue the writ.

Your petition needs to show that a writ is the only way to fix the trial court's error. To convince the court you need the writ, you will need to show the appellate division that you have no way to fix the trial court's error other than through a writ (this is called having "no adequate remedy at law").

This will be hard if the trial court's ruling can be appealed. If the ruling you are challenging can be appealed, either immediately or as part of an appeal of the final judgment in your case, the appellate division will generally consider this appeal to be a good enough way to fix the trial court's ruling (an "adequate remedy"). To be able to explain to the appellate division why you do not have an adequate remedy at law, you will need to find out if the ruling you want to challenge can be appealed, either immediately or as part of an appeal of the final judgment.

Here are some trial court rulings that can be appealed. There are laws (statutes) that say that certain kinds of trial court rulings ("orders") can be appealed immediately. In limited civil cases, California Code of Civil Procedure section 904.2 lists orders that can be appealed immediately, including orders:

- Changing or refusing to change the place of trial (venue)
- Granting a motion to quash service of summons
- Granting a motion to stay or dismiss the action on the ground of inconvenient forum
- Granting a new trial
- Denying a motion for judgment notwithstanding the verdict
- Granting or dissolving an injunction or refusing to grant or dissolve an injunction
- Appointing a receiver
- Made after final judgment in the case

In misdemeanor and infraction cases, orders made after the final judgment that affect the substantial rights of the defendant can be appealed immediately (California Penal Code section 1466).

In misdemeanor cases, orders granting or denying a motion to suppress evidence can also be appealed immediately (California Penal Code section 1538.5(j)).

You can get copies of these statutes at any county law library or online at *leginfo.legislature.ca.gov/faces /codes.xhtml.* You should also check to see if there are published court decisions that indicate whether you can or must use an appeal or a writ petition to challenge the type of ruling you want to challenge in your case.

If the ruling can be appealed, you will need to show that an appeal will not fix the trial court's error. If the trial court ruling you want to challenge can be appealed, you will need to show the appellate division why that appeal is not good enough to fix the trial court's error. To do that, you will need to show the appellate division how you will be harmed by the trial court's error in a way that cannot be fixed by the appeal if the appellate division does not issue the writ (this is called "irreparable" injury or harm). For example, because of

the time it takes for an appeal, the harm you want to prevent may happen before an appeal can be finished.

d. Description of the order you want the appellate division to make

Your petition needs to describe what you are asking the appellate division to order the trial court to do or not do. Writ petitions usually ask that the trial court be ordered to cancel ("vacate") its ruling, issue a new ruling, or not take any steps to enforce its ruling.

If you want the appellate division to order the trial court not to do anything more until the appellate division decides whether to grant the writ you are requesting, you must ask for a "stay." If you want a stay, you should first ask the trial court for a stay. You should tell the appellate division whether you asked the trial court for a stay. If you did not ask the trial court for a stay, you should tell the appellate division why you did not do this.

If you ask the appellate division for a stay, make sure you also fill out the "Stay requested" box on the first page of the *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151).

e. Verifying the petition

Petitions for writs must be "verified." This means that either the petitioner or the petitioner's attorney must declare under penalty of perjury that the facts stated in the petition are true and correct, must sign the petition, and must indicate the date that the petition was signed. On the last page of the *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151), there is a place for you to verify your petition.

13 Is there anything else that I need to serve and file with my petition?

Yes. Along with the petition, you must serve and file a record of what happened in the trial court (see below for an explanation of how to serve and file the petition). Since the appellate division judges were not there in the trial court, a record of what happened must be sent to the appellate division for its review. The materials that make up this record are called "supporting documents."

What needs to be in the supporting documents. The supporting documents must include:

- A record of what was said in the trial court about the ruling that you are challenging (this is called the "oral proceedings") and
- Copies of certain important documents from the trial court.

Read below for more information about these two parts of the supporting documents.

Record of the oral proceedings. There are several ways a record of what was said in the trial court may be provided to the appellate division:

- **A transcript**—A transcript is a written record (often called the "verbatim" record) of the oral proceedings in the trial court. If a court reporter was in the trial court and made a record of the oral proceedings, you can have the court reporter prepare a transcript of those oral proceedings, called a "reporter's transcript," for the appellate division. If a reporter was not there, but the oral proceedings were officially recorded on approved electronic recording equipment, you can have a transcript prepared for the appellate division from the official electronic recording of these proceedings. You (the petitioner) must pay for preparing a transcript, unless the court orders otherwise.
- **A copy of an electronic recording**—If the oral proceedings were officially recorded on approved electronic recording equipment, the court has a local rule for the appellate division permitting this recording to be used as the record of the oral proceedings, and all the parties agree ("stipulate"), a copy of the official electronic recording itself can be used as the record of the oral proceedings instead of a transcript. You (the petitioner) must pay for preparing a copy of the official electronic recording, unless the court orders otherwise.
- **A summary**—If a transcript or official electronic recording of what was said in the trial court is not available, your petition must include a declaration (a statement signed by the petitioner under penalty of perjury) either:
  - Explaining why the transcript or official electronic recording is not available and providing a fair summary of the proceedings, including the petitioner's arguments and any statement by the court supporting its ruling; or

- Stating that the transcript or electronic recording has been ordered, the date it was ordered, and the date it is expected to be filed.

Copies of documents from the trial court. Copies of the following documents from the trial court must also be included in the supporting documents:

- The trial court ruling being challenged in the petition
- All documents and exhibits submitted to the trial court supporting and opposing the petitioner's position
- Any other documents or portions of documents submitted to the trial court that are necessary for a complete understanding of the case and of the ruling being challenged

What if I cannot get copies of the documents from the trial court because of an emergency? Rule 8.931 of the California Rules of Court provides that in extraordinary circumstances the petition may be filed without copies of the documents from the trial court. If the petition is filed without these documents, you must explain in your petition the urgency and the circumstances making the documents available.

Format of the supporting documents. Supporting documents must be put in the format required by rule 8.931 of the California Rules of Court. Among other things, there must be a tab for each document and an index listing the documents that are included. You should carefully read rule 8.931. You can get a copy of rule 8.931 at any courthouse or county law library or online at *www.courts.ca.gov/rules.*

(14) Is there a deadline to ask for a writ?

Yes. For statutory writs, the statute usually sets the deadline for serving and filing the petition. Here is a list of the deadlines for filing petitions for some of the most common statutory writs (you can get copies of these statutes at any county law library or online at *leginfo.legislature.ca.gov/faces/codes.xhtml*).

Statutory Writ	Filing Deadline
Writ challenging a ruling on a motion to disqualify a judge (see California Code of Civil Procedure section 170.3(d))	10 days after notice to the parties of the decision
Writ challenging the denial of a motion for summary judgment (see California Code of Civil Procedure section 437c(m)(l))	20 days after service of written notice of entry of the order
Writ challenging a ruling on a motion for summary adjudication of issues (see California Code of Civil Procedure section 437c(m)(l))	20 days after service of written notice of entry of the order

For common law writs or statutory writs where the statute does not set a deadline, you should file the petition as soon as possible and not later than 30 days after the court makes the ruling that you are challenging in the petition. While there is no absolute deadline for filing these petitions, writ petitions are usually used when it is urgent that the trial court's error be fixed. Remember, the court is not required to grant your petition even if the trial court made an error. If you delay in filing your petition, it may make the appellate division think that it is not really urgent that the trial court's error be fixed and the appellate division may deny your petition. If there are extraordinary circumstances that delayed the filing of your petition, you should explain these circumstances to the appellate division in your petition.

(15) How do I "serve" my petition?

Rule 8.931(d) requires that the petition and one set of supporting documents be served on any named real party in interest and that just the petition be served on the respondent trial court. "Serving" a petition on a party means that you must:

- Have somebody over 18 years old mail, deliver, or electronically send ("serve") the petition to the real party in interest and the respondent court in the way required by law. If the petition is mailed or

personally delivered, it must be by someone who is not a party to the case—so not you.

- Make a record that the petition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) or *Proof of Electronic Service (Appellate Division)* (form APP-109E) can be used to make this record. The proof of service must show who served the petition, who was served with the petition, how the petition was served (by mail, in person, or electronically), and the date the petition was served.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*

16 How do I file my petition?

To file a petition for a writ in the appellate division, you must bring or mail the original petition, including the supporting documents, and the proof of service to the clerk for the appellate division of the superior court that made the ruling you are challenging. If the superior court has more than one courthouse location, you should call the clerk at the courthouse where the ruling you are challenging was made to ask where to file your petition.

You should make a copy of all the documents you are planning to file for your own records before you file them with the court. It is a good idea to bring or mail an extra copy of the petition to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

17 Do I have to pay to file a petition?

There is no fee to file a petition for a writ in a misdemeanor or infraction case, but there is a fee to file a petition for a writ in a limited civil case. You should ask the clerk for the appellate division where you are filing the petition what this fee is. If you cannot afford to pay this filing fee, you can ask the court to waive this fee. To do this, you must fill out a *Request to Waive Court Fees* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www.courts.ca.gov/forms.* You can file this application either before you file your petition or with your petition. The court will review this application and decide whether to waive the filing fee.

18 What happens after I file my petition?

Within 10 days after you serve and file your petition, the respondent or any real party in interest can serve and file preliminary opposition to the petition. Within 10 days after an opposition is filed, you may serve and file a reply to that opposition.

The appellate division does not have to wait for an opposition or reply before it can act on a petition for a writ, however. Without waiting, the appellate division can:

a. Issue a stay

b. Summarily deny the petition

c. Issue an alternative writ or order to show cause

d. Notify the parties that it is considering issuing a preemptory writ in the first instance

e. Issue a peremptory writ in the first instance if such relief was expressly requested in the petition.

Read below for more information about these options.

a. Stay of trial court proceedings

A stay is an order from the appellate division telling the trial court not to do anything more until the appellate division decides whether to grant your petition. A stay puts the trial court proceedings on temporary hold.

b. Summary denial

A "summary denial" means that the appellate division denies the petition without deciding whether the trial court made the legal error claimed by the petitioner or whether the writ requested by the petitioner should be issued based on that error. Remember, even if the trial court made a legal error, the appellate division can decide not to consider that error now but to wait and consider the error as part of any appeal from the final judgment. No reasons need to be given for a summary denial. Most petitions for writs are denied in this way.

c. Alternative writ or order to show cause

An "alternative writ" is an order telling the trial court either to do what the petitioner has requested in the petition (or some modified form of what the petitioner requested) or to show the appellate division why the trial court should not be ordered to do what the petitioner requested. An "order to show cause" is similar; it is an order telling the trial court to show the appellate division why the trial court should not be ordered to do what the petitioner requested in the petition (or some modified form of what the petitioner requested). The appellate division will issue an alternative writ or an order to show cause only if the petitioner has shown that the petitioner has no adequate remedy at law and the appellate division has decided that the petitioner may have shown that the trial court made a legal error that needs to be fixed.

If the appellate division issues an alternative writ and the trial court does what the petitioner requested (or a modified form of what the petitioner requested as ordered by the appellate division), then no further action by the appellate division is needed and the appellate division may dismiss the petition.

If the trial court does not comply with an alternative writ, however, or if the appellate division issues an order to show cause, then the respondent court or a real party in interest can file a response to the appellate division's order (called a "return") that explains why the trial court should not be ordered to do what the petitioner requested. The return must be served and filed within the time specified by the appellate division or, if no time is specified, within 30 days from the date the alternative writ or order to show cause was issued. The petitioner will then have an opportunity to serve and file a reply within 15 days after the return is filed. The appellate division may set the matter for oral argument. When all the papers have been served and filed (or the time to serve and file them has passed) and oral argument is completed, the appellate division will decide the case.

d. Peremptory writ in the first instance

A "peremptory writ in the first instance" is an order telling the trial court to do what the petitioner has requested (or some modified form of what the petitioner requested) that is issued without the appellate division first issuing an alternative writ or order to show cause. It is very rare for the appellate division to issue a peremptory writ in the first instance, and it will not do so unless the respondent and real parties in interest have received notice that the court might do so, either through the petitioner expressly asking for such relief in the petition, or by the court first notifying the parties and giving the respondent court and any real party in interest a chance to file an opposition.

The respondent court or a real party in interest can file a response to the appellate division's notice (called an "opposition") that explains why the trial court should not be ordered to do what the petitioner has requested. The opposition must be served and filed within the time specified by the appellate division or, if no time is specified, within 30 days from the date the notice was issued. The petitioner will then have a chance to serve and file a reply within 15 days after the opposition is filed. The appellate division may then set the matter for oral argument. When all the papers have been served and filed (or the time to serve and file them has passed) and oral argument is completed, the appellate division will decide the case.

19 What should I do if the court denies my petition?

If the court denies your petition, it may be helpful to talk to a lawyer. In a limited civil or infraction case, you must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding an attorney on the California Courts Online Self-Help Center at *www.courts.ca.gov /selfhelp-lowcosthelp.htm.*

INFORMATION FOR A REAL PARTY IN INTEREST

This part of the information sheet is written for a real party in interest—a party from the trial court case other than the petitioner who will be affected by a ruling on a petition for a writ. It explains some of the rules and procedures relating to responding to a petition for a writ. The information may also be helpful to the petitioner.

(20) I have received a copy of a petition for a writ in a case in which I am a party. Do I need to do anything?

You do not *have* to do anything. The California Rules of Court give you the right to file a preliminary opposition to a petition for a writ within 10 days after the petition is served and filed, but you are not required to do this. The appellate division can take certain actions without waiting for any opposition, including:

- Summarily denying the petition;
- Issuing an alternative writ or order to show cause;
- Notifying the parties that it is considering issuing a peremptory writ in the first instance; or
- Issuing a peremptory writ in the first instance if such relief was expressly requested in the petition.

Read the response to question (18) for more information about these options.

Most petitions for writs are summarily denied, often within a few days after they are filed. If you have not already received something from the appellate division saying what action it is taking on the petition, it is a good idea to call the appellate division to see if the petition has been denied before you decide whether and how to respond.

This would be a good time to talk to a lawyer. You do not *have* to have a lawyer; you are allowed to represent yourself in a writ proceeding in the appellate division. But writ proceedings can be very complicated and you will have to follow the same rules that lawyers have to follow. If you have any questions about writ proceedings or about whether and how you should respond to a writ petition, you should talk to a lawyer. In a limited civil case or infraction case, you must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding an attorney on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-lowcosthelp.htm.*

If the petition has not already been summarily denied, you may, but are not required to, serve and file a preliminary opposition to the petition within 10 days after the petition was served and filed. In general, it is a good idea to consider filing a preliminary opposition if the petition misstates the facts or if you think the petition shows that the trial court made a legal error that may need to be fixed. However, the appellate division will seldom grant a writ without first issuing an alternative writ, an order to show cause, or a notice that it is considering issuing a peremptory writ. In all these circumstances, you will get notice from the court and have a chance to file a response. Note that the appellate division may issue a peremptory writ without notice if the petitioner expressly asked the court, in the petition, to issue a peremptory writ in the first instance. If the petitioner did that, you may want to consider whether to file a preliminary opposition, to explain why you believe the small claims court made no legal error and why the petitioner is not entitled to a writ.

If you decide to file a preliminary opposition, you must serve that preliminary opposition on all the other parties to the writ proceeding. "Serving and filing" an opposition means that you must:

- Have somebody over 18 years old mail, deliver, or electronically send ("serve") the preliminary opposition to the other parties in the way required by law. If the preliminary opposition is mailed or personally delivered, it must be by someone who is not a party to the case—so not you.
- Make a record that the preliminary opposition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) or *Proof of Electronic Service (Appellate Division)* (form APP-109E) can be used to make this record. The proof of service must show who served the preliminary opposition, who was served with the preliminary opposition, how the preliminary opposition was served (by mail, in person, or electronically), and the date the preliminary opposition was served.
- File the original preliminary opposition and the proof of service with the appellate division. You should make a copy of the preliminary opposition for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the preliminary opposition to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California

Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*

(21) I have received a copy of an alternative writ or an order to show cause issued by the appellate division. Do I need to do anything?

Yes. Unless the trial court has already done what the alternative writ told it to do, you should serve and file a response called a "return."

As explained above, the appellate division will issue an alternative writ or an order to show cause if the appellate division has decided that the petitioner may have shown that the trial court made a legal error that needs to be fixed. An "alternative writ" is an order telling the trial court either to do what the petitioner has requested in the petition (or some modified form of what the petitioner requested) or to show the appellate division why the trial court should not be ordered to do what the petitioner requested. An "order to show cause" is similar; it is an order telling the trial court to show the appellate division why the trial court should not be ordered to do what the petitioner requested in the petition (or some modified form of what the petitioner requested).

If the appellate division issues an alternative writ and the trial court does what the petitioner requested (or a modified form of what the petitioner requested as ordered by the appellate division), then no further action by the appellate division is needed and the appellate division may dismiss the petition. If the trial court does not comply with an alternative writ, however, or if the appellate division issues an order to show cause, then the respondent court or the real party in interest may serve and file a response to the appellate division's order, called a "return."

A return is your argument to the appellate division about why the trial court should not be ordered to do what the petitioner has requested. If you are represented by a lawyer in the writ proceeding, your lawyer will prepare your return. If you are not represented by a lawyer, you will need to prepare your own return. A return is usually a legal response called an "answer." An answer is used to admit or deny the facts alleged in the petition, to add to or correct the facts, and to explain any legal defenses to the legal arguments made by the petitioner. You should read California Code of Civil Procedure sections 430.10–430.80 for more information about answers. You can get copies of these statutes at any county law library or online at *leginfo.legislature.ca.gov/faces/codes.xhtml*. A return can also include additional supporting documents not already filed by the petitioner.

If you do not file a return when the appellate division issues an alternative writ or order to show cause, it does not mean that the appellate division is required to issue the writ requested by the petitioner. However, the appellate division will treat the facts stated by the petitioner in the petition as true, which makes it more likely the appellate division will issue the requested writ.

Unless the appellate division sets a different filing deadline in its alternative writ or order to show cause, you must serve and file your return within 30 days after the appellate division issues the alternative writ or order to show cause. The return must be served on all the other parties to the writ proceeding. "Serving and filing" the return means that you must:

- Have somebody over 18 years old mail, deliver, or electronically send ("serve") the return to the other parties in the way required by law. If the return is mailed or personally delivered, it must be by someone who is not a party to the case—so not you.
- Make a record that the return has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) or *Proof of Electronic Service (Appellate Division)* (form APP-109E) can be used to make this record. The proof of service must show who served the return, who was served with the return, how the return was served (by mail, in person, or electronically), and the date the return was served.
- File the original return and the proof of service with the appellate division. You should make a copy of the return you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the return to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California

Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*

22 I have received a copy of a notice from the appellate division indicating it is considering issuing a peremptory writ in the first instance. Do I need to do anything?

Yes. You should serve and file a response called an "opposition."

As explained in the answer to question 18, a "peremptory writ in the first instance" is an order telling the trial court to do what the petitioner has requested (or some form of what the petitioner requested as ordered by the appellate division) that is issued without the appellate division first issuing an alternative writ or order to show cause. The appellate division will not issue a peremptory writ in the first instance without first giving the parties notice and a chance to file an opposition. However, when the appellate division issues such a notice, it means that the appellate division is strongly considering granting the writ requested by the petitioner.

An opposition is your argument to the appellate division about why the trial court should not be ordered to do what the petitioner has requested. If you are represented by a lawyer in the writ proceeding, your lawyer will prepare your opposition. If you are not represented by a lawyer, you will need to prepare your own opposition. Like a return discussed above, an opposition is usually a legal response called an "answer." An answer is used to admit or deny the facts alleged in the petition, to add to or correct the facts, and to explain any legal defenses to the legal arguments made by the petitioner. You should read California Code of Civil Procedure sections 430.10–430.80 for more information about answers. You can get copies of these statutes at any county law library or online at *leginfo.legislature.ca.gov/faces/codes.xhtml.*

Unless the appellate division sets a different deadline in its notice that it is considering issuing a peremptory writ, you must serve and file your opposition within 30 days after the appellate division issues the notice. The opposition must be served on all the other parties to the writ proceeding. "Serving and filing" the opposition means that you must:

- Have somebody over 18 years old mail, deliver, or electronically send ("serve") the opposition to the other parties in the way required by law. If the opposition is mailed or personally delivered, it must be by someone who is not a party to the case—so not you.
- Make a record that the opposition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) or *Proof of Electronic Service (Appellate Division)* (form APP-109E) can be used to make this record. The proof of service must show who served the opposition, who was served with the opposition, how the opposition was served (by mail, in person, or electronically), and the date the opposition was served.
- File the original opposition and the proof of service with the appellate division. You should make a copy of the opposition you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the opposition to the clerk when you file your original, and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*

23 What happens after I serve and file my return or opposition?

After you file a return or opposition, the petitioner has 15 days to serve and file a reply. The appellate division may also set the matter for oral argument. When all the papers have been filed (or the time to file them has passed) and oral argument is completed, the appellate division will decide the case.

CR-135 Proposed Statement on Appeal (Misdemeanor)

Clerk stamps date here when form is filed.

DRAFT

03-10-2020

Not approved by the Judicial Council

Instructions

- This form is only for preparing a proposed statement on appeal in an **misdemeanor** case.
- Before you fill out this form, read *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO) to know your rights and responsibilities. You can get form CR-131-INFO at any courthouse or county law library or online at *www.courts.ca.gov/form*s.
- This form can be attached to your *Notice Regarding Record on Appeal (Misdemeanor)* (form CR-134). If it is not attached to that notice, this form must be filed **no later than 20 days after you file that notice. If you have chosen to prepare a statement on appeal and do not file this form on time, the court may dismiss your appeal.**
- Fill out this form and make a copy of the completed form for your records and for each of the other parties.
- Serve a copy of the completed form on each of the other parties and keep proof of this service. You can get information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*
- Take or mail the completed form and proof of service on each of the other parties to the clerk's office for the same court that issued the judgment or order you are appealing. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:
The People of the State of California
v. _____

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

a. Appellant (the party who is filing this appeal):

Name: _____

Street address: _____ *Street* _____ *City* _____ *State* _____ *Zip*

Mailing address *(if different):* _____ *Street* _____ *City* _____ *State* _____ *Zip*

Phone: _____ Email: _____

b. Appellant's lawyer *(skip this if the appellant is filling out this form):*

The lawyer filling out this form *(check (1) or (2)):*

(1) ☐ was the appellant's lawyer in the trial court. (2) ☐ is the appellant's lawyer for this appeal.

Name: _____ State Bar number: _____

Street address: _____ *Street* _____ *City* _____ *State* _____ *Zip*

Mailing address *(if different):* _____ *Street* _____ *City* _____ *State* _____ *Zip*

Phone: _____ Email: _____

Fax: _____

Information About Your Appeal

(2) On *(fill in the date):* _____, I/my client filed a notice of appeal in the trial court case identified in the box on page 1 of this form.

(3) On *(fill in the date):* _____, I/my client filed a *Notice Regarding Record on Appeal,* choosing to use a statement on appeal as the record of what was said in this case.

Proposed Statement

(4) Reasons for Your Appeal

Remember, in an appeal, the appellate division can only review a case for whether certain kinds of legal errors were made in the trial court proceedings (read form CR-131-INFO to learn about these legal errors):

- *There was not "substantial evidence" supporting the judgment, order, or other decision you are appealing.*
- *A "prejudicial error" was made during the trial court proceedings.*

The appellate division:

- *Cannot retry your case or take new evidence.*
- *Cannot consider whether witnesses were telling the truth or lying.*
- *Cannot consider whether there was more or stronger evidence supporting your position than there was supporting the trial court's decision.*

(Check all that apply and describe in detail the legal error or errors you believe were made that are the reason for this appeal.)

a. ☐ There was not substantial evidence that supported the judgment, order, or other decision that I/my client indicated in the notice of appeal that is being appealed in this case. *(Explain why you think the judgment, order, or other decision was not supported by substantial evidence.):* _____

b. ☐ The following error or errors about either the law or court procedure was/were made that caused substantial harm to me/my client. *(Describe each error and how you were/your client was harmed by that error.)*

(1) *Describe the error:* _____

Describe how this error harmed you/your client: _____

4 b. (2) *Describe the error:* _____

Describe how this error harmed you/your client: _____

(3) *Describe the error:* _____

Describe how this error harmed you/your client: _____

☐ *Check here if you need more space to describe these or other errors and attach a separate page or pages describing the errors. At the top of each page, write "CR-135, item 4."*

5 The Charges Against Me/My Client

a. The charges against me/my client were *(list all of the charges indicated on the citation or complaint filed with the court by the prosecutor):* _____

b. I/My client *(check (1), (2), or (3))*

(1) ☐ pleaded not guilty to all of the charges.

(2) ☐ pleaded guilty to only the following charges: _____

(3) ☐ pleaded guilty to all of these charges.

6 Summary of Any Motions and the Court's Order on the Motion

a. Were any motions (requests for the trial court to issue an order) made in this case that are relevant to the reasons you gave in 4 for this appeal?

☐ Yes *(fill out b)* ☐ No *(skip to item 7)*

b. *In the spaces below, describe any motions (requests for orders) that were made in the trial court that are relevant to the reasons you gave in 4 for this appeal. Write a complete and accurate summary of what was said at any hearings on these motions and indicate how the trial court ruled on these motions:*

(1) *Describe the first motion:* _____

The motion was filed by the ☐ prosecutor ☐ defendant.

There ☐ was ☐ was not a hearing on this motion.

If there was a hearing on this motion, write a complete and accurate summary of what was said at this hearing: _____

The trial court ☐ granted this motion ☐ did not grant this motion.

☐ Other *(describe any other action the trial court took concerning this motion):* _____

☐ *Check here if you need more space to describe this motion and attach a separate page or pages describing it. At the top of each page, write "CR-135, Item 6b(1)."*

(2) *Describe the second motion:* _____

The motion was filed by the ☐ prosecutor ☐ defendant.

There ☐ was ☐ was not a hearing on this motion.

If there was a hearing on this motion, write a complete and accurate summary of what was said at this hearing: _____

The trial court ☐ granted this motion ☐ did not grant this motion.

☐ Other *(describe any other action the trial court took concerning this motion):* _____

☐ *Check here if you need more space to describe this motion and attach a separate page or pages describing this motion. At the top of each page, write "CR-135, item 6b(2)."*

6 b. (3) ☐ *Check here if any other motions were filed that are relevant to the reasons you gave in 4 for this appeal, and attach a separate page or pages describing each motion, identifying who made the motion and whether there was a hearing on the motion, summarizing what was said at the hearing on the motion, and indicating whether the trial court granted or denied the motion. At the top of each page, write CR-135, item 6b(3)."*

7 Summary of Testimony and Other Evidence

a. Was there a trial in your case?

☐ No *(skip items b, c, d, e, and f, and go to item 8)*

☐ Yes *(complete items b, c, d, e, and f)*

(1) ☐ Jury trial

(2) ☐ Trial by judge only

b. Did you/your client testify at the trial?

☐ No

☐ Yes *(Write a complete and accurate summary of the testimony you/your client gave that is relevant to the reasons you gave in 4 for this appeal. Include only what you actually said; do not comment on or give your opinion about what you said. Please indicate whether any objections were made concerning your/your client's testimony or any exhibits you/your client asked to present and whether these objections were sustained.):* _____

_____

_____

_____

_____

☐ *Check here if you need more space to summarize your/your client's testimony and attach a separate page or pages summarizing this testimony. At the top of each page, write "CR-135, Item 7b."*

c. Did an officer from the police department, sheriff's office, or other government agency that charged you/your client testify at the trial? *(Check one):*

☐ No

☐ Yes *(complete (1) and (2)):*

(1) The name of the officer who testified is *(fill in the officer's name):* _____

(2) This officer testified that *(Write a complete and accurate summary of the officer's testimony that is relevant to the reasons you gave in 4 for this appeal. Include only what the officer actually said; do not comment on or give your opinion about what the officer said. Please indicate whether any objections were made concerning the officer's testimony or any exhibits the officer asked to present and whether these objections were sustained.):* _____

_____

_____

_____

☐ *Check here if you need more space to summarize the officer's testimony and attach a separate page or pages summarizing this testimony. At the top of each page, write "CR-135, Item 7c."*

(7) d. ☐ Were there any other witnesses at the trial whose testimony is relevant to the reasons you gave in (4) for this appeal?

☐ No

☐ Yes *(fill out (1)–(4)):*

(1) The witness's name is *(fill in the witness's name):* _____

(2) The witness ☐ was ☐ was not an officer from the police department, sheriff's office, or other government agency that charged me/my client.

(3) The witness testified on behalf of ☐ me/my client ☐ the prosecution.

(4) This witness testified that *(Write a complete and accurate summary of the witness's testimony that is relevant to the reasons you gave in (4) for this appeal. Include only what the witness actually said; do not comment on or give your opinion about what the witness said. Please indicate whether any objections were made concerning the witness's testimony or any exhibits the witness asked to present and whether these objections were sustained.):* _____

☐ *Check here if you need more space to summarize this witness's testimony and attach a separate page or pages summarizing this testimony. At the top of each page, write "CR-135, Item 7d."*

e. ☐ Check here if any other witnesses gave testimony at the trial that is relevant to the reasons you gave in (4) for this appeal. Attach a separate page or pages identifying each witness, whether the witness testified on your/your client's behalf or the prosecution's behalf, summarizing the witness's testimony that is relevant to the reasons you gave in (4) for this appeal, and indicating whether any objections were made concerning the witness's testimony or any exhibits the witness asked to present and whether these objections were sustained. At the top of each page, write "CR-135, item 7e."

f. Summarize the evidence, other than the testimony, that was given during the trial that is relevant to the reasons you gave in (3) for this appeal *(Write a complete and accurate summary of the evidence given by both you and the respondent. Include only the evidence; do not comment or give your opinion about this evidence.):*

☐ *Check here if you need more space to summarize the evidence and attach a separate page or pages summarizing this evidence. At the top of each page, write "CR-135, Item 7f."*

8 The Trial Court's Findings

a. ☐ I/My client was found guilty of the following offenses *(list all of the offenses for which you were/your client was found guilty):* _____

b. ☐ I/My client was found not guilty of the following offenses *(list all of the offenses for which you were/your client was found not guilty):* _____

9 The Sentence

The trial court imposed the following fine or other punishment on me/my client *(check all that apply and fill in any required information):*

a. ☐ Jail time *(fill in the amount of time you are/your client is required to spend in jail):*

b. ☐ A fine (including penalty and other assessments) *(fill in the amount of the fine)*: $ _____

c. ☐ Restitution *(fill in the amount of the restitution)*: $ _____

d. ☐ Probation *(fill in the amount of time you are/your client is required to be on probation):*

e. ☐ Other punishment *(describe any other punishment that the trial court imposed in this case):*

REMINDER: You must serve and file this form no later than 20 days after you file your notice regarding the oral proceedings. If you do not file this form on time, the court may dismiss your appeal.

Date: _____

_____ ▶ _____

Type or print name *Signature of appellant or attorney*

CR-143 Proposed Statement on Appeal (Infraction)

Clerk stamps date here when form is filed.

DRAFT

03-10-2020

Not approved by the Judicial Council

Instructions

- This form is only for preparing a statement on appeal in an **infraction** case, such as a case about a traffic ticket.
- Before you fill out this form, read *Information on Appeal Procedures for Infractions* (form CR-141-INFO) to know your rights and responsibilities. You can get form CR-141-INFO at any courthouse or county law library or online at *www.courts.ca.gov/form*s.
- This form can be filed at the same time as your notice of appeal. If it is not filed with your notice of appeal, this form must be filed **no later than 20 days after you file your notice of appeal. If you have chosen to use a statement on appeal and do not file this form on time, the court may dismiss your appeal.**
- Fill out this form and make a copy of the completed form for your records and for each of the other parties.
- You must serve a copy of the completed form on each of the other parties in the case and keep proof of this service. You can get information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*
- Take or mail the completed form and proof of service on each of the other parties to the clerk's office for the same trial court that issued the judgment or order you are appealing. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:
The People of the State of California v. _____

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

a. Appellant (the party who is filing this appeal):

Name: _____

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different):* _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ Email: _____

b. Appellant's lawyer *(skip this if the appellant is filling out this form):*

The lawyer filling out this form *(check (1) or (2)):*

(1) ☐ was the appellant's lawyer in the trial court. (2) ☐ is the appellant's lawyer for this appeal.

Name: _____ State Bar number: _____

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different):* _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ Email: _____

Fax: _____

Information About Your Appeal

(2) On *(fill in the date):* _____, I/my client filed a *Notice of Appeal and Record on Appeal (Infraction),* choosing to use a statement on appeal as the record of what was said in this case.

Proposed Statement

(3) Reasons for Your Appeal

Remember, in an appeal, the appellate division can only review a case for whether certain kinds of legal errors were made in the trial court proceedings (read form CR-141-INFO to learn about these legal errors):

- *There was not "substantial evidence" supporting the judgment, order, or other decision you are appealing.*
- *A "prejudicial error" was made during the trial court proceedings.*

The appellate division:

- *Cannot retry your case or take new evidence.*
- *Cannot consider whether witnesses were telling the truth or lying.*
- *Cannot consider whether there was more or stronger evidence supporting your position than there was supporting the trial court's decision.*

(Check all that apply and describe the legal error or errors you believe were made that are the reason for this appeal.)

a. ☐ There was not substantial evidence that supported the judgment, order, or other decision that I/my client indicated in the notice of appeal is being appealed in this case. *(Explain why you think the judgment, order, or other decision was not supported by substantial evidence):* _____

b. ☐ The following error or errors about either the law or court procedure was/were made that caused substantial harm to me/my client. *(Describe each error and how you were/your client was harmed by that error.)*

(1) *Describe the error:* _____

Describe how this error harmed you/your client: _____

(2) *Describe the error:* _____

Describe how this error harmed you/your client: _____

3 b. (3) *Describe the error:* _____

_____

_____

_____

Describe how this error harmed you/your client: _____

_____

_____

_____

☐ *Check here if you need more space to describe these or other errors and attach a separate page or pages describing the errors. At the top of each page, write "CR-143, item 3."*

4 The Charges Against Me/My Client

a. If the charges against you/your client are based on a citation (ticket) you received, provide the citation number *(fill in the citation number from your ticket):* _____

b. The charges against me/my client were *(list all of the charges indicated on the citation or complaint filed by the prosecutor with the court):* _____

_____

_____

c. I/My client *(check (1), (2), or (3))*

(1) ☐ pleaded not guilty to all of the charges.

(2) ☐ pleaded guilty to only the following charges: _____

_____

(3) ☐ pleaded guilty to all of the charges.

5 Summary of Any Motions and the Court's Order on the Motion

a. Were any motions (requests for the trial court to issue an order) made in this case that are relevant to the reasons you gave in 3 for this appeal?

☐ Yes *(fill out b)* ☐ No *(skip to item 6)*

b. *In the spaces below, describe any motions (requests for orders) that were made in the trial court that are relevant to the reasons you gave in 3 for this appeal. Write a complete and accurate summary of what was said at any hearings on these motions and indicate how the trial court ruled on these motions:*

(1) ☐ I/My client made the following requests (motions) in the trial court *(check all that apply)*:

(a) ☐ To submit a photograph or photographs as evidence *(describe the photographs):*

_____

_____

There ☐ was ☐ was not a hearing on this motion.

5 b. (1) (a) *If there was a hearing on this motion, write a complete and accurate summary of what was said at this hearing:* _____

The court ☐ did ☐ did not accept the photographs.

☐ *Check here if you need more space to describe the motion and attach a separate page or pages describing it. At the top of each page write "CR-143, item 5b(1)(a)."*

(b) ☐ To submit a map or maps as evidence (*describe the maps*): _____

There ☐ was ☐ was not a hearing on this motion.

If there was a hearing on this motion, write a complete and accurate summary of what was said at this hearing: _____

The court ☐ did ☐ did not accept the maps.

☐ *Check here if you need more space to describe the motion and attach a separate page or pages describing it. At the top of each page write "CR-143, item 5b(1)(b)."*

(c) ☐ To submit other material as evidence *(describe what you asked to submit as evidence):*

There ☐ was ☐ was not a hearing on this motion.

If there was a hearing on this motion, write a complete and accurate summary of what was said at this hearing: _____

The court ☐ did ☐ did not accept this material.

☐ *Check here if you need more space to describe the motion and attach a separate page or pages describing it. At the top of each page write "CR-143, item 5b(1)(c)."*

(d) ☐ Other *(describe any other request you made in the trial court and whether the court granted or denied this request):* _____

☐ *Check here if you need more space to describe the motion and attach a separate page or pages describing it. At the top of each page write "CR-143, item 5b(1)(d)."*

5 b.(2) ☐ The prosecutor made the following request (motion) in the trial court *(describe any request the prosecutor made in the trial court and whether the court granted or denied this request):*

_____

_____

_____

There ☐ was ☐ was not a hearing on this motion.

If there was a hearing on this motion, write a complete and accurate summary of what was said at this hearing: _____

_____

_____

The court ☐ did ☐ did not grant this motion.

☐ Other *(describe any other action the trial court took on this motion)*: _____

_____

_____

☐ *Check here if you need more space to describe the motion and attach a separate page or pages describing it. At the top of each page write "CR-143, item 5b(2)."*

(3) ☐ Check here if other motions were filed that are relevant to the reasons you gave in 3 for this appeal, and attach a separate page or pages describing these other motions, identifying who made them and whether there was a hearing on the motion, summarizing what was said at the hearing on the motion, and indicating whether the trial court granted or denied the motion. At the top of each page, write CR-143, item 5b(3).

6 Summary of Testimony and Other Evidence

a. Was there a trial in your case?

No ☐ *(skip items b, c, d, e, and f, and go to item 7)*

Yes ☐ *(complete items b, c, d, e, and f)*

b. Did you/your client testify at the trial?

☐ No

☐ Yes *(Write a complete and accurate summary of the testimony you/your client gave that is relevant to the reasons you gave in 3 for this appeal. Include only what you actually said; do not comment on or give your opinion about what you said. Please indicate whether any objections were made concerning your/your client's testimony or any exhibits you/your client asked to present and whether these objections were sustained.):* _____

_____

_____

_____

_____

☐ *Check here if you need more space to summarize your/your client's testimony and attach a separate page or pages summarizing this testimony. At the top of each page, write "CR-143, Item 6b."*

6 c. Did an officer from the police department, sheriff's office, or other government agency that charged you/your client testify at the trial? *(Check one):*

☐ No

☐ Yes *(complete (1) and (2)):*

(1) The name of the officer who testified is *(fill in the officer's name):* _____

(2) This officer testified that *(Write a complete and accurate summary of the officer's testimony that is relevant to the reasons you gave in* **3** *for this appeal. Include only what the officer actually said; do not comment on or give your opinion about what the officer said. Please indicate whether any objections were made concerning the officer's testimony or any exhibits the officer asked to present and whether these objections were sustained.):* _____

☐ *Check here if you need more space to summarize the officer's testimony and attach a separate page or pages summarizing this testimony. At the top of each page, write "CR-143, Item 6c."*

d. ☐ Were there any other witnesses at the trial?

☐ No

☐ Yes *(fill out (1)–(4)):*

(1) The witness's name is *(fill in the witness's name):*

_____

(2) The witness ☐ was ☐ was not an officer from the government agency that charged me/my client.

(3) The witness testified on behalf of ☐ me/my client ☐ the prosecution.

(4) This witness testified that *(Write a complete and accurate summary of the witness's testimony that is relevant to the reasons you gave in* **3** *for this appeal. Include only what the witness actually said; do not comment on or give your opinion about what the witness said. Please indicate whether any objections were made concerning the witness's testimony or any exhibits the witness asked to present and whether these objections were sustained.):* _____

e. ☐ Check here if other witnesses gave testimony at the trial that is relevant to the reasons you gave in **3** for this appeal. Attach a separate page or pages identifying each other witness that testified at your trial, stating whether that witness testified on your/your client's behalf or the prosecution's behalf, summarizing the witness's testimony that is relevant to the reasons you gave in **3** for this appeal, and indicating whether any objections were made concerning the witness's testimony or any exhibits the witness asked to present and whether these objections were sustained. At the top of each page, write "CR-143, item 6e."

6 f. Summarize the evidence, other than the testimony, that was given during the trial that is relevant to the reasons you gave in 3 for this appeal *(Write a complete and accurate summary of the evidence given by both you and the respondent. Include only the evidence; do not comment or give your opinion about this evidence.):*

_____

_____

_____

_____

☐ *Check here if you need more space to summarize the evidence and attach a separate page or pages summarizing this evidence. At the top of each page, write "CR-143, Item 6f."*

7 The Trial Court's Findings

a. I/My client was found guilty of the following offenses *(list all of the offenses for which you were/your client was found guilty):* _____

_____

_____

b. I/My client was found not guilty of the following offenses *(list all of the offenses for which you were/your client was found not guilty):* _____

_____

_____

c. The following charges were dismissed after proof of correction was shown to the judge *(list all of the charges that were dismissed):* _____

_____

_____

8 The Sentence

The trial court imposed the following fine or other punishment on me/my client *(check all that apply and fill in any required information):*

a. ☐ A fine of *(fill in the amount of the fine)*: $ _____

b. ☐ Traffic school

c. ☐ Community service *(fill in the number of hours)*: _____

d. ☐ Other punishment *(describe any other punishment that the court imposed in this case):*

_____

_____

_____

REMINDER: You must serve and file this form no later than 20 days after you file your notice of appeal. If you do not file this form on time, the court may dismiss your appeal.

Date: _____

_____ ▶ _____

Type or print name *Signature of appellant or attorney*

COURT OF APPEAL APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER:
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	SUPERIOR COURT CASE NUMBER: ***FOR COURT USE ONLY***
APPELLANT: RESPONDENT:	**DRAFT** **03-10-20** **Not approved by the Judicial Council**
RECOMMENDATION FOR APPOINTMENT OF APPELLATE ATTORNEY FOR CHILD **(California Rules of Court, Rule 5.661)**	

INSTRUCTIONS—READ CAREFULLY

- Read the entire form *before* completing any items.
- This form must be clearly handprinted in ink or typed.
- Complete all applicable items in the proper spaces. If you need additional space, add an extra page and check the "Additional pages attached" box on page 2.
- If you are filing this form in the Court of Appeal, file the original and 4 copies.
- If you are filing this form in the California Supreme Court, file the original and 10 copies.
- A copy must be served on the local district appellate project.
- Notify the clerk of the court in writing if you change your address after filing your form.

Individual Courts of Appeal or the Supreme Court may require documents other than or in addition to this form. Contact the clerk of the reviewing court for local requirements.

Form Approved for Optional Use
Judicial Council of California
JV-810 [Rev. January 1, 2021]

Welfare and Institutions Code, § 395(b)(1)
Cal. Rules of Court, rule 5.661
www.courts.ca.gov

APPELLATE CASE TITLE:	COURT OF APPEAL CASE NUMBER:

1. Trial counsel, court-appointed guardian ad litem for the child under rule 5.662, or the child in the above-captioned case:
   a. Name:
   b. I am the ☐ trial counsel ☐ guardian ad litem ☐ child.
   c. Address:
   d. Telephone number:
2. I recommend that an appellate attorney be appointed for the child in this case.
3. The child's best interests cannot be protected without the appointment of counsel on appeal for the following reasons *(check all that apply):*
   a. ☐ An actual or potential conflict exists between the interests of the child and the interests of any respondent.
   b. ☐ The child did not have an attorney serving as the child's guardian ad litem in the trial court.
   c. ☐ The child is of a sufficient age or development such that the child is able to understand the nature of the proceedings, and
      (1) ☐ the child expresses a desire to participate in the appeal; or
      (2) ☐ the child's wishes differ from the child's trial counsel's position.
   d. ☐ The child took a legal position in the trial court adverse to that of one of the child's siblings, and an issue has been raised in an appellant's opening brief regarding the siblings' adverse positions.
   e. ☐ The appeal involves a legal issue regarding a determination of parentage, the child's inheritance rights, educational rights, privileges identified in division 8 of the Evidence Code, consent to treatment, or tribal membership.
   f. ☐ Postjudgment evidence completely undermines the legal underpinnings of the juvenile court's judgment under review, and all parties recognize this and express a willingness to stipulate to reversal of the juvenile court's judgment.
   g. ☐ The child's trial counsel or guardian ad litem, after reviewing the appellate briefs, believes that the legal arguments contained in the respondents' briefs do not adequately represent or protect the best interests of the child.
   h. ☐ The existence of any other factors relevant to the child's best interests *(specify):*
4. State the facts that support your recommendation:

☐ Additional pages attached

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, except for matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF APPLICANT)

APPELLATE CASE TITLE:	COURT OF APPEAL CASE NUMBER:

PROOF OF SERVICE

I served a copy of the foregoing *Recommendation for Appointment of Appellate Attorney for Child* on the following by personally delivering a copy to the person served, OR by delivering a copy to a competent adult at the usual place of residence or business of the person served and thereafter mailing a copy by first-class mail to the person served at the place where the copy was delivered, OR by placing a copy in a sealed envelope and depositing the envelope directly in the United States mail with postage prepaid or at my place of business for same-day collection and mailing with the United States mail, following our ordinary business practices with which I am readily familiar:

1. District appellate project
   a. Name and address:

   b. Date of service:
   c. Method of service:

2. Other
   a. Name and address:

   b. Date of service:
   c. Method of service:

Item number: 04

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 8 or 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Court Records: Retention of Reporters' Transcripts in Criminal Appeals
Amend Cal. Rules of Court, rule 10.1028

Committee or other entity submitting the proposal:
Appellate Advisory Committee

Staff contact (name, phone and e-mail): Christy Simons, 415-865-7694, christy.simons@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 10/28/2019
Project description from annual agenda: Consider amending rule 10.1028 to extend the time for keeping reporters' transcripts in criminal appeals. The rule currently requires that the original reporter's transcript be kept for 20 years, but this is not long enough to account for longer sentences and lengthy appellate processes. Also consider whether to require a digital copy. Source of the project: Supreme Court attorney and former Clerk/Executive Officer of a District Court of Appeal. Subcommittee: Rules.

If requesting July 1 or out of cycle, explain:

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

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue . San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-01

Title
Court Records: Retention of Reporters' Transcripts in Criminal Appeals

Action Requested
Review and submit comments by June 9, 2020

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 10.1028

Proposed Effective Date
January 1, 2021

Proposed by
Appellate Advisory Committee
Hon. Louis R. Mauro, Chair

Contact
Christy Simons, Attorney
415-865-7694
christy.simons@jud.ca.gov

Executive Summary and Origin

To conform to a recent statutory change and to better align the length of time reporters' transcripts must be kept with the length of time they may be needed, the Appellate Advisory Committee proposes amending the rule regarding preservation and destruction of Court of Appeal records. Code of Civil Procedure section 271, subdivision (a), no longer requires that an original reporter's transcript be in paper format. Thus, a provision in rule 10.1028 permitting the court to keep an electronic copy in lieu of an original paper reporter's transcript should be revised. This proposal would also extend the time the court must keep the original or an electronic copy of the reporter's transcript in felony appeals to 100 years. The rule's current requirement to keep the reporter's transcript for 20 years in any case affirming a criminal conviction does not account for longer sentences or changes in felony sentencing laws. This proposal originated with suggestions from a clerk/executive officer of a Court of Appeal and an attorney at the Supreme Court.

The Proposal

Statutory change

Rule 10.1028 governs the preservation and destruction of Court of Appeal records. Prior to 2018, the rule required the court to keep an original reporter's transcript, which, under the version of

Code of Civil Procedure section 271[1] in effect at the time, had to be on paper.[2] Effective January 1, 2018, rule 10.1028, subdivision (d), was amended to allow the Court of Appeal to keep an electronic copy of the reporter's transcript in lieu of keeping the original. An advisory committee comment was added to explain that, "[a]lthough subdivision (a) allows the Court of Appeal to maintain its records in any format that satisfies the otherwise applicable standards for maintenance of court records, including electronic formats, the original of a reporter's transcript is required to be on paper under Code of Civil Procedure section 271(a). Subdivision (d) therefore specifies that an electronic copy may be kept, to clarify that the paper original need not be kept by the court."

Legislation repealing and replacing section 271 took effect January 1, 2018. Among other changes, new section 271 requires that the reporter's transcript be delivered in electronic form unless any of the specified exceptions apply, and provides that an electronic transcript is deemed to be an original for all purposes unless a paper transcript is delivered under any of the exceptions. In light of the new statutory language, rule 10.1028 should be revised to reflect that an original reporter's transcript must be in electronic format unless an exception applies. If an exception applies and the original transcript is on paper, the court may continue to keep either the paper original or a true and correct electronic copy.

Time to keep reporters' transcripts

Rule 10.1028(d) governs the time the Court of Appeal is required to keep records. Under subdivision (c), the court must permanently keep the court's minutes and a register of appeals and original proceedings. Under subdivision (d), all other records, with one exception, may be destroyed 10 years after the decision becomes final. The exception is for original reporters' transcripts in cases affirming a criminal conviction; these must be kept for 20 years after the decision becomes final. This retention time has not changed since the adoption of the initial version of the rule in 1975. (See former rule 55, adopted effective July 1, 1975; renumbered as rule 70 effective January 1, 2005; and renumbered as rule 10.1028 effective January 1, 2007.)

This 20-year retention period is insufficient. Sentences for the most serious felony convictions often exceed 20 years, as does the actual time served under these sentences. Certain writ proceedings may be filed at any time during service of a prison sentence. In addition, changes in felony sentencing laws, such as Proposition 47,[3] which reduced penalties for certain offenses and allows for resentencing, warrant keeping reporters' transcripts in cases affirming felony convictions longer than 20 years so defendants can access opportunities for resentencing or other relief. This is not a theoretical problem. The committee has been advised that the California Department of Justice, which has a longer retention schedule, is frequently contacted by litigants

[1] All further statutory references are to the Code of Civil Procedure.
[2] Section 271 authorized courts and parties to receive, on request, copies of reporters' transcripts in "computer-readable form."
[3] Voters passed Prop. 47, "The Safe Neighborhoods and Schools Act," on November 14, 2014; it went into effect the next day.

for copies of reporters' transcripts in cases in which a criminal conviction was affirmed more than 20 years ago.

Accordingly, the committee proposes adding a provision to rule 10.1028(d) to extend the time for keeping the reporter's transcript in felony cases. New paragraph (d)(3) would state: "In a felony case in which the court affirms a judgment of conviction, the clerk/executive officer must keep the original reporter's transcript or, if the original is in paper, either the original or a true and correct electronic copy, for 100 years after the decision becomes final."

This proposal is required both to conform the rule to statute and to address an identified concern. It would improve access to justice by ensuring that the original reporter's transcript is actually available when needed.

Alternatives Considered

The committee considered taking no action, but rejected this option because portions of the rule are based on a former version of the relevant statute and are inadequate in light of longer sentences and criminal justice reforms.

The committee also considered whether to extend the time for keeping the reporter's transcript only in cases involving a sentence of life or life without the possibility of parole. The committee rejected this option because it is too narrow and would not include many cases in which a reporter's transcript might be needed long after the conviction is affirmed.

The committee also considered extending the time to 50 years rather than 100. The committee declined this option because 50 years might not be long enough in all cases.

In addition, the committee considered a graduated retention schedule, such as the retention schedule adopted by the California Department of Justice, in which documents are retained for different time periods depending on the type of document or the circumstances. Moreover, the committee considered other possible amendments, including whether any reporters' transcripts should be retained permanently and whether the rule should provide that the reporter's transcript must be kept for a certain number of years (such as 10) following the death of the defendant. The committee rejected these options in favor of a rule that is simple and straightforward for the courts to implement, but welcomes comments on these and other options.

Fiscal and Operational Impacts

This proposal would require the Courts of Appeal to change their record retention policies and procedures with respect to reporters' transcripts in the identified cases. Education and training of staff would also be required. Despite the implementation requirements, the committee believes that the benefit of the proposal—making certain reporters' transcripts available to defendants for a more realistic amount of time within which they may be needed, and thereby improving access to justice—outweighs its potential cost to the courts.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Should reporters' transcripts in any type of case be retained permanently?
- Should any other provisions regarding retention of an original reporter's transcript be considered?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 10.1028, at pages 5–6

Rule 10.1028 of the California Rules of Court would be amended, effective January 1, 2021, to read:

Title 10. Judicial Administration Rules

Division 5. Appellate Court Administration

Chapter 1. Rules Relating to the Supreme Court and Courts of Appeal

Rule 10.1028. Preservation and destruction of Court of Appeal records

(a) Form or forms in which records may be preserved

(1) Court of Appeal records may be created, maintained, and preserved in any form or forms of communication or representation, including paper or optical, electronic, magnetic, micrographic, or photographic media or other technology, if the form or forms of representation or communication satisfy the standards or guidelines for the creation, maintenance, reproduction, and preservation of court records established under rule 10.854.

(2) If records are preserved in a medium other than paper, the following provisions of Government Code section 68150 apply: subdivisions (c)–(*l*), excluding subdivision (i)(1).

(b) Methods for signing, subscribing, or verifying documents

Any notice, order, ruling, decision, opinion, memorandum, certificate of service, or similar document issued by an appellate court or by a judicial officer of an appellate court may be signed, subscribed, or verified using a computer or other technology in accordance with procedures, standards, and guidelines established by the Judicial Council. Notwithstanding any other provision of law, all notices, orders, rulings, decisions, opinions, memoranda, certificates of service, or similar documents that are signed, subscribed, or verified by computer or other technological means under this subdivision shall have the same validity, and the same legal force and effect, as paper documents signed, subscribed, or verified by an appellate court or a judicial officer of the court.

(c) Permanent records

The clerk/executive officer of the Court of Appeal must permanently keep the court's minutes and a register of appeals and original proceedings.

(d) Time to keep other records

(1) Except as provided in (2) and (3), the clerk/executive officer may destroy all other records in a case 10 years after the decision becomes final, as ordered by the administrative presiding justice or, in a court with only one division, by the presiding justice.

(2) Except as provided in (3), in a criminal case in which the court affirms a judgment of conviction, the clerk/executive officer must keep the original reporter's transcript or, if the original is in paper, either the original or a true and correct electronic copy of the transcript, for 20 years after the decision becomes final.

(3) In a felony case in which the court affirms a judgment of conviction, the clerk/executive officer must keep the original reporter's transcript or, if the original is in paper, either the original or a true and correct electronic copy, for 100 years after the decision becomes final.

Advisory Committee Comment

Subdivision (d). Subdivision (d) permits the Court of Appeal to keep an electronic copy of the reporter's transcript in lieu of keeping the original if the original transcript is in paper. Although subdivision (a) allows the Court of Appeal to maintain its records in any format that satisfies the otherwise applicable standards for maintenance of court records, including electronic formats, ~~the original of a reporter's transcript is required to be on paper under Code of Civil Procedure section 271(a).~~ Code of Civil Procedure section 271 provides that an original reporter's transcript must be in electronic form unless a specified exception allows for an original paper transcript. Subdivision (d) therefore specifies that an electronic copy may be kept if the original transcript is in paper, to clarify that the paper original need not be kept by the court.

Item number: 05

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Appellate Procedure: Use of an Appendix in Limited Civil Appeals
Adopt Cal. Rules of Court, rule 8.845; amend rules 8.830, 8.840, 8.843 and 8.882; approve form APP-111; revise forms APP-101-INFO and APP-103

Committee or other entity submitting the proposal:
Appellate Advisory Committee

Staff contact (name, phone and e-mail): Christy Simons, 415-865-7694, christy.simons@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 10/28/2019
Project description from annual agenda: Consider amending the rules governing the record on appeal in limited civil cases to allow an appendix as a record of the written documents from the trial court proceedings as an alternative to a clerk's transcript. Source of the project: committee member. Subcommittee: Appellate Division.

If requesting July 1 or out of cycle, explain:

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

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue . San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-02

Title
Appellate Procedure: Use of an Appendix in Limited Civil Cases

Proposed Rules, Forms, Standards, or Statutes
Adopt Cal. Rules of Court, rule 8.845; amend rules 8.830, 8.840, 8.843, and 8.882; approve form APP-111; revise forms APP-101-INFO and APP-103

Proposed by
Appellate Advisory Committee
Hon. Louis R. Mauro, Chair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Christy Simons, Attorney
415-865-7694
christy.simons@jud.ca.gov

Executive Summary and Origin

The Appellate Advisory Committee proposes adopting a new rule and amending four current rules to allow litigants in limited civil appeals to use an appendix in lieu of a clerk's transcript as the record of documents filed in the trial court. The California Rules of Court contain a rule for use of an appendix in the Court of Appeal but do not include such a rule for civil appeals in the appellate division. The proposed rule is based on the existing rule and closely follows its structure and content. To assist litigants in using an appendix, the committee also proposes approving a new form and revising an information sheet and a form for designating the record in limited civil cases. This proposal originated with a suggestion from a judge of the superior court who serves on the appellate division and is a current committee member.

Background

Rule 8.124

Rule 8.124 establishes a procedure for using an appendix in lieu of a clerk's transcript. The appellant may elect to use an appendix when designating the record on appeal. If the appellant does not elect to use an appendix, the respondent may do so but only if the appellant has not been granted a fee waiver for the cost of a clerk's transcript. The parties may prepare separate appendixes or may stipulate to a joint appendix. (Cal. Rules of Court, rule 8.124(a).)

Rule 8.124 specifies the contents of an appendix, including items that must be included, items that may be included, and items that must *not* be included. Much of the content is specified by cross-references to other rules. (See rule 8.124(b).) The rule also sets forth a procedure for including in an appendix a copy of a document or exhibit in the possession of another party and returning documents or exhibits that were sent non-electronically when the remittitur issues. (See rule 8.124(c).)

In addition, the rule includes provisions regarding the form of an appendix, service and filing, the cost of an appendix, and sanctions for an inaccurate or noncomplying appendix. (See rule 8.124(d)–(g).) There are several detailed advisory committee comments explaining and clarifying various subdivisions of the rule.

Appellate division rules

In 2008, the appellate rules for limited civil cases were expanded and renumbered as part of a large project to comprehensively review and update the rules for appellate division proceedings.[1] One of the goals of the project was to make the rules for limited civil appeals as consistent as practicable with the rules for unlimited civil appeals, both in organization and content. As the starting point and guide for the appellate division rules project, the committee used the recently amended and reorganized rules for the Court of Appeal and the Supreme Court. Another goal was to fill in gaps in the appellate division rules, but there is no indication that a rule for use of appendixes in the appellate division was considered as a part of that project, or at any other time.

The Proposal

New rule 8.845

The proposed new rule would allow litigants in appeals of limited civil cases to elect to use an appendix in lieu of a clerk's transcript as the record of documents in the trial court. This option is available to litigants in unlimited civil appeals; the proposal would fill a gap by providing the same option in the appellate division. A principal benefit of electing to use an appendix is saving the cost of paying the court to prepare and copy the clerk's transcript. Thus, the proposal would promote access to justice by providing a way for litigants to reduce the cost of appeals in cases involving $25,000 or less. It would also benefit the superior courts by reducing staff time in preparing the record.

The new rule is modeled on current rule 8.124, the rule for appendixes in unlimited civil appeals. Where that rule contains cross-references to other rules of court for unlimited civil appeals, the new rule cross-references the parallel rules for limited civil appeals, thus maintaining the same structure as the existing rule and consistency between the rules for the Court of Appeal and the appellate division.

[1] See Judicial Council of Cal., Appellate Advisory Committee report, *Appellate Procedure: Rules and Forms for the Superior Court Appellate Divisions* (Dec. 21, 2007, date of report) (Feb. 22, 2008, date of council meeting) (Judicial Council of Cal. binder, Feb. 22, 2008, tab 7).

The only provision in the current rule that is not retained in the proposed new one is subdivision (b)(3)(C) of rule 8.124, which states that an appendix must not contain the record of an administrative proceeding and that any such administrative record must be transmitted to the reviewing court as specified in a separate rule (rule 8.123). The appellate division rules do not contain a rule regarding administrative records, and thus there is no rule for such a provision to cross-reference. The committee is interested in comments on whether the rules for limited civil appeals should include a rule regarding administrative records and whether the new rule on appendixes should address administrative records.

Amend rules 8.830, 8.840, 8.843, and 8.882

To implement the option of using an appendix in limited civil appeals and to maintain consistency with the rules for unlimited civil appeals, the committee proposes amending four existing rules. Rule 8.830 would be amended to add an appendix under rule 8.845 as a form of the record of written documents that must be included in the record on appeal. Rule 8.840, which governs completion and filing of the record, would be amended to add clarifying language and a provision on when the record is complete if the parties are using an appendix and a record of the oral proceedings. Rule 8.843, which governs transmitting exhibits, would be amended to add an appendix as a form of the record of written documents. Finally, provisions would be added to rule 8.882 regarding the time to file an appellant's opening brief if there is an election under rule 8.845 to use an appendix; the proposed language is similar to existing language in rule 8.212(a)(1)(A).

New form APP-111

The committee proposes a new optional form—*Respondent's Notice Electing to Use an Appendix (Limited Civil Case)* (form APP-111)—for respondents electing to use an appendix. The form's content is based on the existing form for respondents in unlimited civil appeals, *Respondent's Notice Electing to Use an Appendix (Unlimited Civil Case)* (form APP-011).

The election procedure for use of an appendix differs from all other appellate rules governing designation of the record on appeal. Under the other rules, the appellant designates, or the parties stipulate, to the form of the record. By contrast, under subdivision (a) of rule 8.124 (and subdivision (a) of proposed new rule 8.845), either party may elect to have the appeal proceed by way of an appendix. Unless the superior court orders otherwise, the respondent may serve and file a timely notice electing to use an appendix if the appellant does not have a waiver of the fee for a clerk's transcript. New form APP-111 would provide instructions and information for respondents to assist them in making this election.

Revise forms APP-101-INFO and APP-103

The committee proposes revisions to *Information on Appeal Procedures (Limited Civil Case)* (form APP-101-INFO), to include information on an appendix as another form of the record of the documents in the trial court. These proposed revisions are based on the parallel information sheet for litigants in unlimited civil appeals, *Information on Appeal Procedures (Unlimited Civil Case)* (form APP-001-INFO).

The proposed changes to *Appellant's Notice Designating Record on Appeal (Limited Civil Case)* (form APP-103) add the option of choosing an appendix as the form of the documents filed in the trial court.

Alternatives Considered

The committee considered not proposing a rule for the use of an appendix in limited civil cases, but decided to move forward with the proposal because there is no apparent reason for not allowing litigants this option. Litigants could save money in the record preparation process, and courts could save time if litigants opt to prepare appendixes rather than request clerks' transcripts.

The committee also considered the complexity of the current rule on use of an appendix in unlimited civil cases and examined whether a parallel rule for limited civil cases should contain all of the same provisions. With the exception of provisions for an administrative record, the committee concluded that all provisions in the current rule should be retained in the new one because the procedures would be similar and the same information and requirements would be helpful in the context of limited civil appeals. As noted above, the committee seeks comments on whether the new rule should include provisions regarding administrative records.

In addition, the committee considered additional revisions to the forms in both unlimited civil and limited civil appeals to provide more information regarding a respondent's option to elect to use an appendix as the record of the documents in the trial court. The committee decided against more revisions to the forms because this option is rarely used, and the committee has received no feedback that the current process for electing to use an appendix in unlimited civil appeals is confusing or otherwise not working well.

Fiscal and Operational Impacts

The committee anticipates no significant fiscal or operational impacts from this proposal. Implementation requirements, such as training for court staff and any changes to case management systems, are expected to be minor. The committee believes that the benefits of the proposal, including savings of money for litigants and time for the courts, outweigh the implementation cost.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Should the proposed new rule specify that an appendix should not contain the record of an administrative proceeding (see current rule 8.124(b)(3)(C))? If so, should the rules for limited civil appeals include a rule on the record of administrative proceedings, similar to rule 8.123 for unlimited civil appeals?
- Should any provisions in the proposed new and amended rules or forms be changed or eliminated to better reflect appellate division practice and procedure?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rules 8.830, 8.840, 8.843, 8.845, and 8.882, at pages 6–14
2. Forms APP-101-INFO, APP-103, and APP-111, at pages 15–38

Rule 8.845 of the California Rules of Court would be adopted, and rules 8.830, 8.840, 8.843, and 8.882 would be amended, effective January 1, 2021, to read:

Rule 8.830. Record on appeal

(a) Normal record

Except as otherwise provided in this chapter, the record on an appeal to the appellate division in a civil case must contain the following, which constitute the normal record on appeal:

(1) A record of the written documents from the trial court proceedings in the form of one of the following:

(A) A clerk's transcript under rule 8.832;

(B) An appendix under rule 8.845;

~~(B)~~(C) If the court has a local rule for the appellate division electing to use this form of the record, the original trial court file under rule 8.833; or

~~(C)~~(D) An agreed statement under rule 8.836.

(2) * * *

(b) * * *

Advisory Committee Comment

Subdivision (a). The options of using the original trial court file instead of a clerk's transcript under (1)~~(B)~~(C) or an electronic recording itself, rather than a transcript, under (2)(B) are available only if the court has local rules for the appellate division authorizing these options.

Rule 8.840. Completion and filing of the record

(a) When the record is complete

(1) If the appellant elected under rule 8.831 or 8.834(b) to proceed without a record of the oral proceedings in the trial court and the parties are not proceeding by appendix under rule 8.845, the record is complete:

(A) If a clerk's transcript will be used, when the clerk's transcript is certified under rule 8.832(d);

(B) If the original trial court file will be used instead of the clerk's transcript, when that original file is ready for transmission as provided under rule 8.833(b); or

(C) If an agreed statement will be used instead of the clerk's transcript, when the appellant files the agreed statement under rule 8.836(b).

(2) If the parties are not proceeding by appendix under rule 8.845 and the appellant elected under rule 8.831 to proceed with a record of the oral proceedings in the trial court, the record is complete when the clerk's transcript or other record of the documents from the trial court is complete as provided in (1) and:

(A) If the appellant elected to use a reporter's transcript, when the certified reporter's transcript is delivered to the court under rule 8.834(d);

(B) If the appellant elected to use a transcript prepared from an official electronic recording, when the transcript has been prepared under rule 8.835;

(C) If the parties stipulated to the use of an official electronic recording of the proceedings, when the electronic recording has been prepared under rule 8.835; or

(D) If the appellant elected to use a statement on appeal, when the statement on appeal has been certified by the trial court or a transcript or an official electronic recording has been prepared under rule 8.827(d)(6).

(3) If the parties are proceeding by appendix under rule 8.845 and the appellant elected under rule 8.831 to proceed with a record of the oral proceedings in the trial court, the record is complete when the record of the oral proceedings is complete as provided in (2)(A), (B), (C), or (D).

(b) * * *

Rule 8.843. Transmitting exhibits

(a) Notice of designation

(1) If a party wants the appellate division to consider any original exhibits that were admitted in evidence, refused, or lodged but that were not copied in the

clerk's transcript under rule 8.832 or the appendix under rule 8.845 or included in the original file under rule 8.833, within 10 days after the last respondent's brief is filed or could be filed under rule 8.882 the party must serve and file a notice in the trial court designating such exhibits.

(2) Within 10 days after a notice under (1) is served, any other party wanting the appellate division to consider additional exhibits must serve and file a notice in the trial court designating such exhibits.

(3) A party filing a notice under (1) or (2) must serve a copy on the appellate division.

(b)–(e) * * *

Rule 8.845. Appendixes

(a) Notice of election

(1) Unless the superior court orders otherwise on a motion served and filed within 10 days after the notice of election is served, this rule governs if:

(A) The appellant elects to use an appendix under this rule in the notice designating the record on appeal under rule 8.831; or

(B) The respondent serves and files a notice in the superior court electing to use an appendix under this rule within 10 days after the notice of appeal is filed, and no waiver of the fee for a clerk's transcript is granted to the appellant.

(2) When a party files a notice electing to use an appendix under this rule, the superior court clerk must promptly send a copy of the register of actions, if any, to the attorney of record for each party and to any unrepresented party.

(3) The parties may prepare separate appendixes or they may stipulate to a joint appendix.

(b) Contents of appendix

(1) A joint appendix or an appellant's appendix must contain:

(A) All items required by rule 8.832(a)(1), showing the dates required by rule 8.832(a)(2);

(B) Any item listed in rule 8.832(a)(3) that is necessary for proper consideration of the issues, including, for an appellant's appendix, any item that the appellant should reasonably assume the respondent will rely on;

(C) The notice of election; and

(D) For a joint appendix, the stipulation designating its contents.

(2) An appendix may incorporate by reference all or part of the record on appeal in another case pending in the reviewing court or in a prior appeal in the same case.

(A) The other appeal must be identified by its case name and number. If only part of a record is being incorporated by reference, that part must be identified by citation to the volume and page numbers of the record where it appears and either the title of the document or documents or the date of the oral proceedings to be incorporated. The parts of any record incorporated by reference must be identified both in the body of the appendix and in a separate section at the end of the index.

(B) If the appendix incorporates by reference any such record, the cover of the appendix must prominently display the notice "Record in case number:____ incorporated by reference," identifying the number of the case from which the record is incorporated.

(C) On request of the reviewing court or any party, the designating party must provide a copy of the materials incorporated by reference to the court or another party or lend them for copying as provided in (c).

(3) An appendix must not:

(A) Contain documents or portions of documents filed in superior court that are unnecessary for proper consideration of the issues.

(B) Contain transcripts of oral proceedings that may be designated under rule 8.834.

(C) Incorporate any document by reference except as provided in (2).

(4) All exhibits admitted in evidence, refused, or lodged are deemed part of the record, whether or not the appendix contains copies of them.

(5) A respondent's appendix may contain any document that could have been included in the appellant's appendix or a joint appendix.

(6) An appellant's reply appendix may contain any document that could have been included in the respondent's appendix.

(c) Document or exhibit held by other party

If a party preparing an appendix wants it to contain a copy of a document or an exhibit in the possession of another party:

(1) The party must first ask the party possessing the document or exhibit to provide a copy or lend it for copying. All parties should reasonably cooperate with such requests.

(2) If the request under (1) is unsuccessful, the party may serve and file in the reviewing court a notice identifying the document or specifying the exhibit's trial court designation and requesting the party possessing the document or exhibit to deliver it to the requesting party or, if the possessing party prefers, to the reviewing court. The possessing party must comply with the request within 10 days after the notice was served.

(3) If the party possessing the document or exhibit sends it to the requesting party non-electronically, that party must copy and return it to the possessing party within 10 days after receiving it.

(4) If the party possessing the document or exhibit sends it to the reviewing court, that party must:

(A) Accompany the document or exhibit with a copy of the notice served by the requesting party; and

(B) Immediately notify the requesting party that it has sent the document or exhibit to the reviewing court.

(5) On request, the reviewing court may return a document or an exhibit to the party that sent it non-electronically. When the remittitur issues, the reviewing court must return all documents or exhibits to the party that sent them, if they were sent non-electronically.

(d) Form of appendix

(1) An appendix must comply with the requirements of rule 8.838 for a clerk's transcript.

(2) In addition to the information required on the cover of a brief by rule 8.883(c)(8), the cover of an appendix must prominently display the title "Joint Appendix" or "Appellant's Appendix" or "Respondent's Appendix" or "Appellant's Reply Appendix."

(3) An appendix must not be bound with or transmitted electronically with a brief as one document.

(e) Service and filing

(1) A party preparing an appendix must:

(A) Serve the appendix on each party, unless otherwise agreed by the parties or ordered by the reviewing court; and

(B) File the appendix in the reviewing court.

(2) A joint appendix or an appellant's appendix must be served and filed with the appellant's opening brief.

(3) A respondent's appendix, if any, must be served and filed with the respondent's brief.

(4) An appellant's reply appendix, if any, must be served and filed with the appellant's reply brief.

(f) Cost of appendix

(1) Each party must pay for its own appendix.

(2) The cost of a joint appendix must be paid:

(A) By the appellant;

(B) If there is more than one appellant, by the appellants equally; or

(C) As the parties may agree.

(g) Inaccurate or noncomplying appendix

Filing an appendix constitutes a representation that the appendix consists of accurate copies of documents in the superior court file. The reviewing court may impose monetary or other sanctions for filing an appendix that contains inaccurate copies or otherwise violates this rule.

Advisory Committee Comment

Subdivision (a). Under this provision, either party may elect to have the appeal proceed by way of an appendix. If the appellant's fees for a clerk's transcript are not waived and the respondent timely elects to use an appendix, that election will govern unless the superior court orders otherwise. This election procedure differs from all other appellate rules governing designation of a record on appeal. In those rules, the appellant's designation, or the stipulation of the parties, determines the type of record on appeal. Before making this election, respondents should check whether the appellant has been granted a fee waiver that is still in effect. If the trial court has granted the appellant a fee waiver for the clerk's transcript, or grants such a waiver after the notice of appeal is filed, the respondent cannot elect to proceed by way of an appendix.

Subdivision (a)(2) is intended to assist appellate counsel in preparing an appendix by providing counsel with the list of pleadings and other filings found in the register of actions or "docket sheet" in those counties that maintain such registers. (See Gov. Code, § 69845.) The provision is derived from rule 10-1 of the United States Circuit Rules (9th Cir.).

Subdivision (b). Under subdivision (b)(1)(A), a joint appendix or an appellant's appendix must contain any register of actions that the clerk sent to the parties under subdivision (a)(2). This provision is intended to assist the reviewing court in determining the accuracy of the appendix. The provision is derived from rule 30-1.3(a)(ii) of the United States Circuit Rules (9th Cir.).

In support of or opposition to pleadings or motions, the parties may have filed a number of lengthy documents in the proceedings in superior court, including, for example, declarations, memorandums, trial briefs, documentary exhibits (e.g., insurance policies, contracts, deeds), and photocopies of judicial opinions or other publications. Subdivision (b)(3)(A) prohibits the inclusion of such documents in an appendix when they are not necessary for proper consideration of the issues raised in the appeal. Even if a document is otherwise includable in an appendix, the rule prohibits the inclusion of any substantial *portion* of the document that is not necessary for proper consideration of the issues raised in the appeal. The prohibition is intended to simplify and therefore expedite the preparation of the appendix, to reduce its cost to the parties, and to relieve the courts of the burden of reviewing a record containing redundant, irrelevant, or immaterial documents. The provision is adapted from rule 30-1.4 of the United States Circuit Rules (9th Cir.).

Subdivision (b)(3)(B) prohibits the inclusion in an appendix of transcripts of oral proceedings that may be made part of a reporter's transcript. (Compare rule 8.834(c)(4) [the reporter must not copy into the reporter's transcript any document includable in the clerk's transcript under rule

8.832].) The prohibition is intended to prevent a party filing an appendix from evading the requirements and safeguards imposed by rule 8.834 on the process of designating and preparing a reporter's transcript. In addition, if an appellant were to include in its appendix a transcript of less than all the proceedings, the respondent would not learn of any need to designate additional proceedings (under rule 8.834(a)(3)) until the appellant had served its appendix with its brief, when it would be too late to designate them. Note also that a party may file a certified transcript of designated proceedings instead of a deposit for the reporter's fee (Cal. Rules of Court, rule 8.834(b)(2)(D).

Subdivision (d). In current practice, served copies of filed documents often bear no clerk's date stamp and are not conformed by the parties serving them. Consistent with this practice, subdivision (d) does not require such documents to be conformed. The provision thereby relieves the parties of the burden of obtaining conformed copies at the cost of considerable time and expense, and expedites the preparation of the appendix and the processing of the appeal. It is to be noted, however, that under subdivision (b)(1)(A) each document necessary to determine the timeliness of the appeal must show the date required under rule 8.822 or 8.823. Note also that subdivision (g) of rule 8.845 provides that a party filing an appendix represents under penalty of sanctions that its copies of documents are accurate.

Subdivision (e). Subdivision (e)(2) requires a joint appendix to be filed with the appellant's opening brief. The provision is intended to improve the briefing process by enabling the appellant's opening brief to include citations to the record. To provide for the case in which a respondent concludes in light of the appellant's opening brief that the joint appendix should have included additional documents, subdivision (b)(5) permits such a respondent to present in an appendix filed with its respondent's brief (see subd. (e)(3)) any document that could have been included in the joint appendix.

Under subdivision (e)(2)–(4), an appendix is required to be filed "with" the associated brief. This provision is intended to clarify that an extension of a briefing period ipso facto extends the filing period of an appendix associated with the brief.

Subdivision (g). Under subdivision (g), sanctions do not depend on the degree of culpability of the filing party—i.e., on whether the party's conduct was willful or negligent—but on the nature of the inaccuracies and the importance of the documents they affect.

Rule 8.882. Briefs by parties and amici curiae

(a) Briefs by parties

(1) The appellant must serve and file an appellant's opening brief within:

(A) 30 days after the record–or the reporter's transcript, after a rule 8.845 election in a civil case–is filed in the appellate division; or

(B) 60 days after the filing of a rule 8.845 election in a civil case, if the appeal proceeds without a reporter's transcript.

(2)–(5) * * *

**(b)–(e) * * *

APP-101-INFO Information on Appeal Procedures for Limited Civil Cases

GENERAL INFORMATION

1 What does this information sheet cover?

This information sheet tells you about appeals in limited civil cases. These are civil cases in which the amount of money claimed is $25,000 or less.

If you are the party who is appealing (asking for the trial court's decision to be reviewed), you are called the APPELLANT, and you should read Information for the Appellant, starting on page 2. If you received notice that another party in your case is appealing, you are called the RESPONDENT and you should read Information for the Respondent, starting on page 11.

This information sheet does not cover everything you may need to know about appeals in limited civil cases. It is meant only to give you a general idea of the appeal process. To learn more, you should read rules 8.800–8.843 and 8.880–8.891 of the California Rules of Court, which set out the procedures for limited civil appeals. You can get these rules at any courthouse or county law library or online at *www.courts.ca.gov/rules.*

2 What is an appeal?

An appeal is a request to a higher court to review a decision made by a judge or jury in a lower court. **In a limited civil case, the court hearing the appeal is the appellate division of the superior court and the lower court—called the "trial court" in this information sheet—is the superior court.**

It is important to understand that **an appeal is NOT a new trial**. The appellate division will not consider new evidence, such as the testimony of new witnesses or new exhibits. The appellate division's job is to review a record of what happened in the trial court and the trial court's decision to see if certain kinds of legal errors were made:

For information about appeal procedures in other kinds of cases, see:

- *Information on Appeal Procedures for Unlimited Civil Cases* (form APP-001)
- *Information on Appeal Procedures for Infractions* (form CR-141-INFO)
- *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO)

You can get these forms at any courthouse or county law library or online at *www.courts.ca.gov/forms.*

- ***Prejudicial error:*** The appellant (the party who is appealing) may ask the appellate division to determine if an error was made about either the law or court procedures in the case that caused substantial harm to the appellant (this is called "prejudicial error").

  Prejudicial error can include things like errors made by the judge about the law, errors or misconduct by the lawyers, incorrect instructions given to the jury, and misconduct by the jury that harmed the appellant. When it conducts its review, the appellate division presumes that the judgment, order, or other decision being appealed is correct. It is the responsibility of the appellant to show the appellate division that an error was made and that the error was harmful.

- ***No substantial evidence:*** The appellant may also ask the appellate division to determine if there was substantial evidence supporting the judgment, order, or other decision being appealed. When it conducts its review, the appellate division only looks to see if there was evidence that reasonably supports the decision. The appellate division generally will not reconsider the jury's or trial court's conclusion about which side had more or stronger evidence or whether witnesses were telling the truth or lying.

The appellate division generally will not overturn the judgment, order, or other decision being appealed unless the record clearly shows that one of these legal errors was made.

3 Do I need a lawyer to represent me in an appeal?

You do not *have* to have a lawyer; if you are an individual (rather than a corporation, for example), you are allowed to represent yourself in an appeal in a limited civil case. But appeals can be complicated and you will have to follow the same rules that lawyers have to follow. If you have any questions about the appeal procedures, you should talk to a lawyer.

If you decide not to use a lawyer, you must put your address, telephone number, fax number (if available), and e-mail address (if available) on the first page of every document you file with the court and let the court know if this contact information changes so that the court can contact you if needed.

4 Where can I find a lawyer to help me with my appeal?

You have to hire your own attorney if you want one. You can get information about finding an attorney on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-lowcosthelp.htm* in the Getting Started section.

INFORMATION FOR THE APPELLANT

This part of the information sheet is written for the appellant—the party who is appealing the trial court's decision. It explains some of the rules and procedures relating to appealing a decision in a limited civil case. The information may also be helpful to the respondent. Additional information for respondents can be found starting on page 11 of this information sheet.

5 Who can appeal?

Only a party in the trial court case can appeal a decision in that case. You may not appeal on behalf of a friend, a spouse, a child, or another relative unless you are a legally appointed representative of that person (such as the person's guardian or conservator).

6 Can I appeal *any* decision the trial court made?

No. Generally, you can only appeal the final judgment—the decision at the end that decides the whole case. Other rulings made by the trial court before the final judgment generally cannot be separately appealed but can be reviewed only later as part of an appeal of the final judgment. There are a few exceptions to this general rule. Code of Civil Procedure section 904.2 lists a few types of orders in a limited civil case that can be appealed right away. These include orders that:

- Change or refuse to change the place of trial (venue)
- Grant a motion to quash service of summons or grant a motion to stay or dismiss the action on the ground of inconvenient forum
- Grant a new trial or deny a motion for judgment notwithstanding the verdict
- Discharge or refuse to discharge an attachment or grant a right to attach
- Grant or dissolve an injunction or refuse to grant or dissolve an injunction
- Appoint a receiver
- Are made after final judgment in the case

(You can get a copy of Code of Civil Procedure section 904.2 at *http://leginfo.legislature.ca.gov/faces /codes.xhtml*.)

7 How do I start my appeal?

First, you must serve and file a notice of appeal. The notice of appeal tells the other party or parties in the case and the trial court that you are appealing the trial court's decision. You may use *Notice of Appeal/Cross-Appeal (Limited Civil Case)* (form APP-102) to prepare a notice of appeal in a limited civil case. You can get form APP-102 at any courthouse or county law library or online at *www.courts.ca.gov/forms*.

8 How do I "serve and file" the notice of appeal?

"Serve and file" means that you must:

- Have somebody over 18 years old mail, deliver, or electronically send ("serve") the notice of appeal to the other party or parties in the way required by law. If the notice of appeal is mailed or personally

delivered, it must be by someone who is not a party to the case—so not you.

- Make a record that the notice of appeal has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) or *Proof of Electronic Service (Appellate Division)* (form APP-109E) can be used to make this record. The proof of service must show who served the notice of appeal, who was served with the notice of appeal, how the notice of appeal was served (by mail, in person, or electronically), and the date the notice of appeal was served.
- Bring or mail the original notice of appeal and the proof of service to the trial court that issued the judgment, order, or other decision you are appealing. You should make a copy of the notice of appeal you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the notice of appeal to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*

9 Is there a deadline to file my notice of appeal?

Yes. In a limited civil case, except in the very limited circumstances listed in rule 8.823, you must file your notice of appeal within **30 days** after the trial court clerk or a party serves either a document called a "Notice of Entry" of the trial court judgment or a file-stamped copy of the judgment or within 90 days after entry of the judgment, whichever is earlier.

This deadline for filing the notice of appeal cannot be extended. If your notice of appeal is late, the appellate division will not be able to consider your appeal.

10 Do I have to pay to file an appeal?

Yes. Unless the court waives this fee, you must pay a fee for filing your notice of appeal. You can ask the clerk of the court where you are filing the notice of appeal what the fee is or look up the fee for an appeal in a limited civil case in the current Statewide Civil Fee Schedule linked at *www.courts.ca.gov/7646.htm* (note that the "Appeal and Writ Related Fees" section is near the end of this schedule and that there are different fees for limited civil cases depending on the amount demanded in the case). If you cannot afford to pay the fee, you can ask the court to waive it. To do this, you must fill out and file a *Request to Waive Court Fees* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www.courts.ca.gov/forms.* You can file this application either before you file your notice of appeal or with your notice of appeal. The court will review this application to determine if you are eligible for a fee waiver.

11 If I file a notice of appeal, do I still have to do what the trial court ordered me to do?

Filing a notice of appeal does NOT automatically postpone most judgments or orders, such as those requiring you to pay another party money or to deliver property to another party (see Code of Civil Procedure sections 917.1–917.9 and 1176; you can get a copy of these laws at *www.leginfo.legislature.ca.gov/faces /codes.xhtml*). These kinds of judgments or orders will be postponed, or "stayed," only if you request a stay and the court grants your request. In most cases, other than unlawful detainer cases in which the trial court's judgment gives a party possession of the property, if the trial court denies your request for a stay, you can apply to the appellate division for a stay. If you do not get a stay and you do not do what the trial court ordered you to do, court proceedings to collect the money or otherwise enforce the judgment or order may be started against you.

12 What do I need to do after I file my notice of appeal?

You must ask the clerk of the trial court to prepare and send the official record of what happened in the trial court in your case to the appellate division.

Since the appellate division judges were not there to see what happened in the trial court, an official record of what happened must be prepared and sent to the

appellate division for its review. You can use *Appellant's Notice Designating Record on Appeal (Limited Civil Case)* (form APP-103) to ask the trial court to prepare this record. You can get form APP-103 at any courthouse or county law library or online at *www.courts.ca.gov/forms.*

You must serve and file this notice designating the record on appeal within 10 days after you file your notice of appeal. "Serving and filing" this notice means that you must:

- Have somebody over 18 years old mail, deliver, or electronically send ("serve") the notice to the other party or parties in the way required by law. If the notice is mailed or personally delivered, it must be by someone who is not a party to the case—so not you.
- Make a record that the notice has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) or *Proof of Electronic Service (Appellate Division)* (form APP-109E) can be used to make this record. The proof of service must show who served the notice, who was served with the notice, how the notice was served (by mail, in person, or electronically), and the date the notice was served.
- Bring or mail the original notice and the proof of service to the trial court that issued the judgment, order, or other decision you are appealing. You should make a copy of the notice you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the notice to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov /selfhelp-serving.htm.*

13 What is the official record of the trial court proceedings?

There are three parts of the official record:

- A record of what was said in the trial court (this is called the "oral proceedings")
- A record of the documents filed in the trial court (other than exhibits)
- Exhibits that were admitted in evidence, refused, or lodged (temporarily placed with the court) in the trial court

Read below for more information about these parts of the record.

a. Record of what was said in the trial court (the "oral proceedings")

The first part of the official record of the trial court proceedings is a record of what was said in the trial court (this is called a record of the "oral proceedings"). You do not *have* to send the appellate division a record of the oral proceedings. But if you want to raise any issue in your appeal that would require the appellate division to consider what was said in the trial court, the appellate division will need a record of those oral proceedings. For example, if you are claiming that there was not evidence supporting the judgment, order, or other decision you are appealing, the appellate division will need a record of the oral proceedings.

You are responsible for deciding how the record of the oral proceedings will be provided and, depending on what option you select and your circumstances, you may also be responsible for paying for preparing this record or for preparing an initial draft of the record. If you do not take care of these responsibilities, a record of the oral proceedings in the trial court will not be prepared and sent to the appellate division. **If the appellate division does not receive this record, it will not be able to review any issues that are based on what was said in the trial court and it may dismiss your appeal.**

In a limited civil case, you can use *Appellant's Notice Designating Record on Appeal (Limited Civil Case)* (form APP-103) to tell the court whether you want a record of the oral proceedings and, if so, the form of the record that you want to use. You can get form APP-103 at any courthouse or county law library or online at *www.courts.ca.gov/forms.*

There are four ways in which a record of the oral proceedings can be prepared for the appellate division:

- If you or the other party arranged to have a court reporter there during the trial court proceedings, the

reporter can prepare a record, called a "reporter's transcript."

- If the proceedings were officially electronically recorded, the trial court can have a transcript prepared from that recording or, if the court has a local rule permitting this and you and the other party agree ("stipulate") to this, you can use the *official electronic recording* itself instead of a transcript.
- You can use an agreed statement.
- You can use a statement on appeal.

Read below for more information about these options.

(1) Reporter's transcript

Description: A reporter's transcript is a written record (sometimes called a "verbatim" record) of the oral proceedings in the trial court prepared by a court reporter. Rule 8.834 of the California Rules of Court establishes the requirements relating to reporter's transcripts.

When available: If a court reporter was there in the trial court and made a record of the oral proceedings, you can choose ("elect") to have the court reporter prepare a reporter's transcript for the appellate division. In most limited civil cases, however, a court reporter will not have been there unless you or another party in your case made specific arrangements to have a court reporter there. Check with the court to see if a court reporter made a record of the oral proceedings in your case before choosing this option.

Contents: If you elect to use a reporter's transcript, you must identify by date (this is called "designating") what proceedings you want included in the reporter's transcript. You can use the same form you used to tell the court you wanted to use a reporter's transcript—*Appellant's Notice Designating Record on Appeal (Limited Civil Case)* (form APP-103)—to do this.
If you elect to use a reporter's transcript, the respondent also has the right to designate additional proceedings to be included in the reporter's transcript. If you elect to proceed without a reporter's transcript, however, the respondent may not designate a reporter's transcript without first getting an order from the appellate division.

Cost: The appellant is responsible for paying for preparing a reporter's transcript. The trial court clerk or the court reporter will notify you of the cost of preparing an original and one copy of the reporter's transcript. You must deposit payment for this cost (and a fee for the trial court) or one of the substitutes allowed by rule 8.834 with the trial court clerk within 10 days after this notice is sent. (See rule 8.834 for more information about this deposit and the permissible substitutes, such as a waiver of this deposit signed by the court reporter.)

Unlike the fee for filing the notice of appeal and the costs for preparing a clerk's transcript, the court cannot waive the fee for preparing a reporter's transcript. A special fund, called the Transcript Reimbursement Fund, may be able to help pay for the transcript. You can get information about this fund at *www.courtreportersboard.ca.gov/consumers/index.shtml#rtf.* If you are unable to pay the cost of a reporter's transcript, a record of the oral proceedings can be prepared in other ways, by using an agreed statement or a statement on appeal, which are described below.

Completion and delivery: After the cost of preparing the reporter's transcript or a permissible substitute has been deposited, the court reporter will prepare the transcript and submit it to the trial court clerk. When the record is complete, the trial court clerk will submit the original transcript to the appellate division and send you a copy of the transcript. If the respondent has purchased it, a copy of the reporter's transcript will also be mailed to the respondent.

(2) Official electronic recording or transcript

When available: In some limited civil cases, the trial court proceedings were officially recorded on approved electronic recording equipment. If your case was officially recorded, you can choose ("elect") to have a transcript prepared from the recording. Check with the trial court to see if the oral proceedings in your case were officially electronically recorded before you choose this option. If the court has a local rule permitting this and all the parties agree ("stipulate"), a copy of an official electronic recording itself can be used as the record, instead of preparing a transcript. If you choose this option, you must attach a copy of this agreement ("stipulation") to your notice designating the record on appeal.

Contents: If you elect to use a transcript of an official electronic recording, you must identify by date (this is called "designating") what proceedings you want included in the transcript. You can use the same form you used to tell the court you wanted to use a transcript of an official electronic recording —*Appellant's Notice Designating Record on Appeal (Limited Civil Case)* (form APP-103)—to do this.

Cost: The appellant is responsible for paying the court for the cost of either (a) preparing a transcript *or* (b) making a copy of the official electronic recording.

(a) If you elect to use a transcript of an official electronic recording, you will need to deposit the estimated cost of preparing the transcript with the trial court clerk and pay the trial court a $50 fee. There are two ways to determine the estimated cost of the transcript:

- You can use the amounts listed in rule 8.130(b)(1)(B) for each full or half day of court proceedings to estimate the cost of making a transcript of the proceeding you have designated in your notice designating the record on appeal. Deposit this estimated amount and the $50 fee with the trial court clerk when you file your notice designating the record on appeal.
- You can ask the trial court clerk for an estimate of the cost of preparing a transcript of the proceedings you have designated in you notice designating the record on appeal. You must deposit this amount and the $50 fee with the trial court within 10 days of receiving the estimate from the clerk.

(b) If the court has a local rule permitting the use of a copy of the electronic recording itself, rather than a transcript, and you have attached your agreement with the other parties to do this ("stipulation") to the notice designating the record on appeal that you filed with the court, the trial court clerk will provide you with an estimate of the costs for this copy of the recording. You must pay this amount to the trial court.

If you cannot afford to pay the cost of preparing the transcript, the $50 fee, or the fee for the copy of the official electronic recording, you can ask the court to waive these costs. To do this, you must fill out and file a *Request to Waive Court Fees* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www.courts.ca.gov/forms.* The court will review this application to determine if you are eligible for a fee waiver.

Completion and delivery: After the estimated cost of the transcript or official electronic recording has been paid or waived, the clerk will have the transcript or copy of the recording prepared. When the transcript is completed or the copy of the official electronic recording is prepared and the rest of the record is complete, the clerk will send it to the appellate division.

(3) Agreed statement

Description: An agreed statement is a written summary of the trial court proceedings agreed to by all the parties. (See rule 8.836 of the California Rules of Court.)

When available: If the trial court proceedings were not recorded either by a court reporter or by official electronic recording equipment or if you do not want to use one of these options, you can choose ("elect") to use an agreed statement as the record of the oral proceedings (please note that it

may take more of your time to prepare an agreed statement than to use either a reporter's transcript or official electronic recording, if they are available).

Contents: An agreed statement must explain what the trial court case was about, describe why the appellate division is the right court to consider an appeal in this case (why the appellate division has "jurisdiction"), and describe the rulings of the trial court relating to the points to be raised on appeal.

The statement should include only those facts that you and the other parties think are needed to decide the appeal.

Preparation: If you elect to use this option, you must file the agreed statement with your notice designating the record on appeal or, if you and the other parties need more time to work on the statement, you can file a written agreement with the other parties (called a "stipulation") stating that you are trying to agree on a statement. If you file this stipulation, within the next 30 days you must either file the agreed statement or tell the court that you and the other parties were unable to agree on a statement and file a new notice designating the record.

(4) Statement on appeal

Description: A statement on appeal is a summary of the trial court proceedings that is approved by the trial court judge who conducted those proceedings (the term "judge" includes commissioners and temporary judges).

When available: If the trial court proceedings were not recorded either by a court reporter or by official electronic recording equipment or if you do not want to use one of these options, you can choose ("elect") to use a statement on appeal as the record of the oral proceedings (please note that it may take more of your time to prepare a statement on appeal than to use either a reporter's transcript or official electronic recording, if they are available).

Contents: A statement on appeal must include:

- A statement of the points you (the appellant) are raising on appeal;
- A summary of the trial court's rulings and judgment; and
- A summary of the testimony of each witness and other evidence that is relevant to the issues you are raising on appeal.

(See rule 8.837 of the California Rules of Court for more information about what must be included in a statement on appeal and the procedures for preparing a statement. You can get a copy of this rule at any courthouse or county law library or online at *www.courts.ca.gov/rules*.)

Preparing a proposed statement: If you elect to use a statement on appeal, you must prepare a proposed statement. If you are not represented by a lawyer, you must use *Proposed Statement on Appeal (Limited Civil Case)* (form APP-104) to prepare your proposed statement. You can get form APP-104 at any courthouse or county law library or online at *www.courts.ca.gov/forms.*

Serving and filing a proposed statement: You must serve and file the proposed statement with the trial court within 20 days after you file your notice designating the record. "Serve and file" means that you must:

- Have somebody over 18 years old mail, deliver, or electronically send ("serve") the proposed statement to the respondent in the way required by law. If the proposed statement is mailed or personally delivered, it must be by someone who is not a party to the case—so not you.
- Make a record that the proposed statement has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) or *Proof of Electronic Service (Appellate Division)* (form APP-109E) can be used to make this record. The proof of service must show who served the proposed statement, who was served with the proposed statement, how the proposed statement was served (by mail, in person, or electronically), and the date the proposed statement was served.
- File the original proposed statement and the proof of service with the trial court. You should make a copy of the proposed statement you are planning to file for your own records before you

file it with the court. It is a good idea to bring or mail an extra copy of the proposed statement to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*

Review and modifications: The respondent has 10 days from the date you serve your proposed statement to serve and file proposed changes (called "amendments") to this statement. The trial court judge then reviews both your proposed statement and any proposed amendments filed by the respondent. The trial judge will either make or order you (the appellant) to make any corrections or modifications to the statement that are needed to make sure that the statement provides an accurate summary of the testimony and other evidence relevant to the issues you indicated you are raising on appeal.

Completion and certification: If the judge makes any corrections or modifications to the proposed statement, the corrected or modified statement will be sent to you and the respondent for your review. If the judge orders you to make any corrections or modifications to the proposed statement, you must serve and file the corrected or modified statement within the time ordered by the judge. If you or the respondent disagree with anything in the modified or corrected statement, you have 10 days from the date the modified or corrected statement is sent to you to serve and file objections to the statement. The judge then reviews any objections, makes or orders you to make any additional corrections to the statement, and certifies the statement as an accurate summary of the testimony and other evidence relevant to the issues you indicated you are raising on appeal.

Sending statement to the appellate division: Once the trial court judge certifies the statement on appeal, the trial court clerk will send the statement to the appellate division along with any record of the documents filed in the trial court.

b. Record of the documents filed in the trial court

The second part of the official record of the trial court proceedings is a record of the documents that were filed in the trial court. There are three ways in which a record of the documents filed in the trial court can be prepared for the appellate division:

- *A clerk's transcript or an appendix*
- The original *trial court file* or
- An *agreed statement*

Read below for more information about these options.

(1) Clerk's transcript or appendix

Description: A clerk's transcript is a record of the documents filed in the trial court prepared by the clerk of the trial court. An appendix is a record of these documents prepared by a party. (See rule 8.845 of the California Rules of Court.)

Contents: Certain documents, such as the notice of appeal and the trial court judgment or order being appealed, must be included in the clerk's transcript or appendix. These documents are listed in rule 8.832(a) and rule 8.845(b) of the California Rules of Court and in *Appellant's Notice Designating Record on Appeal (Limited Civil Case)* (form APP-103).

Clerk's transcript: If you want any documents other than those listed in rule 8.832(a) to be included in the clerk's transcript, you must tell the trial court in your notice designating the record on appeal. You can use form APP-103 to do this. You will need to identify each document you want included in the clerk's transcript by its title and filing date or, if you do not know the filing date, the date the document was signed.

If you—the appellant—request a clerk's transcript, the respondent also has the right to ask the clerk to include additional documents in the clerk's transcript. If this happens, you will be served with a notice saying what other

documents the respondent wants included in the clerk's transcript.

Cost: The appellant is responsible for paying for preparing a clerk's transcript. The trial court clerk will send you a bill for the cost of preparing an original and one copy of the clerk's transcript. You must do one of the following things within 10 days after the clerk sends this bill or the appellate division may dismiss your appeal:

- Pay the bill.
- Ask the court to waive the cost because you cannot afford to pay. To do this, you must fill out and file a *Request to Waive Court Fees* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www. courts.ca.gov /forms.* The court will review this application to determine if you are eligible for a fee waiver.
- Give the court a copy of a court order showing that your fees in this case have already been waived by the court.

Completion and delivery: After the cost of preparing the clerk's transcript has been paid or waived, the trial court clerk will compile the requested documents into a transcript format and, when the record on appeal is complete, will forward the original clerk's transcript to the appellate division for filing. The trial court clerk will send you a copy of the transcript. If the respondent bought a copy, the clerk will also send a copy of the transcript to the respondent.

Appendix: If you choose to prepare an appendix of the documents filed in the superior court, rather than designating a clerk's transcript, that appendix must include all of the documents and be prepared in the form required by rule 8.845 of the California Rules of Court. The parties may prepare separate appendixes or stipulate (agree) to a joint appendix. If separate appendixes are prepared, each party must pay for its own appendix. If a joint appendix is prepared, the parties can agree on how the cost of preparing the appendix will be paid or the appellant will pay the cost.

The party preparing the appendix must serve the appendix on each other party (unless the parties have agreed or the appellate division has ordered otherwise) and file the appendix in the appellate division. The appellant's appendix or a joint appendix must be served and filed with the appellant's opening brief. See (15) for information about the brief.

(2) Trial court file

When available: If the court has a local rule allowing this, the clerk can send the appellate division the original trial court file instead of a clerk's transcript (see rule 8.833 of the California Rules of Court).

Cost: As with a clerk's transcript, the appellant is responsible for paying for preparing the trial court file. The trial court clerk will send you a bill for this preparation cost. You must do one of the following things within 10 days after the clerk sends this bill or the appellate division may dismiss your appeal:

- Pay the bill.
- Ask the court to waive the cost because you cannot afford to pay. To do this, you must fill out and file a *Request to Waive Court Fees* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www.courts.ca.gov /forms*. The court will review this application to determine if you are eligible for a fee waiver.
- Give the court a copy of a court order showing that your fees in this case have already been waived by the court.

Completion and delivery: After the cost of preparing the trial court file has been paid or waived and the record on appeal is complete, the trial court clerk will send the file and a list of the documents in the file to the appellate division. The trial court clerk will also send a copy of the

list of documents to the appellant and respondent so that you can put your own files of documents from the trial court in the correct order.

(3) Agreed statement

When available: If you and the respondent have already agreed to use an agreed statement as the record of the oral proceedings (see a(3) above) and agree to this, you can use an agreed statement instead of a clerk's transcript. To do this, you must attach to your agreed statement all of the documents that are required to be included in a clerk's transcript.

c. Exhibits

The third part of the official record of the trial court proceeding is the exhibits, such as photographs, documents, or other items that were admitted in evidence, refused, or lodged (temporarily placed with the court) in the trial court. Exhibits are considered part of the record on appeal, but the clerk will not include any exhibits in the clerk's transcript unless you ask that they be included in your notice designating the record on appeal. *Appellant's Notice Designating Record on Appeal (Limited Civil Case)* (form APP-103), includes a space for you to make this request. You also can ask the trial court to send original exhibits to the appellate division at the time briefs are filed (see rule 8.843 for more information about this procedure and see below for information about briefs).

Sometimes, the trial court returns an exhibit to a party at the end of the trial. If the trial court returned an exhibit to you or another party and you or the other party ask for that exhibit to be included in the clerk's transcript or sent to the appellate division, the party who has the exhibit must deliver that exhibit to the trial court clerk as soon as possible.

14 What happens after the official record has been prepared?

As soon as the record on appeal is complete, the clerk of the trial court will send it to the appellate division. When the appellate division receives the record, it will send you a notice telling you when you must file your brief in the appellate division.

15 What is a brief?

Description: A "brief" is a party's written description of the facts in the case, the law that applies, and the party's argument about the issues being appealed. If you are represented by a lawyer in your appeal, your lawyer will prepare your brief. If you are not represented by a lawyer, you will have to prepare your brief yourself. You should read rules 8.882–8.884 of the California Rules of Court, which set out the requirements for preparing, serving, and filing briefs in limited civil appeals, including requirements for the format and length of these briefs. You can get copies of these rules at any courthouse or county law library or online at *www.courts.ca.gov/rules.*

Contents: If you are the appellant, your brief, called an "appellant's opening brief," must clearly explain what you believe are the legal errors made in the trial court. Your brief must refer to the exact places in the clerk's transcript and the reporter's transcript (or the other forms of the record you are using) that support your argument. Remember that an appeal is not a new trial. The appellate division will not consider new evidence, such as the testimony of new witnesses or new exhibits, so do not include any new evidence in your brief.

Serving and filing: You must serve and file your brief in the appellate division by the deadline the court set in the notice it sent you, which is usually 30 days after the record is filed in the appellate division or 60 days from the date the appellant chooses to proceed with no reporter's transcript under rule 8.845. "Serve and file" means that you must:

- Have somebody over 18 years old mail, deliver, or electronically send ("serve") the brief to the other parties in the way required by law. If the brief is mailed or personally delivered, it must be by someone who is not a party to the case—so not you.
- Make a record that the brief has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) or *Proof of Electronic Service (Appellate Division)* (form APP-109E) can be used to make this record. The proof of service must show who served the brief, who was served with the brief, how the brief was served (by

mail, in person, or electronically), and the date the brief was served.

- File the original brief and the proof of service with the appellate division. You should make a copy of the brief you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the brief to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.
- Note: If a party chooses to prepare an appendix of the documents filed in the trial court instead of designating a clerk's transcript, the appellant's appendix or a joint appendix must be served and filed with the appellant's opening brief.

You can get more information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*

You and the other parties can agree (stipulate) to extend the time for filing this brief by up to 30 days (see rule 8.882(b) for requirements for these agreements). You can also ask the court to extend the time for filing this brief if you can show good cause for an extension (see rule 8.811(b) for a list of the factors the court will consider in deciding whether there is good cause for an extension). You can use *Application for Extension of Time to File Brief (Limited Civil Case)* (form APP-106) to ask the court for an extension.

If you do not file your brief by the deadline set by the appellate division, the court may dismiss your appeal.

16 What happens after I file my brief?

Within 30 days after you serve and file your brief, the respondent may, but is not required to, respond by serving and filing a respondent's brief. If the respondent does not file a brief, the appellant does not automatically win the appeal. The court will decide the appeal on the record, the appellant's brief, and any oral argument by the appellant.

If the respondent files a brief, within 20 days after the respondent's brief was filed, you may, but are not required to, file another brief replying to the respondent's brief. This is called a "reply brief."

17 What happens after all the briefs have been filed?

Once all the briefs have been filed or the time to file them has passed, the appellate division will notify you of the date for oral argument in your case.

18 What is "oral argument"?

"Oral argument" is the parties' chance to explain their arguments to the appellate division judges in person. You do not have to participate in oral argument if you do not want to; you can notify the appellate division that you want to "waive" oral argument. If all parties waive oral argument, the judges will decide your appeal based on the briefs and the record that were submitted. But if one party waives oral argument and another party or parties does not, the appellate division will hold oral argument with the party or parties who did not waive it.

If you do choose to participate in oral argument, you will have up to 10 minutes for your argument unless the appellate division orders otherwise. Remember that the judges will have already read the briefs, so you do not need to read your brief to the judges. It is more helpful to tell the judges what you think is most important in your appeal or ask the judges if they have any questions you could answer.

19 What happens after oral argument?

After oral argument is held (or the date it was scheduled passes if all the parties waive oral argument), the judges of the appellate division will make a decision about your appeal. The appellate division has 90 days after the date scheduled for oral argument to decide the appeal. The clerk of the court will mail you a notice of the appellate division's decision.

20 What should I do if I want to give up my appeal?

If you decide you do not want to continue with your appeal, you must file a written document with the appellate division notifying it that you are giving up (this is called "abandoning") your appeal. You can use *Abandonment of Appeal (Limited Civil Case)* (form APP-107) to file this notice in a limited civil case. You

can get form APP-107 at any courthouse or county law library or online at *www.courts.ca.gov/forms.*

INFORMATION FOR THE RESPONDENT

This section of this information sheet is written for the respondent—the party responding to an appeal filed by another party. It explains some of the rules and procedures relating to responding to an appeal in a limited civil case. The information may also be helpful to the appellant.

21 I have received a notice of appeal from another party. Do I need to do anything?

You do not *have* to do anything. The notice of appeal simply tells you that another party is appealing the trial court's decision. However, this would be a good time to get advice from a lawyer, if you want it. You do not *have* to have a lawyer; if you are an individual (not a corporation, for example), you are allowed to represent yourself in an appeal in a limited civil case. But appeals can be complicated and you will have to follow the same rules that lawyers have to follow.

If you have any questions about the appeal procedures, you should talk to a lawyer. You must hire your own lawyer if you want one. You can get information about finding a lawyer on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-lowcosthelp.htm*.

22 If the other party appealed, can I appeal too?

Yes. Even if another party has already appealed, you may still appeal the same judgment or order. This is called a "cross-appeal." To cross-appeal, you must serve and file a notice of appeal. You can use *Notice of Appeal/Cross-Appeal (Limited Civil Case)* (form APP-102) to file this notice in a limited civil case. Please read the information for appellants about filing a notice of appeal, starting on page 2 of this information sheet, if you are considering filing a cross-appeal.

23 Is there a deadline to file a cross-appeal?

Yes. You must serve and file your notice of appeal within either the regular time for filing a notice of appeal (generally 30 days after mailing or service of Notice of Entry of the judgment or a file-stamped copy of the judgment) or within 10 days after the clerk of the trial court mails notice of the first appeal, whichever is later.

24 I have received a notice designating the record on appeal from another party. Do I need to do anything?

You do not *have* to do anything. A notice designating the record on appeal lets you know what kind of official record the appellant has asked to be sent to the appellate division. Depending on the kind of record chosen by the appellant, however, you may have the option to:

- Add to what is included in the record
- Participate in preparing the record *or*
- Ask for a copy of the record

Look at the appellant's notice designating the record on appeal to see what kind of record the appellant has chosen and read about that form of the record in the response to question 13 above. Then read below for what your options are when the appellant has chosen that form of the record.

(a) Reporter's transcript

If the appellant is using a reporter's transcript, you have the option of asking for additional proceedings to be included in the reporter's transcript. To do this, within 10 days after the appellant files its notice designating the record on appeal, you must serve and file a notice designating additional proceedings to be included in the reporter's transcript.

Whether or not you ask for additional proceedings to be included in the reporter's transcript, you must generally pay a fee if you want a copy of the reporter's transcript. The trial court clerk or reporter will send you a notice indicating the cost of preparing a copy of the reporter's transcript. If you want a copy of the reporter's transcript, you must deposit this amount (and a fee for the trial court) or one of the substitutes allowed by rule 8.834 with the trial court clerk within 10 days after this notice is sent. (See rule 8.834 for more information

about this deposit and the permissible substitutes, such as a waiver of this deposit signed by the court reporter.)

Unlike the fee for preparing a clerk's transcript, the court cannot waive the fee for preparing a reporter's transcript. A special fund, called the Transcript Reimbursement Fund, may be able to help pay for the transcript. You can get information about this fund at w*ww.courtreportersboard.ca.gov/consumers /index.shtml#trf.* The reporter will not prepare a copy of the reporter's transcript for you unless you deposit the cost of the transcript, or one of the permissible substitutes, or your application for payment by the Transcript Reimbursement Fund is approved.

If the appellant elects not to use a reporter's transcript, you may not designate a reporter's transcript without first getting an order from the appellate division.

(b) Agreed statement

If you and the appellant agree to prepare an agreed statement (a summary of the trial court proceedings that is agreed to by the parties), you and the appellant will need to reach an agreement on that statement within 30 days after the appellant files its notice designating the record.

(c) Statement on appeal

If the appellant elects to use a statement on appeal (a summary of the trial court proceedings that is approved by the trial court), the appellant will send you a proposed statement to review. You will have 10 days from the date the appellant sent you this proposed statement to serve and file suggested changes (called "amendments") that you think are needed to make sure that the statement provides an accurate summary of the testimony and other evidence relevant to the issues the appellant indicated the appellant is raising on appeal. "Serve and file" means that you must:

- Have somebody over 18 years old mail, deliver, or electronically send ("serve") the proposed amendments to the appellant in the way required by law. If the proposed amendments are mailed or personally delivered, it must be by someone who is not a party to the case—so not you.
- Make a record that the proposed amendments have been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) or *Proof of Electronic Service (Appellate Division)* (form APP-109E) can be used to make this record. The proof of service must show who served the proposed amendments, who was served with the proposed amendments, how the proposed amendments were served (by mail, in person, or electronically), and the date the proposed amendments were served.
- File the original proposed amendments and the proof of service with the trial court. You should make a copy of the proposed amendments you are planning to file for your own records before you file them with the court. It is a good idea to bring or mail an extra copy of the proposed amendments to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov /selfhelp-serving.htm*.

(d) Clerk's transcript or appendix

Clerk's transcript: If the appellant is using a clerk's transcript, you have the option of asking the clerk to include additional documents in the clerk's transcript.

To do this, within 10 days after the appellant serves its notice designating the record on appeal, you must serve and file a notice designating additional documents to be included in the clerk's transcript. You may use *Respondent's Notice Designating Record on Appeal (Limited Civil Case)* (form APP-110) for this purpose.

Whether or not you ask for additional documents to be included in the clerk's transcript, you must pay a fee if you want a copy of the clerk's

transcript. The trial court clerk will send you a notice indicating the cost for a copy of the clerk's transcript. If you want a copy, you must deposit this amount with the court within 10 days after the clerk's notice was sent.

If you cannot afford to pay this cost, you can ask the court to waive it. To do this, you must fill out and file a *Request to Waive Court Fees* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www.courts.ca.gov/forms.* The court will review this application and determine if you are eligible for a fee waiver. The clerk will not prepare a copy of the clerk's transcript for you unless you deposit payment for the cost or obtain a fee waiver.

Appendix: If the appellant is using an appendix, and you and the appellant have not agreed to a joint appendix, you may prepare a separate respondent's appendix. See pages 8-9 for more information about preparing an appendix.

25 What happens after the official record has been prepared?

As soon as the record on appeal is complete, the clerk of the trial court will send it to the appellate division. When the appellate division receives this record, it will send you a notice telling you when you must file your brief in the appellate division.

A brief is a party's written description of the facts in the case, the law that applies, and the party's argument about the issues being appealed. If you are represented by a lawyer, your lawyer will prepare your brief. If you are not represented by a lawyer in your appeal, you will have to prepare your brief yourself. You should read rules 8.882–8.884 of the California Rules of Court, which set out the requirements for preparing, serving, and filing briefs in limited civil appeals, including requirements for the format and length of these briefs. You can get these rules at any courthouse or county law library or online at *www.courts.ca.gov/rules.htm.*

The appellant serves and files the first brief, called an "appellant's opening brief." You may, but are not required to, respond by serving and filing a respondent's brief within 30 days after the appellant's opening brief is filed. "Serve and file" means that you must:

- Have somebody over 18 years old mail, deliver, or electronically send ("serve") the brief to the other parties in the way required by law. If the brief is mailed or personally delivered, it must be by someone who is not a party to the case—so not you.
- Make a record that the brief has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) or *Proof of Electronic Service (Appellate Division)* (form APP-109E) can be used to make this record. The proof of service must show who served the brief, who was served with the brief, how the brief was served (by mail, in person, or electronically), and the date the brief was served.
- File the original brief and the proof of service with the appellate division. You should make a copy of the brief you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the brief to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed. You can get more information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*

You and the other parties can agree (stipulate) to extend the time for filing this brief by up to 30 days (see rule 8.882(b) for requirements for these agreements). You can also ask the court to extend the time for filing this brief if you can show good cause for an extension (see rule 8.811(b) for a list of the factors the court will consider in deciding whether there is good cause for an extension). You can use *Application for Extension of Time to File Brief (Limited Civil Case)* (form APP-106) to ask the court for an extension.

If you do not file a respondent's brief, the appellant does not automatically win the appeal. The court will decide the appeal on the record, the appellant's brief, and any oral argument by the appellant. Remember that an appeal is not a new trial. The appellate division will not consider new evidence, such as the testimony of new witnesses or new exhibits, so do not include any new evidence in your brief.

If you file a respondent's brief, the appellant then has an opportunity to serve and file another brief within 20 days replying to your brief.

26 What happens after all the briefs have been filed?

Once all the briefs have been filed or the time to file them has passed, the court will notify you of the date for oral argument in your case.

"Oral argument" is the parties' chance to explain their arguments to appellate division judges in person. You do not have to participate in oral argument if you do not want to; you can notify the appellate division that you want to "waive" oral argument. If all parties waive oral argument, the judges will decide the appeal based on the briefs and the record that were submitted. But if one party waives oral argument and another party or parties does not, the appellate division will hold oral argument with the party or parties who did not waive it.

If you do choose to participate in oral argument, you will have up to 10 minutes for your argument unless the appellate division orders otherwise. Remember that the judges will have already read the briefs, so you do not need to read your brief to the judges. It is more helpful to tell the judges what you think is most important in the appeal or ask the judges if they have any questions you could answer.

After oral argument is held (or the scheduled date passes if all parties waive argument), the judges of the appellate division will make a decision about the appeal. The appellate division has 90 days after oral argument to decide the appeal. The clerk of the court will mail you a notice of the appellate division's decision.

APP-103 Appellant's Notice Designating Record on Appeal (Limited Civil Case)

Clerk stamps date here when form is filed.

DRAFT

01-24-20

Not approved by the Judicial Council

Instructions

- This form is only for choosing ("designating") the record on appeal in a **limited civil case.**
- Before you fill out this form, read *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO) to know your rights and responsibilities. You can get form APP-101-INFO at any courthouse or county law library or online at *www.courts.ca.gov/forms*.
- This form can be attached to your notice of appeal. If it is not attached to your notice of appeal, you must serve and file this form within 10 days after you file your notice of appeal. **If you do not file this form on time, the court may dismiss your appeal.**
- Fill out this form and make a copy of the completed form for your records and for each of the other parties.
- Serve a copy of the completed form on each of the other parties and keep proof of this service. You can get information about how to serve court papers and proof of service on the California Courts Online Self-Help Center site at *www.courts.ca.gov/selfhelp-serving.htm.*
- Take or mail the original completed form and proof of service on the other parties to the clerk's office for the same court that issued the judgment or order you are appealing. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

a. Name of Appellant (the party who is filing this appeal):

Name: _____

b. Appellant's contact information *(skip this if the appellant has a lawyer for this appeal):*

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different):* _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ E-mail: _____

c. Appellant's lawyer *(skip this if the appellant does not have a lawyer for this appeal):*

Name: _____ State Bar number: _____

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different):* _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ E-mail: _____

Fax: _____

Trial Court Case Name: _____ Trial Court Case Number:

Information About Your Appeal

(2) On *(fill in the date):* _____ I/my client filed a notice of appeal in the trial court case identified in the box on page 1 of this form.

Record of Oral Proceedings in the Trial Court

You do not have to provide the appellate division with a record of what was said in the trial court (this is called a record of the "oral proceedings"). But if you want to raise any issue in your appeal that would require the appellate division to consider what was said in the trial court, you will need to provide the appellate division with a record of those oral proceedings. For example, if you are claiming that there was not evidence supporting the judgment, order, or other decision you are appealing, you will need to provide a record of the oral proceedings.

(3) I elect (choose)/My client elects to proceed *(check a or b):*

a. ☐ WITHOUT a record of the oral proceedings in the trial court (*skip item* (4); *go to item* (5)). I understand that if I elect to proceed without providing a record of the oral proceedings, the appellate division will not be able to review any issues I might want to raise about what was said in the trial court during those proceedings or any claim that there was not evidence to support the judgment, order, or decision I am appealing.
(Write initials here): _____

b. ☐ WITH a record of the oral proceedings in the trial court *(complete item* (4) *below)*. I understand that if I elect (choose) to proceed WITH a record of the oral proceedings in the trial court, I have to choose the record I want to use and take the actions described below to make sure this record is provided to the appellate division. I understand that if I do not take the actions described below and the appellate division does not receive this record, I am not likely to succeed in my appeal. *(Write initials here)*: _____

(4) I want to use the following record of what was said in the trial court proceedings in my case *(check and complete **only one** of the following below—a, b, c, d, or e):*

a. ☐ **Reporter's Transcript.** *This option is available only if there was a court reporter in the trial court who made a record of what was said in court. Check with the trial court to see if there was a court reporter in your case before choosing this option. Complete (1) and (2).*

(1) **Designation of proceedings to be included in reporter's transcript.** I request that the following proceedings in the trial court be included in the reporter's transcript. (*You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings* [*for example, the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions*]*, the name of the court reporter who recorded the proceedings, and whether a certified transcript of the designated proceeding was previously prepared.)*

Date	Department	Description	Reporter's Name	Prev. prepared?
(a)				☐ Yes ☐ No
(b)				☐ Yes ☐ No
(c)				☐ Yes ☐ No
(d)				☐ Yes ☐ No
(e)				☐ Yes ☐ No
(f)				☐ Yes ☐ No
(g)				☐ Yes ☐ No

☐ *Check here if you need to list other proceedings and attach a separate page or pages listing those proceedings. At the top of each page, write "APP-103, item 4a."*

4 a. (continued)

(2) The proceedings designated in (1) ☐ include ☐ do not include all of the testimony in the trial court. If the designated proceedings DO NOT include all of the testimony, state the points that you intend to raise on appeal. *(Rule 8.834(a)(2) provides that your appeal will be limited to these points unless, on a motion, the appellate division permits otherwise.)*

_____

_____

_____

☐ *Check here if you need more space to list other points and attach a separate page or pages listing those points. At the top of each page, write "APP-103, item 4a(2)."*

(3) ☐ **Certified transcripts.** I have attached to this Appellant's Notice Designating Record on Appeal an original certified transcript of *all the proceedings I have designated* in (1). The transcript complies with the format requirements in rule 8.144 of the California Rules of Court. Under rule 8.834, no payment is due for this transcript (skip the rest of 4 and go to 5).

(4) **Payment for reporter's transcript.**

(a) ☐ I will pay for the reporter's transcript I have designated in (1). Within 10 days of getting the reporter's estimate of the cost of the transcript, I will:

☐ Deposit an amount equal to the estimated cost of the transcript with the trial court, and a fee of $50 for the superior court to hold this deposit in trust. I understand that if I do not comply with this requirement, my appeal may be dismissed.

☐ File with the trial court a copy of the written waiver of deposit signed by the reporter. I understand that if I do not comply with this, my appeal may be dismissed.

(b) ☐ I am unable to afford the cost of the reporter's transcript I have designated in (1) and am therefore applying to the Transcript Reimbursement Fund to pay for this transcipt. Within 10 days of receipt of the court reporter's estimate of the costs for this transcript, I will file with the trial court a copy of my application to the Court Reporters Board for payment or reimbusement from the Transcript Reimbursement Fund.

(5) **Format of reporter's transcript.** I request that the reporter provide my copy of the transcript in:

(a) ☐ Paper format only.

(b) ☐ Electronic format only.

(c) ☐ Both paper and electronic format.

OR

b. ☐ **Transcript From Official Electronic Recording.** *This option is available only if an official electronic recording was made of what was said in the trial court. Check with the trial court to see if an official electronic recording was made in your case before choosing this option. Identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings, and if you know it, the name of the electronic recording monitor who recorded the proceedings:*

Date	Department	Description	Electronic Monitor's Name
(a)			
(b)			
(c)			

☐ *Check here if you need more space to describe any proceeding or to list more proceedings and attach a separate page describing or listing those proceedings. At the top of each page, write "APP-103, item 4b."*

4 b. (continued)

Check and complete (1) or (2).

(1) ☐ I will pay the trial court clerk for this transcript myself. I understand that if I do not pay for the transcript, my appeal may be dismissed.

(a) ☐ With this notice designating the record on appeal, I have deposited with the trial court clerk the approximate cost of transcribing the proceedings I designated above, calculated as provided in rule 8.130(b)(1)(B).

(b) ☐ Within 10 days of receipt of the clerks estimate of the cost of the transcript, I will deposit that amount with the trial court clerk.

(2) ☐ I am asking that the transcript be provided at no cost to me because I cannot afford to pay this cost. I have attached *(check (a) or (b) and attach the appropriate document):*

(a) ☐ An order granting a waiver of the cost under rules 3.50–3.58 and 8.818(d).

(b) ☐ An application for a waiver of court fees and costs under rules 3.50–3.58 and 8.818(d). *(Use* Request to Waive Court Fees *(form FW-001). The court will review this form to decide if you are eligible for a fee waiver.)*

OR

c. ☐ **Copy of Official Electronic Recording.** *This option is available only if an official electronic recording was made of what was said in the trial court, the court has a local rule for the appellate division permitting the use of the official electronic recording itself as the record of the proceedings, and all of the parties have agreed (stipulated) that they want to use the recording itself as the record of what was said in the case. Check with the trial court to see if an official electronic recording was made in your case before choosing this option. You must attach a copy of your agreement (stipulation) with the other parties to this notice. Check and complete (1) or (2).*

(1) ☐ I will pay the trial court clerk for this copy of the recording myself when I receive the clerk's estimate of the cost of this copy. I understand that if I do not pay for this copy of the recording, it will not be prepared and provided to the appellate division.

(2) ☐ I am asking that a copy of the recording be provided at no cost to me because I cannot afford to pay this cost. I have submitted the following document with this notice designating the record *(check (a) or (b) and submit the appropriate document):*

(a) ☐ An order granting a waiver of the cost under rules 3.50–3.58 and 8.818(d).

(b) ☐ An application for a waiver of court fees and costs under rules 3.50–3.58 and 8.818(d). *(Use* Request to Waive Court Fees *(form FW-001). The court will review this form to decide if you are eligible for a fee waiver.)*

OR

d. ☐ **Agreed Statement.** *An agreed statement is a summary of the trial court proceedings agreed to by the parties. See form APP-101-INFO for information about preparing an agreed statement. Check (1) or (2).*

(1) ☐ I have attached an agreed statement to this notice.

(2) ☐ All the parties have agreed in writing (stipulated) to try to agree on a statement *(you must attach a copy of this agreement (stipulation) to this notice)*. I understand that, within 30 days after I file this notice, I must file either the agreed statement or a notice indicating the parties were unable to agree on a statement and a new notice designating the record on appeal, and if I do not, the court may dismiss my appeal.

4 (continued)

OR

e. ☐ **Statement on Appeal.** *A statement on appeal is a summary of the trial court proceedings approved by the trial court. See form APP-101-INFO for information about preparing a proposed statement. Check (1) or (2).*

(1) ☐ I have attached my proposed statement on appeal to this notice. (*If you are not represented by a lawyer in this appeal, you must use* Proposed Statement on Appeal (Limited Civil Case) *(form APP-104) to prepare and file this proposed statement. You can get a copy of form APP-104 at any courthouse or county law library or online at* www.courts.ca.gov/forms.htm.)

(2) ☐ I have NOT attached my proposed statement on appeal to this notice. I understand that I must serve and file this proposed statement in the trial court within 20 days of the date I file this notice and that if I do not file the proposed statement on time, the court may dismiss my appeal.

Record of the Documents Filed in the Trial Court

5 I elect (choose)/My client elects to use the following record of the documents filed in the trial court *(check a, b, or c and fill in any required information):*

a. ☐ **Clerk's Transcript.** *(Fill out (1)–(4).) Note that, if the appellate division has adopted a local rule permitting this, the clerk may prepare and send the original court file to the appellate division instead of a clerk's transcript.*

(1) **Required documents.** *The clerk will automatically include the following items in the clerk's transcript, but you must provide the date each document was filed or, if that is not available, the date the document was signed.*

Document Title and Description	Date of Filing
(a) Notice of appeal	
(b) Notice designating record on appeal (this document)	
(c) Judgment or order appealed from	
(d) Notice of entry of judgment (if any)	
(e) Notice of intention to move for new trial or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order (if any)	
(f) Ruling on any item included under (e)	
(g) Register of actions or docket	

5 a. (continued)

(2) **Additional documents.** *If you want any documents in addition to the required documents listed in (1) above to be included in the clerk's transcript, you must identify those documents here.*

☐ I request that the clerk include in the transcript the following documents that were filed in the trial court. *(Identify each document you want included by its title and provide the date it was filed or, if that is not available, the date the document was signed.)*

Document Title and Description	Date of Filing
(a)	
(b)	
(c)	
(d)	
(e)	

☐ *Check here if you need to list other documents and attach a separate page or pages listing those documents. At the top of each page, write "APP-103, item 5a(2)."*

(3) **Exhibits.**

☐ I request that the clerk include in the transcript the following exhibits that were admitted in evidence, refused, or lodged in the trial court. *(For each exhibit, give the exhibit number (such as Plaintiff's #1 or Defendant's A) and a brief description of the exhibit, and indicate whether or not the court admitted the exhibit into evidence. If the trial court has returned a designated exhibit to a party, the party who has that exhibit must deliver it to the trial court clerk as soon as possible.)*

Exhibit Number	Description	Admitted Into Evidence
		☐ Yes ☐ No
		☐ Yes ☐ No
		☐ Yes ☐ No
		☐ Yes ☐ No
		☐ Yes ☐ No

☐ *Check here if you need to list other exhibits and attach a separate page or pages listing those exhibits. At the top of each page, write "APP-103, item 5a(3)."*

5 a. (continued)

(4) **Payment for clerk's transcript.** *(Check a or b.)*

(a) ☐ I will pay the trial court clerk for this transcript myself when I receive the clerk's estimate of the costs of the transcript. I understand that if I do not pay for the transcript, it will not be prepared and provided to the appellate division.

(b) ☐ I am asking that the clerk's transcript be provided at no cost to me because I cannot afford to pay this cost. I have submitted the following document with this notice designating the record *(check (i) or (ii) and submit the checked document):*

(i) ☐ An order granting a waiver of the cost under rules 3.50–3.58 and 8.818(d).

(ii) ☐ An application for a waiver of court fees and costs under rules 3.50–3.58 and 8.818(d). *(Use* Request to Waive Court Fees *(form FW-001). The court will review this form to decide if you are eligible for a fee waiver.)*

OR

b. ☐ **An appendix under rule 8.845.**

OR

c. ☐ **Agreed statement.** *(This option is only available if you have chosen to use an agreed statement as the record of the oral proceedings under item 4 above and you attach to your agreed statement copies of all the documents that are required to be included in the clerk's transcript. These documents are listed in 5a(1) above and in rule 8.832 of the California Rules of Court.)*

Date: _____

_____ ▶ _____

Type or print your name *Signature of appellant or attorney*

APP-111

Respondent's Notice Electing to Use an Appendix (Limited Civil Case)

Clerk stamps date here when form is filed.

DRAFT

01-28-2020

Not approved by the Judicial Council

Instructions

- This form is only for choosing ("electing") to use an appendix as the record of the documents filed in the trial court on appeal in a **limited civil case.**
- Before you fill out this form, read *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO) to know your rights and responsibilities. You can get form APP-101-INFO at any courthouse or county law library or online at *www.courts.ca.gov/forms*.
- You must serve and file this form **no later than 10 days** after the notice of appeal is filed.
- Fill out this form and make a copy of the completed form for your records and for each of the other parties.
- Serve a copy of the completed form on each of the other parties and keep proof of this service. You can get information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) or on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*
- Take or mail the original completed form and proof of service on the other parties to the clerk's office for the same court that issued the judgment or order that is being appealed. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

a. Name of respondent (the party who is responding to an appeal filed by another party):

Name: _____

b. Respondent's contact information *(skip this if the respondent has a lawyer for this appeal):*

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different):* _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ E-mail: _____

c. Respondent's lawyer *(skip this if the respondent does not have a lawyer for this appeal):*

Name: _____ State Bar number: _____

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different):* _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ E-mail: _____

Fax: _____

Trial Court Case Name: _____

Trial Court Case Number:

Information About the Appeal

2 On *(fill in the date):* _____ another party filed a notice of appeal in the trial court case identified in the box on page 1 of this form.

3 On *(fill in the date):* _____ the appellant filed an appellant's notice designating the record on appeal.

Record of the Documents Filed in the Trial Court

4 The appellant has not been granted a waiver of the fees for a clerk's transcript. I elect under rule 8.845(a) to use an appendix instead of a clerk's transcript under rule 8.832 as the record of the documents filed in the trial court.

Date: _____

_____
Type or print your name

_____
Signature of respondent or attorney

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INVITATION TO COMMENT

SPR20-32

Title
Appellate Procedure: Emergency Orders to Toll and Extend Time

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 8.66

Proposed by
Hon. Marsha G. Slough, Chair, Executive and Planning Committee
Hon. David M. Rubin, Chair, Judicial Branch Budget Committee and Litigation Management Committee
Hon. Kyle S. Brodie, Chair, Judicial Council Technology Committee
Hon. Marla O. Anderson, Chair, Legislation Committee
Hon. Harry E. Hull, Jr., Chair, Rules Committee

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
Rule is effective April 4, 2020, and is circulating for comment post-amendment

Contact
Christy Simons, 415-865-7694
christy.simons@jud.ca.gov

Executive Summary and Origin

To assist the appellate courts in continuing to operate during the COVID-19 pandemic, the Judicial Council recently amended rule 8.66 of the California Rules of Court, the appellate rule governing extensions of time because of a public emergency, to provide for tolling in addition to extending time. The amendments also allow the Chair of the Judicial Council to order tolling or extensions of time for up to 30 days rather than 14 days, and clarify and simplify various provisions of the rule.

The rule was amended prior to circulation because of the courts' urgent need for these changes to take effect immediately. The chairs of the Judicial Council's six internal committees are now circulating the rule and seeking comments following amendment of the rule. The internal committee chairs will recommend further amendments, based on the comments, if appropriate.

The Proposal

The COVID-19 pandemic is having unprecedented impacts on courts throughout the state, including the appellate courts. Since the middle of March 2020, under former rule 8.66 and as authorized by the Chair of the Judicial Council, all six Courts of Appeal and the Supreme Court have issued orders extending for 30 days the time periods specified in the appellate rules. In implementing these orders, however, the courts became aware of shortcomings in the rule. In particular, the orders authorized by the former rule provided for extensions of time, but not for tolling. Tolling stops or suspends the running of time; when the tolling period ends, the time starts running again. By contrast, extending time adds days to the end of a time period. Tolling gives courts flexibility and can be easier to apply.

In addition to adding tolling, the amendments to subdivision (a) added a "public health crisis" as a type of public emergency that could necessitate an order under the rule, lengthened the time in (a)(1) that the Chair may order tolling or an extension from 14 days to 30 days to be consistent with the amount of time in (a)(2) that the Chair may authorize a court to toll or extend time, and simplified language in (a)(1) and (a)(2).

The amendments to subdivision (b) added language regarding tolling, required in (b)(1) that the length of any tolling or extension ordered by the Chair under (a)(1) must be specified in the order, and made minor wording changes in (b)(1) and (b)(2).

The amendments to subdivision (c) updated the language from *extending* the orders under the rule to *renewing* the orders, and added provisions that the Chair may renew an order with or without a request, an order may be renewed prior to its expiration, and orders under both (a)(1) and (a)(2) may be renewed for up to 30 days per renewal. In addition, the former rule appeared to authorize only one extension of an order. The amendments clarified that an order may be renewed more than once, "for additional periods not to exceed 30 days per renewal." As in subdivision (a), the amendments removed the distinction between the length of time the Chair may extend an order (14 days) and the length of time the Chair may authorize the court to extend time (30 days), to provide for renewal for up to 30 days for both types.

Finally, the amendments added two new advisory committee comments regarding tolling. The first explains the concept of tolling and provides a case citation. The second clarifies that the tolling and extension of time authorized under this rule apply to all rules of court that govern finality in the Supreme Court and the Courts of Appeal.

Alternatives Considered

The internal committee chairs considered taking no action, but rejected this alternative in light of the public emergency confronting the courts and litigants.

The internal committee chairs also considered listing the specific rules governing finality in the second new advisory committee comment, rather than referring to them collectively. The

committee rejected this option because a list could be, or could become, incomplete. In addition, rule numbers may change, and updating cross-references can be cumbersome.

Fiscal and Operational Impacts

It is anticipated that the proposal will facilitate appellate court operations by expanding the types of relief that can be ordered, clarifying that additional periods of relief, if necessary, are authorized, and making other changes to improve the working of the rule. Operational impacts will include the time to inform judicial officers and court staff regarding the amendments, and could include changes to case management systems. It is unclear what fiscal impact the proposal may have on the appellate courts.

Attachments and Links

1. Cal. Rules of Court, rule 8.66, at pages 4–5

Title 8. Appellate Rules

Division 1. Rules Relating to the Supreme Court and Courts of Appeal

Chapter 1. General Provisions

Article 4. Applications and Motions; Extending and Shortening Time

Rule 8.66. ~~Extending~~ Tolling or extending time because of public emergency

(a) Emergency tolling or extensions of time

If made necessary by the occurrence or danger of an earthquake, fire, public health crisis, or other public emergency, or by the destruction of or danger to a building housing a reviewing court, the Chair of the Judicial Council, notwithstanding any other rule in this title, may:

(1) ~~Extend~~ Toll for up to 30 days or extend by no more than ~~14 additional~~ 30 days ~~the time to do any act required or permitted under~~ any time periods specified by these rules; or

(2) Authorize specified courts to toll for up to 30 days or extend by no more than 30 ~~additional~~ days ~~the time to do any act required or permitted under~~ any time periods specified by these rules.

(b) Applicability of order

(1) An order under (a)(1) must specify the length of the tolling or extension and whether ~~it~~ the order applies throughout the state, only to specified courts, or only to courts or attorneys in specified geographic areas, or applies in some other manner.

(2) An order ~~of the Chair of the Judicial Council~~ under (a)(2) must specify the length of the authorized tolling or extension.

(c) ~~Additional extensions~~Renewed orders

If made necessary by the nature or extent of the public emergency, with or without a request, the Chair of the Judicial Council may ~~extend or~~ renew an order issued under ~~(a)~~ this rule prior to its expiration. An order may be renewed for ~~an~~ additional periods ~~of:~~ not to exceed 30 days per renewal.

~~(1) No more than 14 days for an order under (a)(1); or~~

~~(2) No more than 30 days for an order under (a)(2).~~

Advisory Committee Comment

The Chief Justice of California is the Chair of the Judicial Council (see rule 10.2).

Any tolling ordered under this rule is excluded from the time period specified by the rules. (See *Woods v. Young* (1991) 53 Cal.3d 315, 326, fn. 3 ["Tolling may be analogized to a clock that is stopped and then restarted. Whatever period of time that remained when the clock is stopped is available when the clock is restarted, that is, when the tolling period has ended."].)

The tolling and extension of time authorized under this rule include and apply to all rules of court that govern finality in both the Supreme Court and the Courts of Appeal.

Item number: 06

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Appellate Procedure: Consent to Electronic Service

Committee or other entity submitting the proposal:
Appellate Advisory Committee

Staff contact (name, phone and e-mail): Eric Long, 415-865-7691, eric.long@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Amend rules 8.72, 8.74, and 8.78 to conform to section 1010.6 of the Code of Civil Procedure, which was recently amended and provides that the act of electronic filing does not constitute consent to electronic service. Subcommittee: Rules.

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.)

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INVITATION TO COMMENT

SPR20-03

Title
Appellate Procedure: Consent to Electronic Service

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 8.25, 8.72, and 8.78; revise form APP-009-INFO

Proposed by
Appellate Advisory Committee
Hon. Louis R. Mauro, Chair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Eric Long, Attorney, 415-865-7691
eric.long@jud.ca.gov

Executive Summary and Origin

The Appellate Advisory Committee proposes amending rules and revising a form to clarify the appellate procedures for electronic service. The proposal would amend rules 8.25, 8.72, and 8.78 of the California Rules of Court and revise form APP-009-INFO. The purpose of the proposed amendments and revisions is to clarify the procedures for electronic service in the Supreme Court and the Courts of Appeal. The proposal originated from the committee's awareness of a change in the law regarding consent to electronic service.

Background

Effective January 1, 2018, the Legislature amended Code of Civil Procedure section 1010.6 to require all persons to provide express consent to electronic service in each specific action in the trial courts. The trial court and appellate court rules had allowed the act of electronically filing alone to evidence consent to receive electronic service, but the 2018 amendments to section 1010.6 eliminated this option for trial courts. As amended, subdivision (a)(2)(A)(ii) states:

> For cases filed on or after January 1, 2019, if a document may be served by mail, express mail, overnight delivery, or facsimile transmission, electronic service of the document is not authorized unless a party or other person has expressly consented to receive electronic service in that specific action or the court has ordered electronic service on a represented party or other represented person under subdivision (c) or (d). Express consent to electronic service may be accomplished either by (I) serving a notice on all the parties and filing the notice

> with the court, or (II) manifesting affirmative consent through electronic means with the court or the court's electronic filing service provider, and concurrently providing the party's electronic address with that consent for the purpose of receiving electronic service. The act of electronic filing shall not be construed as express consent.

(Code Civ. Proc., § 1010.6(a)(2)(A)(ii).) Subdivision (e) directs the Judicial Council to "adopt uniform rules for electronic filing and service of documents *in the trial courts of the state*, which shall include statewide policies on vendor contracts, privacy, and access to public records, and rules relating to the integrity of electronic service." (§ 1010.6(e) (emphasis added).) There are no provisions in section 1010.6 that expressly speak to appellate court proceedings or to the adoption of rules for electronic service in the appellate courts.

Electronic filing and electronic service in the appellate courts and the trial courts are in different stages of implementation. The Judicial Council first adopted rules for e-filing and e-service in the appellate courts in 2010 as a pilot project in the Court of Appeal, Second Appellate District, and then in 2012 for all appellate courts. Last year, the Appellate Advisory Committee proposed instituting mandatory e-filing with statewide formatting requirements (subject to certain exceptions), effective January 1, 2020, which the council approved. Consistent with mandatory e-filing in the appellate courts, the appellate rules treat electronic filing as agreement to receive e-service unless a party opts out of e-service. (Cal. Rules of Court, rule 8.78(a)(2)(B).) E-filing in the trial courts, on the other hand, was authorized in 2012, when the Legislature enacted Assembly Bill 2073 (Stats. 2012, ch. 320). A pilot project on mandatory e-filing in the Superior Court of Orange County from 2013 was a success,[1] and as of 2019, 29 of the 58 trial courts provide e-filing and e-service to the public.[2] Although the trial courts are making commendable progress in implementing e-filing, it nevertheless remains true that while the appellate courts uniformly rely on e-filing and service, only half of the trial courts have standardized the practice.

The Proposal

It appears that the 2018 amendment to Code of Civil Procedure section 1010.6 only applies to the trial courts, and not to the appellate courts. Because section 1010.6 and its legislative history are silent about e-service in the appellate courts, the procedures in the Supreme Court and the Courts of Appeal do not need to change. The committee therefore proposes amending rules 8.25, 8.72, and 8.78 and revising form APP-009-INFO to reflect that express consent to electronic service is not required from every party in each specific appellate proceeding.

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[1] See Judicial Council of Cal., *Report on the Superior Court of Orange County's Mandatory E-Filing Pilot Project* (Sept. 30, 2014), *www.courts.ca.gov/documents/lr-SC-of-Orange-e-file-pilot-proj.pdf*.

[2] See Judicial Council of Cal., *Report to the Legislature: State Trial Court Electronic Filing and Document Service Accessibility Compliance* (Dec. 23, 2019), *https://jcc.legistar.com/View.ashx?M=F&ID=7977274&GUID=AE037AC0-DC91-496B-83D9-CDCDE8D0674A*.

This proposal would clarify that the appellate rules authorize electronic service if a party registers with the court's electronic filing service provider and provides an electronic service address, unless the party opts out.

Proposed rule 8.25 would not change, except to remove references to methods of service permitted by the Code of Civil Procedure. APP-009-INFO form would be revised in the same way. The deletions are intended to eliminate ambiguity about whether section 1010.6 applies more broadly in the appellate courts, and to acknowledge that e-service is a permissible method of service in the appellate courts. New language would be added to the form to note that section 1010.6(a)(2)(A)(ii) addresses electronic service in the trial courts, and rule 8.78 addresses electronic service in the Courts of Appeal.

Proposed rule 8.78(a)(2)(B) would be clarified to reflect existing appellate practice. Although the rule has long provided that the act of electronically filing any document with the court is deemed to show a party's agreement to electronic service, the appellate practice has been to rely on a party's *registration* with the court's electronic filing service provider (EFSP) and concurrent provision of an email address—prerequisites to electronically filing any document with the court—as a basis for showing agreement to electronic service. This proposed change maintains the status quo with respect to electronic filing and electronic service in the Supreme Court and the Courts of Appeal and more accurately reflects how parties authorize electronic service in these courts.

Proposed rule 8.78(g) would exempt courts from the electronic service rules applicable to parties, reflecting that courts send notifications and transmit documents rather than serving documents on parties. No changes are proposed with respect to electronic service on courts.

New advisory committee comments to rules 8.25 and 8.78 acknowledge the difference in procedures for electronic service in the trial courts and the appellate courts by noting that the type of consent required in the trial courts by section 1010.6 is not required of parties in the Supreme Court and the Courts of Appeal.

Proposed rule 8.72, which presently requires electronic filers to furnish an email address at which they agree to accept service, would be amended to acknowledge that furnishing an email address does not necessarily mean a party has authorized e-service because a party may opt out of e-service under rule 8.78(a)(2)(B).

Alternatives Considered

The committee considered proposing rules that would implement section 1010.6's express consent requirements in the appellate courts. The committee concluded that such a significant change in procedure was not supported for at least three reasons. First, there could be significant costs associated with directing the court's EFSPs to develop an opt-in option at case initiation. Second, case filings might be delayed due to unexpected service requirements where the parties have been relying on e-service in the appellate courts for several years. Third, the Legislature did not address the appellate courts when it amended section 1010.6. The committee was not

independently aware of any compelling reasons to adopt the trial court's practices at this time, so the committee proposes clarifying and maintaining existing appellate procedures for electronic service.

The committee also considered leaving the appellate rules and form unchanged at this time. Considering the trial court's e-service procedures, however, the committee was concerned that preexisting references to the Code of Civil Procedure in the appellate rules and form could cause confusion for practitioners and litigants. The committee also recognized that the appellate rules did not fully reflect current practice and wanted the rules to be clearer about when electronic service is permissible in the Supreme Court and the Courts of Appeal.

Fiscal and Operational Impacts

Implementation of this proposal should not have significant fiscal or operational impacts. This proposal is intended to create efficiencies and to assist parties and courts in understanding the existing appellate procedures. Unlike the alternative considered, which could burden the courts and litigants with additional service and filing requirements, no costs of implementation are anticipated other than informing courts and litigants of the new rule amendments and form revisions.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rules 8.25, 8.77, and 8.78, at pages 6–8
2. Form APP-009-INFO, at pages 9–11

3. Link A: Code Civ. Proc., § 1010.6, *https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1010.6.&lawCode=CCP*

Rules 8.25, 8.72, and 8.78 of the California Rules of Court would be amended, effective January 1, 2021, to read:

Rule 8.25. Service, filing, and filing fees

(a) Service

(1) Before filing any document, a party must serve~~, by any method permitted by the Code of Civil Procedure,~~ one copy of the document on the attorney for each party separately represented, on each unrepresented party, and on any other person or entity when required by statute or rule.

(2) The party must attach to the document presented for filing a proof of service showing service on each person or entity required to be served under (1). The proof must name each party represented by each attorney served.

(b)–(c) * * *

Advisory Committee Comment

Subdivision (a). ~~Subdivision (a)(1) requires service "by any method permitted by the Code of Civil Procedure." The reference is to the several permissible methods of service provided in~~ Code of Civil Procedure sections 1010.6– ~~1020~~ 1013a describe generally permissible methods of service. *Information Sheet for Proof of Service (Court of Appeal)* (form APP-009-INFO) provides additional information about how to serve documents and how to provide proof of service. Note that in the Supreme Court and the Courts of Appeal, registration with the court's electronic filing servicer provider is deemed to show agreement to accept service electronically at the email address provided, unless a party affirmatively opts out of electronic service under rule 8.78(a)(2)(B). This procedure differs from the procedure for electronic service in the trial courts (including the appellate division of the superior court). See rules 2.250–2.261.

* * *

Rule 8.72. Responsibilities of court and electronic filer

(a) * * *

(b) Responsibilities of electronic filer

Each electronic filer must:

(1) Take all reasonable steps to ensure that the filing does not contain computer code, including viruses, that might be harmful to the court's electronic filing system and to other users of that system;

(2) Furnish one or more electronic service addresses, in the manner specified by the court, at which the electronic filer agrees to accept ~~service~~ receipt and filing confirmations under rule 8.77 and, if applicable, at which the electronic filer agrees to receive electronic service; and

(3) Immediately provide the court and all parties with any change to the electronic filer's electronic service address.

Rule 8.78. Electronic service

(a) Authorization for electronic service; exceptions

(1) A document may be electronically served under these rules:

(A) If electronic service is provided for by law or court order; or

(B) If the recipient agrees to accept electronic services as provided by these rules and the document is otherwise authorized to be served by mail, express mail, overnight delivery, or fax transmission.

(2) A party indicates that the party agrees to accept electronic service by:

(A) Serving a notice on all parties that the party accepts electronic service and filing the notice with the court. The notice must include the electronic service address at which the party agrees to accept service; or

(B) ~~Electronically filing any document with the court~~ Registering with the court's electronic filing service provider and providing the party's electronic service address. ~~The act of electronic filing shall be~~ Registration with the court's electronic filing service provider is deemed to show that the party agrees to accept service at the electronic service address that the party has ~~furnished to the court under rule 8.72(b)(2)~~ provided, unless the party serves a notice on all parties and files the notice with the court that the party does not accept electronic service and chooses instead to be served paper copies at an address specified in the notice.

(3) A document may be electronically served on a nonparty if the nonparty consents to electronic service or electronic service is otherwise provided for by law or court order. All provisions of this rule that apply or relate to a party also apply to any nonparty who has agreed to or is otherwise required by law or court order to accept electronic service or to electronically serve documents.

(b)–(f) * * *

(g) Electronic ~~service~~ delivery by court and electronic service ~~or~~ on court

(1) The court may ~~electronically serve~~ deliver any notice, order, opinion, or other document issued by the court ~~in the same manner that parties may serve documents~~ by electronic ~~service~~ means.

(2) * * *

Advisory Committee Comment

In the Supreme Court and the Courts of Appeal, registration with the court's electronic filing servicer provider is deemed to show agreement to accept service electronically at the email address provided, unless a party affirmatively opts out of electronic service under rule 8.78(a)(2)(B). This procedure differs from the procedure for electronic service in the trial courts (including the appellate division of the superior court). See rules 2.250–2.261.

INFORMATION SHEET FOR PROOF OF SERVICE
(COURT OF APPEAL)

GENERAL INFORMATION ABOUT SERVICE AND PROOF OF SERVICE

This information sheet provides instructions for completing *Proof of Service (Court of Appeal)* (form APP-009) or *Proof of Electronic Service (Court of Appeal)* (form APP-009E). This information sheet is not part of the proof of service and does not need to be copied, served, or filed.

Rule 8.25 of the California Rules of Court provides that before filing any document in court in a case in the Court of Appeal, a party must serve, one copy of the document on the attorney for each party separately represented, on each unrepresented party, and on any other person or entity when required by statute or rule. Other rules specifically require that certain documents be served, including the notice of appeal and notice designating the record on appeal in civil appeals and briefs in both civil and criminal appeals.

To "serve" a document on a person means to have that document delivered to the person. The general requirements concerning service are set out in Code of Civil Procedure sections 1010.6–1013a. Section 1010.6(a)(2)(ii) addresses electronic service in the trial courts. Rule 8.78 of the California Rules of Court addresses electronic service in the Courts of Appeal. There are three main ways to serve documents: (1) by mail, (2) by personal delivery, or (3) by electronic service. Regardless of what method of service is used, the Code of Civil Procedure provides that a document in a court case can only be served by a person who is over 18 years of age. Service by mail or personal delivery must be by someone who is not a party in the case; electronic service may be performed directly by a party. Electronic service may be by (1) electronic transmission, transmitting a document to the electronic service address of a person; or by (2) electronic notification, sending a message to the electronic service address specifying the exact name of the document served and providing a hyperlink at which the served document may be viewed and downloaded.

If you are a party to the case and wish to serve documents by mail or personal delivery, you must therefore have someone else who is over 18 and who is not a party to the case serve any documents in your case. You will need to give the person doing the serving (the server) the names and addresses of all those who must be served. You will also need to give the server one copy of each document that needs to be served for each person or entity that is being served.

If you are serving documents electronically, you can do this yourself or have another person over 18 do it for you. The person doing the serving (the server) will need the names and electronic service addresses of all those who must be served, and the document to be served in a form that allows it to be electronically transmitted or made available by hyperlink.

Rule 8.25 also requires the party filing a document in the court to attach to the document presented for filing a proof of service showing the required service. *Proof of Service (Court of Appeal)* (form APP-009) or *Proof of Electronic Service (Court of Appeal)* (form APP-009E) may be used to provide this required proof of service in any proceeding in the Court of Appeal. The server should follow the instructions below for completing the *Proof of Service (Court of Appeal)* (form APP-009) or *Proof of Electronic Service (Court of Appeal)* (form APP-009E). If another person is serving the documents for you—as is required if the document will be served by mail or personal delivery—tell the server to give you the original form when it is completed. You will need to attach this original proof of service to the document you are filing.

INSTRUCTIONS FOR THE SERVER (THE PERSON WHO IS SERVING THE DOCUMENTS) IF SERVING BY MAIL OR PERSONAL DELIVERY

If you are serving a document for a party in a court case, it is your responsibility to prepare the proof of service. You can use *Proof of Service (Court of Appeal)* (form APP-009) to prepare this proof of service in any case in the Court of Appeal. The proof of service should be printed or typed. If you have internet access, a fillable version of form APP-009 is available at *www.courts.ca.gov/forms*. You can fill out most of the form before you serve the document, but you should sign and date the form only after you have finished serving the document.

Complete the top section of *Proof of Service (Court of Appeal)* (form APP-009) as follows:

1. *First box, left side*: Check whether the document is being served by mail or by personal delivery.
2. *Third box, left side*: Print the name of the case in which the document is being filed, the Court of Appeal case number, and the superior court case number. Use the same case name and numbers as are on the top of the document that you are serving.
3. *Box, top of form, right side*: Leave this box blank for the court's use.

Complete items 1–3 as follows:

1. You are stating that you are over the age of 18 and that you are not a party to this action.
2. Check one of the boxes and provide your home or business address.

Form Approved for Optional Use
Judicial Council of California
APP-009-INFO [Rev. January 1, 2021]

3. Fill in the name of the document that you are serving.

   a. If you are serving the document by mail, check the box in item 3a and BEFORE YOU SEAL AND MAIL THE ENVELOPE, fill in the following information:

      (1) Check the box in item 3a(1)(a) if you will personally deposit the document with the U.S. Postal Service such as at a U.S. Postal Service Office or U.S. Postal Service mailbox. Check the box in item 3a(1)(b) if you will put the document in the mail at your place of business.

      (2) Provide the date the documents are being mailed.

      (3) Provide the name and address of each person to whom you are mailing the document. If you need more space to list additional names and addresses, check the box after item (3)(c) and attach a page listing them. At the top of the page, write "APP-009, Item 3a."

      (4) You are stating that you live or work in the county in which the document is being mailed. Provide the city and state from which the document is being mailed.

      Once you have finished filling out these parts of the form, make one copy of *Proof of Service (Court of Appeal)* (form APP-009) with this information filled in for each person you are serving by mail and put this copy in the envelope with the document you are serving. Seal the envelope and mail the document as you have indicated on the proof of service.

   b. If you personally delivered the document, check the box in item 3b. For a party represented by an attorney, delivery needs to be made by giving the document directly to the party's attorney or by leaving the document in an envelope or package clearly labeled to identify the attorney being served with a receptionist at the attorney's office or an individual in charge of the office. For a party who is not represented by an attorney, delivery needs to be made by giving the document directly to the party or by leaving the document at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening. Under item 3b, for each person to whom you delivered the document, you need to provide:

      (1) The name of the person;

      (2) The address at which you delivered the document;

      (3) The date on which you delivered the document; and

      (4) The time at which you delivered the document.

      If you need more space to list additional names, addresses, and delivery dates and times, check the box under item 3b and attach a page listing this information. At the top of the page, write "APP-009, Item 3b."

At the bottom of the form, print your name, sign the form, and fill in the date on which you signed the form. **By signing, you are stating under penalty of perjury that all the information you have provided on *Proof of Service (Court of Appeal)* is true and correct.**

Give the original completed *Proof of Service* to the party for whom you served the document.

INSTRUCTIONS FOR THE SERVER (THE PERSON WHO IS SERVING THE DOCUMENTS) IF SERVING ELECTRONICALLY

If you are serving a document for a party in a court case, it is your responsibility to prepare the proof of service. If you are serving a document electronically, you can use *Proof of Electronic Service (Court of Appeal)* (form APP-009E) to prepare this proof of service in any case in the Court of Appeal. The proof of service should be printed or typed. A fillable version of form APP-009E is available at *www.courts.ca.gov/forms*. You can fill out most of the form before you serve the document, but you should sign and date the form only after you have finished serving the document.

Complete the top section of *Proof of Electronic Service (Court of Appeal)* (form APP-009E) as follows:

1. *Third box, left side*: Print the name of the case in which the document is being filed, the Court of Appeal case number, and the superior court case number. Use the same case name and numbers as are on the top of the document that you are serving.
2. *Box, top of form, right side*: Leave this box blank for the court's use.

Complete items 1–4 as follows:

1. You are stating that you are over the age of 18.
2. a. Check one of the boxes and provide your home or business address.

   b. Provide your electronic service address. This is the address at which you have agreed to accept electronic service.

Continued on the reverse

3. Fill in the names of the documents that you are serving.

4. Fill in the information for the person to whom you are sending the document. If you are serving more than one person, check the box after item 4c and attach a page listing the persons served, with the electronic service address and date and time of service for each person served. At the top of the page, write "APP-009E, Item 4."

   a. Provide the name of the person being served. If the person being served is an attorney, also fill in the name or names of the parties represented.

   b. Provide the electronic service address of the person to whom you are sending the document.

   c. Provide the date on which you transmitted the document.

   After you have filled in the information in items 1–4, create an electronic copy of the *Proof of Electronic Service (Court of Appeal)* (form APP-009E). Transmit the filled-in form with the document you are serving to each person served.

   At the bottom of the form, print your name, sign the form, and fill in the date on which you signed the form. **By signing, you are stating under penalty of perjury that all the information you have provided on *Proof of Electronic Service (Court of Appeal)* is true and correct.**

   If you are not the party for whom the documents are served, give the original completed Proof of Service to the party for whom you served the document.

Item number: 07

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Appellate Procedure: Date and Time of Filing for Electronically Submitted Documents; amend rule 8.77

Committee or other entity submitting the proposal:
Appellate Advisory Committee

Staff contact (name, phone and e-mail): Eric Long, 415-865-7691, eric.long@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Amend rule 8.77 to clarify that an e-filed document received by the court before midnight that meets the filing requirements is deemed to have been filed that day. This project addresses an ambiguity in the rule that has resulted in inconsistent treatment of e-filed documents that are received after business hours. Source of the project: California Lawyers Association. Subcommittee: Rules.

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.)
On March 5, 2020, the Appellate Advisory Committee approved the Invitation to Comment and proposed amendments to rule 8.77. However, the chair and staff subsequently realized that there was an ambiguity in the proposed new language regarding the date and time of filing. To clarify the rule and better achieve the goal of this proposal, the chair and staff recommend the version of the rule that is included in these materials. In this version, rule 8.77(a) contains a new paragraph (2), "Filing," the result of separating former paragraph (2), "Confirmation of filing," into two distinct paragraphs to clarify the rule's language. In the version approved by the committee, paragraph (2) contained both concepts, was repetitive, and allowed for possible misinterpretation. On behalf of the committee, the chair requests that RUPRO approve for circulation this modified version of the proposed rule amendments; no changes were made to the Invitation to Comment document.

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www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-04

Title
Appellate Procedure: Date and Time of Filing for Electronically Submitted Documents

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 8.77

Proposed by
Appellate Advisory Committee
Hon. Louis R. Mauro, Chair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Eric Long, Attorney
415-865-7691
eric.long@jud.ca.gov

Executive Summary and Origin

The Appellate Advisory Committee proposes amending the rule regarding confirmation of receipt and filing of electronically submitted documents to clarify the date and time of filing. Among other things, rule 8.77 of the California Rules of Court currently addresses the receipt date of submissions received after the close of business but is silent as to when a received document is deemed filed. The committee proposes amending rule 8.77 to state that an electronic document that complies with filing requirements is deemed filed on the date and time it was received by the court. This proposal is based on a suggestion from the California Lawyers Association, Committee on Appellate Courts, Litigation Section.

Background

Electronic filing allows for submission of documents at any time, even after a clerk's office is closed. Regardless of the date and time a document is submitted and received, however, the clerk's office needs time to confirm that the document complies with filing requirements. Such review by the clerk's office must be prompt, but it is not instantaneous for an electronically submitted document. Moreover, when a document is submitted after court business hours, the document will not be reviewed by the clerk's office before the next business day.

Under rule 8.77(a)(1), an electronically submitted document is initially "received" by the court, and a confirmation of receipt is generated. Rule 8.77(c) instructs that if a document is received

after 11:59 p.m., it is considered received on the next court day.[1] Once a court clerk confirms that the document complies with filing requirements, a confirmation of "filing" indicating the date and time of filing is generated under rule 8.77(a)(2). However, rule 8.77 does not specify when the document is deemed filed.[2]

It has been reported that appellate courts are determining the date and time of filing in different ways. Some courts deem compliant documents filed on the day they were received, but other courts deem them filed on the day the clerk approves the document for filing.

A practitioner reported electronically submitting a writ petition for filing in an appellate district on Day 1 at 5:30 p.m. A court clerk reviewed the materials on Day 2 and determined that the filing requirements had been satisfied. The clerk filed the document on Day 2 even though it was received by the court on Day 1. If the litigant's writ petition had been due on Day 1, it would have been untimely.

The Proposal

This proposal would clarify that the date and time of filing is the date and time a compliant document is received by the court.

The committee also proposes revising the title of rule 8.77 to reflect electronic submission and to encompass date and time of filing.

The proposal would alleviate concerns of litigants and practitioners that their timely, compliant submissions may be deemed untimely. The proposal is of particular importance when an appellate due date is jurisdictional (e.g., a statutory writ). A uniform time-of-filing provision will assist with the consistent handling of electronically submitted documents and would be consistent with California Rules of Court, rule 1.20, which states: "Unless otherwise provided, a document is deemed filed on the date it is received by the court clerk."

Alternatives Considered

The committee considered no action but determined that the experience of litigants and practitioners warrants action.

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[1] "A document that is received electronically by the court after 11:59 p.m. is deemed to have been received on the next court day." (Cal. Rules of Court, rule 8.77(c).)

[2] Some California appellate courts also address this topic by local rule. The local rules for the Courts of Appeal, First and Fifth Appellate Districts, state: "Filing documents electronically does not alter any filing deadlines. In order to be timely filed on the day they are due, all electronic transmissions of documents must be completed (i.e., received completely by the Clerk of the Court) prior to midnight." (Ct. App., First Dist. and Fifth Dist., Local Rules, rules 12(f) and 8(g), respectively, Electronic Filing.) Additionally, the Third Appellate District provides: "Electronic filing does not alter any filing deadlines. An electronic filing not completely received by the court by 11:59 p.m. will be deemed to have been received on the next court day." (Ct. App., Third Dist., Local Rules, rule 5(j), Electronic Filing.) The local rules for the Second, Fourth, and Sixth Districts do not address the topic.

A submission from an electronic filer reaches the court through an electronic filing service provider (EFSP). Although the court generally receives a submission almost instantaneously, the committee recognizes the possibility that transmission delays can occur. For example, an electronic filer might submit a document before midnight, but the court might not receive the document until after midnight because of a transmission delay between the EFSP and the court. Given such a possibility, the committee considered two alternatives to using the date and time of receipt as the date and time of filing: (1) using the date and time of submission to the EFSP as the date and time of filing, or (2) imposing an after-hours deadline (such as 11:45 p.m.) for submission of documents to an EFSP to make it more likely that a court will receive a submission before midnight. The committee seeks comments on these alternatives.

Fiscal and Operational Impacts

The committee anticipates no significant fiscal or operational impacts and no costs of implementation other than informing courts and litigants of the new rule amendments.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- The proposed rule uses the court's receipt date and time as the date and time of filing because transmission from the electronic filing service provider to the court is generally instantaneous. Would it be more appropriate, however, to use the date and time of submission to the EFSP as the date and time of filing? Or would another alternative prove more workable? If an alternative is appropriate, describe the alternative and explain why it would be preferable to the instant proposal.
- Can you document one or more transmission delays between (1) the date and time of submission to an EFSP, and (2) the date and time of receipt by a court? If so, would an after-hours submission deadline adequately address such a transmission delay, and if so, what should the deadline be?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 8.77, at p. 5

Rule 8.77 of the California Rules of Court would be amended, effective January 1, 2021, to read:

Rule 8.77. Actions by court on receipt of ~~electronic filing~~ electronically submitted document; date and time of filing

(a) Confirmation of receipt and filing of document

(1) *Confirmation of receipt*

When the court receives an electronically submitted document, the court must arrange to promptly send the electronic filer confirmation of the court's receipt of the document, indicating the date and time of receipt by the court. ~~A document is considered received at the date and time the confirmation of receipt is created.~~

(2) *Filing*

If the electronically submitted document received by the court complies with filing requirements, the document is deemed filed on the date and time it was received by the court as stated in the confirmation of receipt.

~~(2)~~ (3) *Confirmation of filing*

~~If the document received by the court under (1) complies with filing requirements,~~ When the court files an electronically submitted document, the court must arrange to promptly send the electronic filer confirmation that the document has been filed. The filing confirmation must indicate the date and time of filing as specified in the confirmation of receipt, and ~~is proof that the document was filed on the date and at the time specified. The filing confirmation~~ must also specify:

(A) Any transaction number associated with the filing; and

(B) The titles of the documents as filed by the court.

~~(3)~~ (4) ~~(4)~~ (5) * * *

(b)–(e) * * *

Item number: 08

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Appellate Procedure: Method of Notice to Court Reporter; Amend Cal. Rules of Court, rules 8.405, 8.450, and 8.454

Committee or other entity submitting the proposal:
Appellate Advisory Committee

Staff contact (name, phone and e-mail): Sarah Abbott, 415-865-7687, Sarah.Abbott@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Consider amending rules 8.405, 8.450, and 8.454 to remove or modify the requirement that the clerk notify the court reporter "by telephone and in writing" to prepare a transcript. This language may be outdated or inconsistent with other rules requiring notification by the clerk. Source of the project: Director of Juvenile Operations, Los Angeles Superior Court. Subcommittee: Rules.

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.)

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INVITATION TO COMMENT

SPR20-05

Title
Appellate Procedure: Method of Notice to Court Reporter

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 8.405, 8.450, and 8.454

Proposed by
Appellate Advisory Committee
Hon. Louis R. Mauro, Chair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Sarah Abbott, 415-865-7687
Sarah.abbott@jud.ca.gov

Executive Summary and Origin

The Appellate Advisory Committee proposes amending three appellate rules of court for juvenile appeals and writs to update the language regarding the notice the clerk must give to the court reporter to prepare the reporter's transcript. The requirement that the notice must be "by telephone and in writing" is not found in other appellate rules governing notice to court reporters and the change would provide clerks with more flexibility in how they provide notice. This proposal is based on a suggestion received from the director of juvenile operations at a superior court.

Background

Rules 8.400 through 8.474 of the appellate rules govern juvenile appeals and writs. Rule 8.405(b)(1) currently requires that when a notice of appeal is filed in a juvenile case, the superior court clerk "must immediately . . . [n]otify the reporter *by telephone and in writing* to prepare a reporter's transcript and deliver it to the clerk within 20 days after the notice of appeal is filed." (Italics added.) Rules 8.450 and 8.454 address the filing of a notice of intent to file a writ petition to review orders under Welfare and Institutions Code sections 366.26 and 366.28, respectively.[1] Subdivision (h)(1) of each of these rules requires the following:

[1] Welfare and Institutions Code section 366.26 governs hearings terminating parental rights or establishing guardianship of children adjudged dependent children of court, and section 366.28 governs the appeal of decisions involving placement or removal orders following the termination of parental rights.

> When the notice of intent is filed, the superior court clerk must:
> [¶] (1) Immediately notify each court reporter *by telephone and in writing* to prepare a reporter's transcript of the oral proceedings at each session of the hearing that resulted in the order under review and deliver the transcript to the clerk within 12 calendar days after the notice of intent is filed.

(Italics added.) No other appellate rule requires a court clerk to notify a court reporter "by telephone and in writing" to prepare a transcript. Some appellate rules do require that the reviewing court clerk "make a reasonable effort to notify the clerk of the respondent court by telephone or e-mail" of an urgent situation such as an appellate decision to grant a writ or issue an order staying or prohibiting a proceeding to occur in the lower court within a short time frame.[2] Other appellate rules require the clerk to notify the parties "by telephone or another expeditious method" of events that would seem to require immediate attention, such as shortening the time for oral argument.[3] However, none of these rules requires immediate telephonic and written notification for court reporters.

Instead, the rules addressing the notice that the court clerk must give to court reporters in other types of appeals use more general language, and generally require court clerks to "promptly" send notice of an appeal to court reporters, without specifying the method of notification.[4]

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[2] See, e.g., rules 8.452(h)(3) (requiring appellate court clerk to make "reasonable effort to notify the clerk of the respondent court by telephone or e-mail" if a writ under Welfare and Institutions Code section 366.26 staying or prohibiting a proceeding to occur within seven days or requiring action within seven days is granted); 8.456(h)(3) (same for writ or order under juvenile writ under Welfare and Institutions Code section 366.28); 8.489(b)(1) (same for writ or order in Supreme Court and Court of Appeal); 8.975(b)(1) (same for small claims writ in appellate division).

[3] See, e.g., rules 8.256(b) (requiring appellate clerk to "immediately notify the parties by telephone or other expeditious method" if notice period for oral argument in court of appeal is shortened); 8.392(b)(5) (same if court of appeal requires an answer to a request for certificate of appealability to review superior court decision denying relief on successive habeas corpus petition in death penalty-related proceeding); 8.524(c) (same if notice period for oral argument in Supreme Court is shortened); 8.702(g) (same if notice period for oral argument in CEQA appeals is shortened); 8.716 (same if notice period for oral argument in appeal of decision to compel arbitration is shortened); 8.885(c)(1) (same if notice period for oral argument in misdemeanor appeal is shortened); 8.889(b)(2) (same if court decides to require answer to request for rehearing in misdemeanor appeal); 8.929(c)(1) (same if notice period for oral argument in infraction appeal is shortened).

[4] See, e.g., rules 8.130(d)(2) (in civil appeals, "clerk must promptly send the reporter notice of the designation [of the reporter's transcript] and of the deposit or substitute and notice to prepare the transcript, showing the date the notice was sent to the reporter" when the clerk receives specified items); 8.304(c)(1) (in criminal appeals, "[w]hen a notice of appeal is filed, the superior court clerk must promptly send a notification of the filing . . . to each court reporter, and to any primary reporter or reporting supervisor"); 8.834(b)(4) (in limited civil appeals to the appellate division of the superior court, "clerk must promptly notify the reporter to prepare the transcript when the court receives" the deposit or substitute for the cost); 8.864(a)(1) (in misdemeanor appeals, "[i]f the appellant elects to use a reporter's transcript, the clerk must promptly send a copy of appellant's notice making this election and the notice of appeal to each court reporter"); 8.915(a)(1) (same for infraction appeals).

The Proposal

The committee proposes removing the requirement that court clerks notify court reporters "by telephone and in writing" from rules 8.405, 8.450, and 8.454 governing juvenile appeals and writs. The committee believes that, because the requirement for immediate telephonic and written notice is an anomaly among the appellate rules, it is advisable to amend these rules to more closely align them with other appellate rules by removing the phrase "by telephone and in writing" from each of them. This change would also provide clerks with more flexibility in how they provide notice, while retaining the requirement that the notice be immediate.

Alternatives Considered

Because the requirement that court clerks notify court reporters "by telephone and in writing" does not directly conflict with another rule, the committee considered not recommending any amendment to these rules, but decided that the proposed amendments would be beneficial.

The committee also considered whether the existing requirement in each of these rules that notification to the court reporter be "immediate" should be modified to instead require "prompt" (or some other temporal descriptor) notification. However, the committee does not recommend this additional modification because, by statute, juvenile appeals have priority over most other appeals.[5] The committee determined that this priority justifies the requirement for "immediate" rather than "prompt" notice to the reporter in the rules under consideration.

Fiscal and Operational Impacts

The proposal removes the requirement that the court clerk immediately notify court reporters "by telephone and in writing" to prepare a reporters transcript in juvenile appeals and writs. This will likely result in minimal or no implementation costs, and should result in a slight decrease in workload for the clerk providing the notice.

[5] See Welf. & Inst. Code, §§ 800(a) (delinquency), 395(a)(1) (dependency); Code Civ. Proc., § 45 (appeals from orders freeing a minor from parent's custody/control).

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rules 8.405, 8.450, and 8.454, at pages 5–6

Rules 8.405, 8.450, and 8.454 of the California Rules of Court would be amended, effective January 1, 2021, to read:

Title 8. Appellate Rules

Division 1. Rules Relating to the Supreme Court and Courts of Appeal

Chapter 5. Juvenile Appeals and Writs

Article 2. Appeals

Rule 8.405. Filing the appeal

(a) * * *

(b) Superior court clerk's duties

(1) When a notice of appeal is filed, the superior court clerk must immediately:

(A) Send a notification of the filing to:

(i) Each party other than the appellant, including the child if the child is 10 years of age or older;

(ii) The attorney of record for each party;

(iii) Any person currently awarded by the juvenile court the status of the child's de facto parent;

(iv) Any Court Appointed Special Advocate (CASA) volunteer;

(v) If the court knows or has reason to know that an Indian child is involved, the Indian custodian, if any, and tribe of the child or the Bureau of Indian Affairs, as required under Welfare and Institutions Code section 224.2; and

(vi) The reviewing court clerk; and

(B) Notify the reporter ~~by telephone and in writing~~ to prepare a reporter's transcript and deliver it to the clerk within 20 days after the notice of appeal is filed.

(2)–(6) * * *

Article 3. Writs

Rule 8.450. Notice of intent to file writ petition to review order setting hearing under Welfare and Institutions Code section 366.26

(a)–(g) * * *

(h) Preparing the record

When the notice of intent is filed, the superior court clerk must:

(1) Immediately notify each court reporter ~~by telephone and in writing~~ to prepare a reporter's transcript of the oral proceedings at each session of the hearing that resulted in the order under review and deliver the transcript to the clerk within 12 calendar days after the notice of intent is filed; and

(2) Within 20 days after the notice of intent is filed, prepare a clerk's transcript that includes the notice of intent, proof of service, and all items listed in rule 8.407(a).

(i)–(j) * * *

Rule 8.454. Notice of intent to file writ petition under Welfare and Institutions Code section 366.28 to review order designating specific placement of a dependent child after termination of parental rights

(a)–(g) * * *

(h) Preparing the record

When the notice of intent is filed, the superior court clerk must:

(1) Immediately notify each court reporter ~~by telephone and in writing~~ to prepare a reporter's transcript of the oral proceedings at each session of the hearing that resulted in the order under review and to deliver the transcript to the clerk within 12 calendar days after the notice of intent is filed; and

(2) Within 20 days after the notice of intent is filed, prepare a clerk's transcript that includes the notice of intent, proof of service, and all items listed in rule 8.407(a).

(i)–(j) * * *

Item number: 09

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Jury Instructions: Civil Jury Instructions (Release 37); Judicial Council of California Civil Jury Instructions (CACI)

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

Staff contact (name, phone and e-mail): Eric Long, 415-865-7691, eric.long@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Maintenance—Case Law; Maintenance—Legislation; New Instructions and Expansion into New Areas; Maintenance—Comments from Users; Maintenance—Sources and Authority;

If requesting July 1 or out of cycle, explain:
California Rules of Court, rules 2.1050(d) and 10.58(a), require the advisory committee to update, amend, and add topics to CACI on a regular basis and to submit its recommendations to the council for approval. Jury instructions are currently revised twice a year, and more often if necessary. Release 37 is the midyear supplement to CACI for 2020. Release 36 was approved by the Judicial Council in November 2019, and Release 35, a special out-of-cycle release in response to Government Code section 12923, effective January 1, 2019, was approved by the Judicial Council in July 2019.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
In addition to recommending to the council approval of 41 instructions, 12 verdict forms, and one addition to the CACI User Guide, the advisory committee also requests that the Rules Committee give final approval to 169 revised CACI instructions under the provisions of the guidelines adopted on December 19, 2006, titled Jury Instructions Corrections and Technical and Minor Substantive Changes.

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 20-128
For business meeting on May 15, 2020

Title
Jury Instructions: Civil Jury Instructions (Release 37)

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

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

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Action Required

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Contact
Eric Long, 415-865-7691
eric.long@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approving for publication the new and revised civil jury instructions prepared by the committee. These revisions bring the instructions up to date with developments in the law over the previous six months. On Judicial Council approval, the instructions will be published in the official midyear supplement to the 2020 edition of the *Judicial Council of California Civil Jury Instructions* (*CACI*).

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective May 15, 2020, approve for publication the following civil jury instructions prepared by the committee:

1. Revisions to 46 instructions and verdict forms: CACI Nos. 113, 420, 440, 1100, VF-1100, 1102, VF-1201, 1305, VF-2506A, VF-2506B, VF-2506C, VF-2507A, VF-2507B, VF-2507C, VF-2508, 2511, 2521C, 2522C, 2540, 2545, 2560, 2561, 2705, VF-3012, 3020, 3050, 3053, VF-3501, 3704, 3903C, 3903D, 3904A, 4106, 4300, 4301, 4303, 4304, 4305, 4306, 4307, 4308, 4309, 4325, 4575, VF-4602, and 4603;

2. The addition of 7 new instructions: CACI Nos. 118, 1812, 1813, 1814, 3906, 4920, and 4921; and

3. A revision to the User Guide.

A table of contents and the proposed new and revised civil jury instructions are attached at pages 8–202.

Relevant Previous Council Action

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

This is release 37 of *CACI*. The council approved release 36 at its November 2019 meeting.

Analysis/Rationale

A total of 41 instructions, 12 verdict forms, and one revision to the User Guide are presented in this release. The Judicial Council's Rules Committee has also approved changes to 169 additional instructions under a delegation of authority from the council to the Rules Committee.[2]

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

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

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

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

New instructions

CACI No. 118, *Personal Pronouns*. The California Department of Fair Employment and Housing requested that all CACI instructions be revised to permit users to select nonbinary pronouns for persons who identify as neither male nor female. CACI instructions had included many male/female pronoun options.[3] The committee has expanded these bracketed options to include "nonbinary pronoun" in each bracketed personal pronoun set. No. 118 is a new pretrial instruction addressing the use of personal pronouns.

CACI Nos. 1812–1814. New instructions on the Computer Data Access and Fraud Act. The Computer Data Access and Fraud Act, Penal Code section 502, authorizes a civil action for certain violations. The committee anticipates that litigation arising from these violations will increase as Californians rely on computers and online services to conduct more of their day-to-day activities. The committee therefore proposes three new instructions in the Right of Privacy series: No. 1812, *Comprehensive Computer Data and Access Fraud Act—Essential Factual Elements*; No. 1813, *Definition of "Access"*; and No. 1814, *Damages for Investigating Violations of Comprehensive Computer Data and Access Fraud Act*.

CACI No. 3906, *Lost Earnings and Lost Earning Capacity—Jurors Not to Consider Race, Ethnicity, or Gender (Economic Damage)*. The Legislature in Senate Bill 41 (Stats. 2019, ch. 136), effective January 1, 2020, added section 3361 to the Civil Code. That section provides, "Estimations, measures, or calculations of past, present, or future damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death shall not be reduced based on race, ethnicity, or gender." (Civ. Code, § 3361.) The committee agreed that the new provision warranted a new instruction advising jurors not to take race, ethnicity, or gender in to account when determining a reasonable amount of lost earnings or lost earning capacity. Cross-references to the new instruction were added to the Directions for Use of two other instructions in the Damages series: No. 3903C, *Past and Future Lost Earnings (Economic Damage)*, and No. 3903D, *Lost Earning Capacity (Economic Damage)*.

CACI Nos. 4920 and 4921. New instructions on Wrongful Foreclosure. The committee began thinking about instructions in this area a few years ago after two court of appeal decisions in *Majd v. Bank of America, N.A.*[4] and *Miles v. Deutsche Bank National Trust Co.*[5] Based on these cases and more recent authority, the committee proposes adding two instructions to the Real

[3] E.g., "he/she," "his/her," "him/her."

[4] (2015) 243 Cal.App.4th 1293.

[5] (2015) 236 Cal.App.4th 394.

Property Law series addressing (1) the essential factual elements of a wrongful foreclosure claim and (2) when tender of payment is excused.

Revised instructions

CACI No. 440, *Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*. Assembly Bill 392 (Stats. 2019, ch. 170), effective January 1, 2020, amended Penal Code section 835a, which is the basis for this negligence instruction. The statutory amendments principally relate to the use of deadly force by a peace officer, so the Directions for Use now note that the instruction may require modifications for cases involving the use of deadly force by a peace officer. Commenters encouraged the committee to make further revisions to No. 440 or to draft new instructions based on the new provisions of section 835a; the committee will continue to monitor developments in this area and consider revisions to this instruction (or new instructions) in future release cycles.

CACI No. 1102, *Definition of "Dangerous Condition."* Based on public comments received during the last release cycle concerning No. 1125, *Conditions on Adjacent Property*, the committee determined that the instructions in Dangerous Condition of Public Property series would be clearer if the Directions for Use for No. 1102 cross-referenced the most recent addition to the series of instructions.

CACI Nos. 2521C and 2522C; VF-2506A, VF-2606B, VF-2506C, VF-2607A, VF-2507B, and VF-2507C (Fair Employment and Housing Act series—harassment). The revisions to these instructions follow from the committee's work in release 35.[6] In that prior release, the committee first revised several work environment harassment instructions in the Fair Employment and Housing Act series based on Government Code section 12923, effective January 1, 2019. (See Sen. Bill 1300; Stats. 2018, ch. 955.)

The CACI instructions had used the terms "hostile or abusive" to express a workplace environment infected with harassing conduct. However, Government Code section 12923(a) says, "[t]he Legislature hereby declares that harassment creates a hostile, offensive, oppressive, or intimidating work environment." Section 12923(b) states, "A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has … created an intimidating, hostile, or offensive working environment." To give effect to these provisions, the committee agreed to add "intimidating, offensive, and oppressive" to the adjectives "hostile or abusive," and to remove "unwanted" because if conduct is harassing it is, by definition, unwanted. The committee also

[6] The council approved release 35 in July 2019. (See Judicial Council of Cal., Rep. (June 19, 2019), available at *https://jcc.legistar.com/View.ashx?M=F&ID=7510624&GUID=72448D53-2E72-446A-A970-0FFF29D770A3*.

changed the title of these instructions to "Work Environment Harassment"—a minor change that removed "Hostile" as a modifier.

In this release, the committee has made those same changes to other work environment harassment instructions in the series that it did not revise in release 35, and has also concluded that section 12923(b) supports the elimination of the concept "widespread" from the instructions and verdict forms for sexual favoritism claims.

CACI No. 2561, *Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship*. This instruction had used a cross-reference to No. 2545, *Disability Discrimination—Affirmative Defense—Undue Hardship*. The Directions for Use advised users to modify the disability discrimination instruction by replacing "disability" with "religious observance." The committee took this approach based on the view that the law is the same for both disability and religious creed discrimination.[7] Public comments in the last release cycle noted, however, that while the undue hardship factors are the same in both contexts, Government Code section 12940(*l*)(1) also requires employers to "explore any available reasonable alternative means of accommodating the religious belief or observance" short of an undue hardship. To give effect to the statutory language in subdivision (*l*), the committee has now drafted a separate undue hardship instruction for religious creed discrimination that is derived from No. 2545.

CACI No. 3904A, *Present Cash Value*. In *Lewis v. Ukran*,[8] the court held that the party seeking a reduction of future damages to present cash value bears the burden of presenting expert evidence of an appropriate calculation, including the appropriate discount rate, to enable the fact finder to make a rational determination. The committee revised the instruction to reflect this requirement. The instruction includes two alternative paragraphs depending on the circumstances. The first alternative is for when a party seeks a reduction and bears the burden of establishing it with expert evidence. The second alternative is for when the parties stipulate to a present cash value adjustment without expert evidence.

CACI Nos. 4300, 4301, 4303, 4304, 4305, 4306, 4307, 4308, 4309, and 4325 (Unlawful Detainer series). The Tenant Protection Act of 2019 (Assem. Bill 1482; Stats. 2019, ch. 597), effective January 1, 2020, added notice and "just cause" requirements to certain residential real property tenancies. The recentness of the legislation and its breadth is such that the committee has not yet proposed any substantive revisions to the instructions in the Unlawful Detainer series. Instead, the committee's revisions in this release note the existence of the act in the Directions

[7] Gov. Code, § 12940(*l*)(1); see Gov. Code, § 12926(u).

[8] (2019) 36 Cal.App.5th 886, 896.

for Use and/or Sources and Authority, and they advise users of the possible need to modify the instructions in light of the new legislation, if necessary.

CACI No. 4603, *Whistleblower Protection—Essential Factual Elements*. The committee added a whistleblower's actual disclosure of information to element 2, which was inadvertently omitted from the instruction. (Lab. Code, § 1102.5(b).) The committee also added a note to the Directions for Use for claims under Labor Code section 1102.5(c) based on *Nejadian v. County of Los Angeles*.[9] The Court of Appeal in *Nejadian* held that the plaintiff must show that the activity the plaintiff refused to participate in would result in a violation of or noncompliance with a statute, rule, or regulation, which is a legal determination that the court is required to make.

User Guide: Personal pronouns. In the last release, the committee took a first step to further the goals of the Gender Recognition Act (Sen. Bill 179; Stats. 2019, ch. 853), which declares that it is the policy of the State of California that intersex, transgender, and nonbinary people are entitled to full legal recognition and equal treatment under the law. The committee added in release 36 a note to the User Guide advising that the pronoun options in *CACI* (e.g., "he/she") were not intended to be limiting. In this release, the committee has added "nonbinary pronoun" to the bracketed personal pronoun options found throughout *CACI*, and the User Guide now acknowledges the expanded options and the need to use correct personal pronouns or an individual's name.

Policy implications

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

Comments

The proposed additions and revisions to *CACI* circulated for comment from January 19 through March 2, 2020. Comments were received from 12 different commenters. Some submitted comments on multiple instructions, and some commented on only a single instruction.

No single instruction generated a large number of comments.

The committee evaluated all comments and revised some of the instructions in light of the comments received. A chart summarizing the comments received on all instructions and the committee's responses is attached at pages 203–245.

Alternatives considered

Rules 2.1050(d) and 10.58(a) of the California Rules of Court require the committee to update, revise, and add topics to *CACI* on a regular basis and to submit its recommendations to the council for approval. There are no alternative actions for the committee to consider.

[9] (2019) 40 Cal.App.5th 703, 719.

Fiscal and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish the 2020 edition of *CACI* and pay royalties to the Judicial Council. Other licensing agreements with other publishers provide additional royalties.

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

Attachments

1. Jury instructions, at pages 8–202
2. Chart of comments, at pages 203–245

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113. Bias

Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against ~~any~~ parties~~y~~ or witnesses because of ~~his or her~~their disability, gender, gender identity, gender expression, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [*insert any other impermissible form of bias***]].**

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

New June 2010; Revised December 2012, May 2020

Sources and Authority

- Conduct Exhibiting Bias Prohibited. Standard 10.20(a)(2) of the California Standards of Judicial Administration.
- Judge Must Perform Duties Without Bias. Canon 3(b)(5) of the California Code of Judicial Ethics.

Secondary Sources

Witkin, California Procedure (5th ed. 2008) Trial, § 132

1 California Trial Guide, Unit 10, *Voir Dire Examination*, §§ 10.03[1], 10.21[2], 10.50, 10.80, 10.100 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 6, *Jury Selection*, § 6.21

118. Personal Pronouns

One of the [parties/witnesses/attorneys/*specify other participant in the case***] in this case uses the personal pronouns [***specify the person's pronouns***]. You may hear the judge and attorneys refer to [***name of person***] using the pronouns: [***specify the person's pronouns***].**

New May 2020

Directions for Use

It is the policy of the State of California that intersex, transgender, and nonbinary people are entitled to full legal recognition and equal treatment under the law. In accordance with this policy, attorneys and courts should take affirmative steps to ensure that they are using correct personal pronouns. To further this policy, these instructions have been expanded to include "nonbinary pronoun" wherever appropriate. Although the advisory committee acknowledges a trend for the singular use of "they," "their," and "them," the committee also recognizes these pronouns have plural denotations with the potential to confuse jurors. For clarity in the jury instructions, the committee recommends using an individual's name rather than a personal nonbinary pronoun (such as "they") if the pronoun could result in confusion.

The court should consult with the attorneys in the case before reading this instruction to the jury. The court should also consult with the individual whose pronouns are being discussed to ensure the court acts in a way that protects the individual's dignity and privacy.

Sources and Authority

- Gender Recognition Act. Stats. 2019, ch. 853 (SB 179).
- "Sex" Defined. Gov. Code, § 12926(r)(2).
- "Gender Expression" Defined. Cal. Code Regs., tit. 2, § 11030(a).
- "Gender Identity" Defined. Cal. Code Regs., tit. 2, § 11030(b).

Secondary Sources

420. Negligence per se: Rebuttal of the Presumption of Negligence — (Violation Excused)

A violation of a law is excused if [*name of plaintiff/name of defendant*] proves that one of the following is true:

(a) The violation was reasonable because of [*name of plaintiff/defendant*]'s [*specify type of "incapacity"*]; [or]

(b) Despite using reasonable care, [*name of plaintiff/name of defendant*] was not able to obey the law; [or]

(c) [*Name of plaintiff/name of defendant*] faced an emergency that was not caused by [his/her/*nonbinary pronoun*] own misconduct; [or]

(d) Obeying the law would have involved a greater risk of harm to [*name of plaintiff/defendant*] or to others; [or]

(e) [*Other reason excusing or justifying noncompliance*.]

New September 2003; Revised May 2020

Directions for Use

The burden of proof shifts from the party asserting a negligence per se claim to the party claiming an excuse for violating a law. (*Baker-Smith v. Skolnick* (2019) 37 Cal.App.5th 340, 347 [249 Cal.Rptr.3d 514].) ~~Subparagraph~~ Factor (b), regarding an attempt to comply with the applicable statute or regulation, should not be given ~~where~~ if the evidence does not show such an attempt. (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 423 [94 Cal.Rptr. 49].) ~~Subparagraph~~ Factor (b) should be used only in special cases because it relies on the concept of due care to avoid a charge of negligence per se. (*Casey v. Russell* (1982) 138 Cal.App.3d 379, 385 [188 Cal.Rptr. 18].)

Sources and Authority

- Rebuttal of Presumption of Negligence per se. Evidence Code section 669(b)(1).
- ~~The language of section 669(b)(1) appears to be based on the following Supreme Court holding:~~ "In our opinion the correct test is whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." (*Alarid v. Vanier* (1958) 50 Cal.2d 617, 624 [327 P.2d 897].)
- "[T]he presumption of negligence codified in Evidence Code section 669, subdivision (a), may be rebutted by proof that '[t]he person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who

desired to comply with the law.' " (*Taulbee v. EJ Distribution Corp.* (2019) 35 Cal.App.5th 590, 597 [247 Cal.Rptr.3d 538, 544].)

- "An excuse instruction is improper unless special circumstances exist." (*Baker-Smith, supra,* 37 Cal.App.5th at p. 345.)
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"The Restatement Second of Torts illustrates the types of situations which may justify or excuse a violation of the statute: [¶] '(a) [T]he violation is reasonable because of the actor's incapacity [e.g., a small child runs into the street without looking, in violation of statute requiring pedestrians to look both ways before crossing]; [¶]
'(b) [H]e neither knows nor should know of the occasion for compliance;
[¶] '(c) [H]e is unable after reasonable diligence or care to comply [e.g., a statute provides that railroads must keep fences clear of snow. A heavy blizzard covers the fences with snow and, acting promptly and reasonably, the railroad company is unable to remove all the snow for 3 days. Someone crosses the fence on the snow mound and is injured. The violation of the statute is excused];
[¶] '(d) [H]e is confronted by an emergency not due to his own misconduct [e.g., swerving into left lane to avoid child suddenly darting into the road];
[¶] '(e) [C]ompliance would involve a greater risk of harm to the actor or to others.'
Thus, in emergencies or because of some unusual circumstances, it may be difficult or impossible to comply with the statute, and the violation may be excused." (*Casey, supra,* 138 Cal.App.3d at p. 384, internal citations omitted.)~~In *Casey v. Russell* (1982) 138 Cal.App.3d 379 [188 Cal.Rptr. 18], the court held that an instruction that tracked the language of section 669(b)(1) was erroneous because it "[did] not adequately convey that there must be some special circumstances which justify violating the statute." (*Id.* at p. 385.) The court's opinion cited section 288A of the Restatement Second of Torts for a list of the types of emergencies or unusual circumstances that may justify or excuse a violation of the statute:~~

~~(a) The violation is reasonable because of the actor's incapacity;~~

~~(b) He neither knows nor should know of the occasion for compliance;~~

~~(c) He is unable after reasonable diligence or care to comply;~~

~~(d) He is confronted by an emergency not due to his own misconduct;~~

~~(e) Compliance would involve a greater risk of harm to the actor or to others.~~

- ~~According to the Restatement comment, this list of circumstances is not meant to be exclusive~~.

- "To determine whether excuse could be a defense in a negligence per se case, California law weighs the benefits and burdens of accident precautions." (*Baker-Smith, supra,* 37 Cal.App.5th at p. 345.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~871~~1002–~~896~~1028

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.28-1.31

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, § 3.13 (Matthew Bender)

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

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.81 (Matthew Bender)

440. Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements

A law enforcement officer may use reasonable force to [arrest/detain] a person when the officer has reasonable cause to believe that that person has committed or is committing a crime. However, the officer may use only that degree of force necessary to accomplish the [arrest/detention].

[*Name of plaintiff***] claims that [***name of defendant***] used unreasonable force in [arresting/detaining] [him/her/*nonbinary pronoun*]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] used force in [arresting/detaining] [***name of plaintiff***];**

2. **That the amount of force used by [***name of defendant***] was unreasonable;**

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

4. **That [***name of defendant***]'s use of unreasonable force was a substantial factor in causing [***name of plaintiff***]'s harm.**

In deciding whether [*name of defendant***] used unreasonable force, you must consider ~~all of~~ the totality of the circumstances of the [arrest/detention] and determine what force a reasonable [***insert type of ~~peace~~ officer***] in [***name of defendant***]'s position would have used under the same or similar circumstances. "Totality of the circumstances" means all facts known to the officer at the time, including the conduct of [***name of defendant***] and [***name of plaintiff***] leading up to the use of force. Among the factors to be considered are the following:**

(a) **Whether [***name of plaintiff***] reasonably appeared to pose an immediate threat to the safety of [***name of defendant***] or others;**

(b) **The seriousness of the crime at issue; [and]**

(c) **Whether [***name of plaintiff***] was actively resisting [arrest/detention] or attempting to avoid [arrest/detention] by flight[; and/.]**

[(d) [*Name of defendant***]'s tactical conduct and decisions before using ~~[deadly]~~ force on [***name of plaintiff***].]**

New June 2016; Revised May 2020

Directions for Use

Use this instruction if the plaintiff makes a negligence claim under state law arising from the force used

in effecting an arrest or detention. Such a claim is often combined with a claimed civil rights violation under 42 United States Code section 1983 (See CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*.) It might also be combined with a claim for battery. See CACI No. 1305, *Battery by Peace Officer*. For additional authorities on excessive force by a law enforcement officer, see the Sources and Authority to these two CACI instructions.

For cases involving the use of deadly force by a peace officer, Penal Code section 835a may require modifications to the instruction.

Factors (a), (b), and (c) are often referred to as the "*Graham* factors." (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are to be applied under California negligence law. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506].) They are not exclusive (see *Glenn v. Wash. County* (9th Cir. 2011) 661 F.3d 460, 467–468.); additional factors may be added if appropriate to the facts of the case. If negligence, civil rights, and battery claims are all involved, the instructions can be combined so as to give the *Graham* factors only once. A sentence may be added to advise the jury that the factors apply to all three claims.

Give optional factor (d) if the officer's conduct leading up to the need to use force is at issue. Liability can arise if the earlier tactical conduct and decisions show, as part of the totality of circumstances, that the ultimate use of force was unreasonable. In this respect, California negligence law differs from the federal standard under the Fourth Amendment. (*Hayes v. County of San Diego* (2014) 57 Cal. 4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].)

Sources and Authority

- Legislative Findings re Use of Force by Law Enforcement. Penal Code section 835a(a).
- Use of Objectively Reasonable Force to Arrest. ~~California~~ Penal Code section 835a(b).
- When Peace Officer Need Not Retreat. Penal Code section 835a(d).
- Definitions. Penal Code section 835a(e).

- "Consistent with these principles and the factors the high court has identified, the federal court in this case did not instruct the jury to conduct some abstract or nebulous balancing of competing interests. Instead, as noted above, it instructed the jury to determine the reasonableness of the officers' actions in light of 'the totality of the circumstances at the time,' including 'the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape.' The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law. Moreover, California's civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the high court has identified and that the federal court's instructions in this case set forth. (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1305.) Thus, plaintiffs err in arguing that the federal and state standards of reasonableness differ in that the former involves a fact finder's balancing of competing interests." (*Hernandez, supra,* 46 Cal.4th at p. 514, internal citation omitted.)

- "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of ' "the nature and quality of the intrusion on the individual's Fourth Amendment interests" ' against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra,* 490 U.S. at p. 396, internal citations omitted.)

- "The most important of these [*Graham* factors, above] is whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553].)

- "Plaintiff must prove unreasonable force as an element of the tort." (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272 [74 Cal.Rptr.2d 614].)

- " ' "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. … [T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. …" ' In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required." (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527–528 [89 Cal.Rptr.3d 801], internal citations omitted.)

- " '[A]s long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the "most reasonable" action or the conduct that is the least likely to cause harm and at the same time the most likely to result in the successful apprehension of a violent suspect, in order to avoid liability for negligence.' " (*Hayes, supra,* 57 Cal.4th at p. 632.)

- ~~"A police officer's use of deadly force is reasonable if ' " 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.' …" …' " (*Brown, supra,* 171 Cal.App.4th at p. 528.)~~

- ~~"Law enforcement personnel's tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability. Such liability can arise, for example, if the tactical conduct and decisions show, as part of the totality of circumstances, that the use of deadly force was unreasonable." (*Hayes, supra,* 57 Cal.4th at p. 639.)~~

- "The California Supreme Court did not address whether decisions before non-deadly force can be

actionable negligence, but addressed this issue only in the context of 'deadly force.' " (*Mulligan v. Nichols* (9th Cir. 2016) 835 F.3d 983, 991, fn. 7.)

Secondary Sources

5 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § 496~~424~~

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.24 seq. (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.22 (Matthew Bender)

1100. Dangerous Condition on Public Property—Essential Factual Elements (Gov. Code, § 835)

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

1. **That [*name of defendant*] owned [or controlled] the property;**

2. **That the property was in a dangerous condition at the time of the ~~incident~~injury;**

3. **That the dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred;**

4. **[That negligent or wrongful conduct of [*name of defendant*]'s employee acting within the scope of ~~his or her~~ employment created the dangerous condition;]**

   [or]

   [That [*name of defendant*] had notice of the dangerous condition for a long enough time to have protected against it;]

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

6. **That the dangerous condition was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised October 2008, June 2016, May 2020

Directions for Use

For element 4, choose either or both options depending on whether liability is alleged under Government Code section 835(a), 835(b), or both.

See also CACI No. 1102, *Definition of "Dangerous Condition,"* and CACI No. 1103, *Notice*.

Sources and Authority

- Liability of Public Entity for Dangerous Condition of Property. Government Code section 835.
- Actual Notice. Government Code section 835.2(a).
- Constructive Notice. Government Code section 835.2(b).
- Definitions. Government Code section 830.

- ""The Government Claims Act (§ 810 et seq.; the Act) 'is a comprehensive statutory scheme that sets forth the liabilities and immunities of public entities and public employees for torts.' Section 835 … prescribes the conditions under which a public entity may be held liable for injuries caused by a dangerous condition of public property. Section 835 provides that a public entity may be held liable for such injuries 'if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, [and] that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred.' In addition, the plaintiff must establish that either: (a) '[a] negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition,' or (b) '[t]he public entity had . . . notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.' " (*Cordova v. City of Los Angeles* (2015) 61 Cal.4th 1099, 1104 [190 Cal.Rptr.3d 850, 353 P.3d 773], internal citations omitted.)

- "[A] public entity may be liable for a dangerous condition of public property even when the immediate cause of a plaintiff's injury is a third party's negligent or illegal act (such as a motorist's negligent driving), if some physical characteristic of the property exposes its users to increased danger from third party negligence or criminality. Public entity liability lies under section 835 when some feature of the property increased or intensified the danger to users from third party conduct." (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1457−1458 [192 Cal.Rptr.3d 376], internal citation omitted.)

- "Subdivisions (a) and (b) of section 835 obviously address two different types of cases. However, what distinguishes the two types of cases is not simply whether the public entity has notice of the dangerous condition. Instead, what distinguishes the two cases in practice is who created the dangerous condition. Because an entity must act through its employees, virtually all suits brought on account of dangerous conditions created by the entity will be brought under subdivision (a). In contrast, subdivision (b) can also support suits based on dangerous conditions not created by the entity or its employees." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 836 [15 Cal.Rptr.2d 679, 843 P.2d 624].)

- "[T]he res ipsa loquitur presumption does not satisfy the requirements for holding a public entity liable under section 835, subdivision (a). Res ipsa loquitur requires the plaintiff to show only (1) that the accident was of a kind which ordinarily does not occur in the absence of negligence, (2) that the instrumentality of harm was within the defendant's exclusive control, and (3) that the plaintiff did not voluntarily contribute to his or her own injuries. Subdivision (a), in contrast, requires the plaintiff to show that an employee of the public entity 'created' the dangerous condition; in view of the legislative history … ,the term 'created' must be defined as the sort of involvement by an employee that would justify a presumption of notice on the entity's part." (*Brown, supra,* 4 Cal.4th at p. 836.)

- "Focusing on the language in *Pritchard, supra,* 178 Cal. App. 2d at page 256, stating that where the public entity 'has itself created the dangerous condition it is per se culpable,' plaintiff argues that the negligence that section 835, subdivision (a), refers to is not common law negligence, but something that exists whenever the public entity creates the dangerous condition of property. We disagree. If the Legislature had wanted to impose liability whenever a public entity created a dangerous condition, it

would merely have required plaintiff to establish that an act or omission of an employee of the public entity within the scope of his employment created the dangerous condition. Instead, section 835, subdivision (a), requires the plaintiff to establish that a '*negligent or wrongful* act or omission of an employee of the public entity within the scope of his employment created the dangerous condition.' (Italics added.) Plaintiff's interpretation would transform the highly meaningful words 'negligent or wrongful' into meaningless surplusage, contrary to the rule of statutory interpretation that courts should avoid a construction that makes any word surplusage." (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1135 [72 Cal.Rptr.3d 382, 176 P.2d 654], original italics, internal citation omitted.)

- "In order to recover under Government Code section 835, it is not necessary for plaintiff to prove a negligent act *and* notice; either negligence *or* notice will suffice." (*Curtis v. State of California* (1982) 128 Cal.App.3d 668, 693 [180 Cal.Rptr. 843], original italics.)

- "A public entity may not be held liable under section 835 for a dangerous condition of property that it does not own or control." (*Goddard v. Department of Fish & Wildlife* (2015) 243 Cal.App.4th 350, 359 [196 Cal.Rptr.3d 625].)

- "For liability to be imposed on a public entity for a dangerous condition of property, the entity must be in a position to protect against or warn of the hazard. Therefore, the crucial element is not ownership, but rather control." (*Mamola v. State of California ex rel. Dept. of Transportation* (1979) 94 Cal.App.3d 781, 788 [156 Cal.Rptr. 614], internal citation omitted.)

- "Liability for injury caused by a dangerous condition of property has been imposed when an unreasonable risk of harm is created by a combination of defect in the property and acts of third parties. However, courts have consistently refused to characterize harmful third party conduct as a dangerous condition-absent some concurrent contributing defect in the property itself." (*Hayes v. State of California* (1974) 11 Cal.3d 469, 472 [113 Cal.Rptr. 599, 521 P.2d 855], internal citations omitted.)

- "[P]laintiffs in this case must show that a dangerous condition of property--that is, a condition that creates a substantial risk of injury to the public--proximately caused the fatal injuries their decedents suffered as a result of the collision with [third party]'s car. But nothing in the statute requires plaintiffs to show that the allegedly dangerous condition also caused the third party conduct that precipitated the accident." (*Cordova, supra,* 61 Cal. 4th at p. 1106.)

- "The existence of a dangerous condition is ordinarily a question of fact but 'can be decided as a matter of law if reasonable minds can come to only one conclusion.' " (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1347 [75 Cal.Rptr.3d 168].)

Secondary Sources

5 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Torts, §§ ~~249~~301–~~285~~341

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-C, *Immunity From Liability*, ¶ 6:91 et seq. (The Rutter Group)

Hanning et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, *Liability For "Dangerous Conditions" Of Public Property*, ¶ 2:2785 et seq. (The Rutter Group)

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.9–12.55

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, § 464.81 (Matthew Bender)

19A California Points and Authorities, Ch. 196*, Public Entities*, § 196.11 (Matthew Bender)

1102. Definition of "Dangerous Condition" (Gov. Code, § 830(a))

A "dangerous condition" is a condition of public property that creates a substantial risk of injury to members of the general public when the property [or adjacent property] is used with reasonable care and in a reasonably foreseeable manner. A condition that creates only a minor risk of injury is not a dangerous condition. [Whether the property is in a dangerous condition is to be determined without regard to whether [*name of plaintiff*]/ [or] [*name of third party*] exercised or failed to exercise reasonable care in [his/her/*nonbinary pronoun*] use of the property.]

New September 2003; Revised June 2010, May 2020

Directions for Use

Give this instruction if a plaintiff claims that a condition of public property creates a substantial risk of injury to the plaintiff as a user of public or adjacent property when the property was used with reasonable care and in a reasonably foreseeable manner. (Gov. Code, § 830(a).) For claims involving conditions on the adjacent property that are alleged to have contributed to making the public property dangerous, give CACI No. 1125, *Conditions on Adjacent Property*.

Give the last sentence if comparative fault is at issue. It clarifies that comparative fault does not negate the possible existence of a dangerous condition. (See *Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131 [231 Cal.Rptr. 598].)

Sources and Authority

- "Dangerous Condition" Defined. Government Code section 830(a).
- No Liability for Minor Risk. Government Code section 830.2.
- "The Act defines a' "[d]angerous condition" 'as 'a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.' Public property is in a dangerous condition within the meaning of section 835 if it 'is physically damaged, deteriorated, or defective in such a way as to foreseeably endanger those using the property itself.' " (*Cordova v. City of L.A.* (2015) 61 Cal.4th 1099, 1105 [190 Cal.Rptr.3d 850, 353 P.3d 773], internal citations omitted.)
- "A public entity is not, without more, liable under section 835 for the harmful conduct of third parties on its property. But if a condition of public property 'creates a substantial risk of injury even when the property is used with due care', a public entity 'gains no immunity from liability simply because, in a particular case, the dangerous condition of its property combines with a third party's negligent conduct to inflict injury.' " (*Cordova, supra*, 61 Cal.4th at p. 1105, internal citations omitted.)
- "In general, '[whether] a given set of facts and circumstances creates a dangerous condition is usually

a question of fact and may only be resolved as a question of law if reasonable minds can come to but one conclusion.' " (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 810 [205 Cal.Rptr. 842, 685 P.2d 1193], internal citation omitted.)

- "An initial and essential element of recovery for premises liability under the governing statutes is proof a dangerous condition existed. The law imposes no duty on a landowner—including a public entity—to repair trivial defects, or 'to maintain [its property] in an absolutely perfect condition.' " (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 566 [78 Cal.Rptr.3d 910], internal citations omitted.)

- "The status of a condition as 'dangerous' for purposes of the statutory definition does *not* depend on whether the plaintiff or other persons were actually exercising due care but on whether the condition of the property posed a substantial risk of injury to persons who *were* exercising due care." (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 768 [140 Cal.Rptr.3d 722], original italics.)

- "[T]he fact the particular plaintiff may not have used due care is relevant only to his [or her] comparative fault and not to the issue of the presence of a dangerous condition." (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1459 [192 Cal.Rptr.3d 376].)

- "The negligence of a plaintiff-user of public property ... is a defense which may be asserted by a public entity; it has no bearing upon the determination of a 'dangerous condition' in the first instance. … If, however, it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a)." (*Fredette, supra,* 187 Cal.App.3d at p. 131, internal citation omitted.)

- "Even though it is foreseeable that persons may use public property without due care, a public entity may not be held liable for failing to take precautions to protect such persons." (*Fredette, supra,* 187 Cal.App.3d at p. 132, internal citation omitted.)

- "With respect to public streets, courts have observed 'any property can be dangerous if used in a sufficiently improper manner. For this reason, a public entity is only required to provide roads that are safe for reasonably foreseeable careful use. [Citation.] "If [] it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a)." [Citation.]' " (*Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, 1183 [83 Cal.Rptr.3d 372], internal citations omitted.)

- "A public entity is not charged with anticipating that a person will use the property in a criminal way, here, driving with a 'willful or wanton disregard for safety of persons or property ....' " (*Fuller v. Department of Transportation* (2019) 38 Cal.App.5th 1034, 1042 [251 Cal.Rptr.3d 549].)

- "[A] prior dangerous condition may require street lighting or other means to lessen the danger but the absence of street lighting is itself not a dangerous condition." (*Mixon v. Pacific Gas & Electric Co.* (2012) 207 Cal.App.4th 124, 133 [142 Cal.Rptr.3d 633].)

- "Although public entities may be held liable for injuries occurring to reasonably foreseeable users of the property, even when the property is used for a purpose for which it is not designed or which is illegal, liability may ensue only if the property creates a substantial risk of injury when it is used with due care. Whether a condition creates a substantial risk of harm depends on how the general public would use the property exercising due care, including children who are held to a lower standard of care. (§ 830.) The standard is an objective one; a plaintiff's particular condition ... , does not alter the standard." (*Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1466 [72 Cal.Rptr.2d 464], internal citations omitted.)

- "A public entity may be liable for a dangerous condition of public property even where the immediate cause of a plaintiff's injury is a third party's negligence if some physical characteristic of the property exposes its users to increased danger from third party negligence. 'But it is insufficient to show only harmful third party conduct, like the conduct of a motorist. " '[T]hird party conduct, by itself, unrelated to the condition of the property, does not constitute a "dangerous condition" for which a public entity may be held liable.' " … There must be a defect in the physical condition of the property and that defect must have some causal relationship to the third party conduct that injures the plaintiff. …' " (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1069–1070 [129 Cal.Rptr.3d 690], internal citation omitted.)

- "Nothing in the provisions of section 835, however, specifically precludes a finding that a public entity may be under a duty, given special circumstances, to protect against harmful criminal conduct on its property." (*Peterson, supra,* 36 Cal.3d at pp. 810–811, internal citations omitted.)

- "Two points applicable to this case are ... well established: first, that the location of public property, by virtue of which users are subjected to hazards on adjacent property, may constitute a 'dangerous condition' under sections 830 and 835; second, that a physical condition of the public property that increases the risk of injury from third party conduct may be a 'dangerous condition' under the statutes." (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 154 [132 Cal.Rptr.2d 341, 65 P.3d 807].)

- "[T]he absence of other similar accidents is 'relevant to the determination of whether a condition is dangerous.' But the city cites no authority for the proposition that the absence of other similar accidents is *dispositive* of whether a condition is dangerous, or that it compels a finding of nondangerousness absent other evidence." (*Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337, 1346 [107 Cal.Rptr.3d 730], original italics, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Torts, § ~~269~~321

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) § 12.15

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01[2][a] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California*

Government Claims Act, § 464.81 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.11 (Matthew Bender)

VF-1100. Dangerous Condition of Public Property

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] own [or control] the property?**
   ____ Yes ____ No

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

2. **Was the property in a dangerous condition at the time of the ~~incident~~injury?**
   ____ Yes ____ No

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

3. **Did the dangerous condition create a reasonably foreseeable risk that this kind of ~~incident~~ injury would occur?**
   ____ Yes ____ No

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

4. **[Did the negligent or wrongful conduct of [*name of defendant*]'s employee acting within the scope of ~~his or her~~ employment create the dangerous condition?]**

   [or]

   [Did [*name of defendant*] have notice of the dangerous condition for a long enough time for [*name of defendant*] to have protected against it?]
   ____ Yes ____ No

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

5. **Was the dangerous condition a substantial factor in causing harm to [*name of plaintiff*]?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

[a. Past economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other past economic loss	**$ _____]**

Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other future economic loss	**$ _____]**

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 1100, *Dangerous Condition on Public Property—Essential Factual Elements*.

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

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional depending on the circumstances.

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

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

VF-1201. Strict Products Liability—Design Defect—Affirmative Defense—Misuse or Modification

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?
____ Yes ____ No

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

2. Was the [*product*] [misused/ [or] modified] after it left [*name of defendant*]'s possession in a way that was so highly extraordinary that it was not reasonably foreseeable to [him/her/*nonbinary pronoun*/it]?
____ Yes ____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, skip question 3 and answer question 4.

3. Was the [misuse/ [or] modification] the sole cause of [*name of plaintiff*]'s harm?
____ Yes ____ No

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

[4. Is the [*product*] one about which an ordinary consumer can form reasonable minimum safety expectations?
____ Yes ____ No

If your answer to question 4 is yes, answer question 5. If your answer is no, skip question 5 and answer question 6.]

[5. Did the [*product*] fail to perform as safely as an ordinary consumer would have expected when used or misused in an intended or reasonably foreseeable way?
____ Yes ____ No

Regardless of your answer to question 5, answer question 6.]

[6. Did the ~~risk of the [*product*]'s design outweigh the~~ benefits of the [*product*]'s design outweigh the risks of the design?
____ Yes ____ No

If your answer to ~~either~~ question 5 ~~or question 6~~ is yes or your answer to question 6 is no, answer question 7. If you answered no to ~~both~~ question~~s~~ 5 and yes to question 6, stop here, answer no further questions, and have the presiding juror sign and date

this form.]

7. Was the [*product*]'s design a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court

attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised October 2004, April 2007, April 2009, December 2010, June 2011, December 2011, December 2014, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 1203, *Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements*, CACI No. 1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof*, and CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions 6 through 9 of CACI No. VF-1200, *Strict Products Liability—Manufacturing Defect—Comparative Fault at Issue*, may be added at the end.

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.

This verdict form can be used in a case in which the jury will decide design defect under both the consumer expectation and the risk-benefit tests. If only the risk-benefit test is at issue, omit questions 4 and 5. If only the consumer expectation test is at issue, omit question 6. Modify the transitional language following questions 5 and 6 if only one test is at issue in the case. Include question 4 if the court has decided to give to the jury the preliminary question as to whether the consumer expectation test can be applied to the product at issue in the case. (See *Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1233–1234 [115 Cal.Rptr.3d 151].) An additional question may be needed if the defendant claims that the plaintiff's injuries were caused by some product other than the defendant's.

If specificity is not required, users do not have to itemize all the damages listed in question 8. The breakdown is optional depending on the circumstances.

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.

1305. Battery by Peace Officer—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] harmed [him/her/*nonbinary pronoun*] by using unreasonable force to [arrest [him/her/*nonbinary pronoun*]/prevent [his/her/*nonbinary pronoun*] escape/overcome [his/her/*nonbinary pronoun*] resistance/[*insert other applicable action*]]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] intentionally touched [*name of plaintiff*] [or caused [*name of plaintiff*] to be touched];**

2. **That [*name of defendant*] used unreasonable force to [arrest/prevent the escape of/overcome the resistance of/*insert other applicable action*] [*name of plaintiff*];**

3. **That [*name of plaintiff*] did not consent to the use of that force;**

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

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

[A/An] [*insert type of peace officer*] may use reasonable force to arrest or detain a person when the officer ~~he or she~~ has reasonable cause to believe that that person has committed a crime. Even if the ~~[*insert type of peace officer*]~~ officer is mistaken, a person being arrested or detained has a duty not to use force to resist the ~~[*insert type of peace officer*]~~ officer unless the [*insert type of peace officer*] is using unreasonable force.

In deciding whether [*name of defendant*] used unreasonable force, you must determine the amount of force that would have appeared reasonable to [a/an] [*insert type of peace officer*] in [*name of defendant*]'s position under the same or similar circumstances. You should consider, among other factors, the following:

(a) The seriousness of the crime at issue;

(b) Whether [*name of plaintiff*] reasonably appeared to pose an immediate threat to the safety of [*name of defendant*] or others; and

(c) Whether [*name of plaintiff*] was actively resisting arrest or attempting to evade arrest.

[[A/An] [*insert type of peace officer*] who makes or attempts to make an arrest is not required to retreat or cease from ~~his or her~~ the officer's efforts because the person being arrested resists or threatens to ~~of the resistance or threatened~~ resist~~ance of the person being arrested~~.]

New September 2003; Revised December 2012, May 2020

Directions for Use

For additional authorities on excessive force, see the Sources and Authority for CACI No. 440, *Unreasonable Force by Law Enforcement in Arrest or Other Seizure–Essential Factual Elements*, and CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*.

For cases involving the use of deadly force by a peace officer, Penal Code section 835a may require modifications to the instruction.

Sources and Authority

- Use of Objectively Reasonable Force to Arrest. ~~California~~ Penal Code section 835a.
- Duty to Submit to Arrest. ~~California~~ Penal Code section 834a.
- "Plaintiff must prove unreasonable force as an element of the tort." (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272 [74 Cal.Rptr.2d 614].)
- " ' "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. … [T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. …" ' In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required." (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527–528 [89 Cal.Rptr.3d 801], internal citations omitted.)
- "A police officer's use of deadly force is reasonable if ' " 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.' …" …' " (*Brown, supra,* 171 Cal.App.4th at p. 528.)
- "[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention ... ." (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)
- "[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer unless excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense." (*Evans, supra,* 22 Cal.App.4th at p. 331, internal citation omitted.)
- "Consistent with these principles and the factors the high court has identified, the federal court in this case did not instruct the jury to conduct some abstract or nebulous balancing of competing interests. Instead, as noted above, it instructed the jury to determine the reasonableness of the officers' actions in light of 'the totality of the circumstances at the time,' including 'the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape.' The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence

law. Moreover, California's civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the high court has identified and that the federal court's instructions in this case set forth. (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1305.) Thus, plaintiffs err in arguing that the federal and state standards of reasonableness differ in that the former involves a fact finder's balancing of competing interests." (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Torts, § ~~424~~496

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.24 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, §§ 58.22, 58.61, 58.92 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.20 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 12:22 (Thomson Reuters)

1812. Comprehensive Computer Data and Access Fraud Act—Essential Factual Elements (Pen. Code, § 502)

[*Name of plaintiff***] claims that [***name of defendant***] has violated the Comprehensive Computer Data and Access Fraud Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] is the [owner/lessee] of the [***specify computer, computer system, computer network, computer program, and/or data***];**

2. **That [***name of defendant***] knowingly [***specify one or more prohibited acts from Pen. Code, § 502(c), e.g., accessed [name of plaintiff]'s data on a computer, computer system, or computer network***];**

[3. **That [***name of defendant***]'s [***specify conduct from Pen. Code, § 502(c), e.g., use of the computer services***] was without [***name of plaintiff***]'s permission;]**

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

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

New May 2020

Directions for Use

Give this instruction for a claim under the Comprehensive Computer Data Access and Fraud Act (CDAFA). CDAFA makes civil remedies available to any person who suffers damage or loss by reason of the commission of certain computer-related offenses. (Pen. Code, § 502(c), (e)(1).)

For element 1, the court may need to define the technology (e.g., "computer network," "computer program or software," "computer system," or "data") or other statutory term depending on the facts and circumstances of the particular case. (See Pen. Code, § 502(b) [defining various terms].) For a definition of "access," see CACI No. 1813, *Definition of "Access."*

Some of the prohibited acts for element 2 may also require that the defendant do something specific with the access or that the defendant have a specific purpose. For example, if the defendant allegedly deleted or used plaintiff's computer data, it must have been done without permission and either to (a) devise or execute any scheme or artifice to defraud, deceive, or extort, or (b) wrongfully control or obtain money, property, or data. (See Pen. Code, § 502(c)(1).) Modify the instruction to include these elements where required.

Include element 3 regarding lack of permission depending on the violation(s) alleged. Lack of permission is a required element for violations of subdivisions (c)(1)–(7) and (c)(9)–(13), but not for violations of subdivisions (c)(8) and (c)(14). Modify element 3 accordingly. Delete element 3 for violations of the latter subdivisions.

If plaintiff's claim involves a "government computer system" or a "public safety infrastructure computer system" and there is a factual dispute about the type of computer system involved, this instruction should be modified to add that issue as an element. (See Pen. Code, § 502(c)(10), (11), (12), (13), and (14).)

Sources and Authority

- Comprehensive Computer Data Access and Fraud Act. Penal Code section 502.

- "Penal Code section 502, subdivision (e)(1) permits a civil action to recover expenses related to investigating the unauthorized computer access." (*Verio Healthcare, Inc. v. Superior Court* (2016) 3 Cal.App.5th 1315, 1319–1321 [208 Cal.Rptr.3d 436].)

- "Four of the section 502, subdivision (c) offenses include access as an element. The provision under which [defendant] was charged does not. When different words are used in adjoining subdivisions of a statute that were enacted at the same time, that fact raises a compelling inference that a different meaning was intended. The Legislature's requirement of unpermitted access in some section 502 offenses and its failure to require that element in other parts of the same statute raise a strong inference that the subdivisions that do not require unpermitted access were intended to apply to persons who gain lawful access to a computer but then abuse that access." (*People v. Childs* (2013) 220 Cal.App.4th 1079, 1102 [164 Cal.Rptr.3d 287], internal citations omitted.)

- "[The CDAFA] does not require *unauthorized* access. It merely requires *knowing* access. What makes that access unlawful is that the person 'without permission takes, copies, or makes use of' data on the computer. A plain reading of the statute demonstrates that its focus is on unauthorized taking or use of information." (*United States v. Christensen* (9th Cir. 2015) 828 F.3d 763, 789, original italics, internal citations omitted.)

- "Because [defendant] had implied authorization to access [plaintiff]'s computers, it did not, at first, violate the [CDAFA]. But when [plaintiff] sent the cease and desist letter, [defendant], as it conceded, knew that it no longer had permission to access [plaintiff]'s computers at all. [Defendant], therefore, knowingly accessed and without permission took, copied, and made use of [plaintiff]'s data." (*Facebook, Inc. v. Power Ventures, Inc.* (9th Cir. 2016) 844 F.3d 1058, 1069.)

- "[T]aking data using a *method* prohibited by the applicable terms of use, when the taking itself generally is permitted, does not violate the CDAFA." (*Oracle USA, Inc. v. Rimini Street, Inc.* (9th Cir. 2018) 879 F.3d 948, 962, reversed in part on other grounds by *Rimini Street, Inc. v. Oracle USA, Inc.* (2019) – U.S. –, 139 S.Ct. 873, 881 [203 L.Ed.2d 180], original italics.)

Secondary Sources

1813. Definition of "Access" (Pen. Code, § 502(b)(1))

The term "access" means to gain entry to, instruct, cause input to, cause output from, cause data processing with, or communicate with the logical, arithmetical, or memory function resources of a computer, computer system, or computer network.

A person can access a computer, computer system, or computer network in different ways. For example, access can be accomplished by sitting down at a computer and using the mouse and keyboard, or by using a wireless network or some other method or tool to gain remote entry.

New May 2020

Directions for Use

This instruction should be read with CACI No. 1812, *Comprehensive Computer Data and Access Fraud Act—Essential Factual Elements*, for claims that require that the defendant "access" a computer, computer system, or computer network. (See Pen. Code, § 502 (c)(1), (2), (4), (7), and (11).)

Sources and Authority

- "Access" Defined. Penal Code section 502(b)(1).

- "Underscoring that 'accessing' a computer's 'logical, arithmetical, or memory function' is different from the ordinary, everyday use of a computer to which people are accustomed when they speak of 'using' a computer, another subdivision criminalizes 'us[ing] or caus[ing] to be used computer services' without permission. Principles of statutory interpretation obligate us to give different meanings to the words 'use' and 'access' in order to avoid rendering either word redundant." (*Chrisman v. City of Los Angeles* (2007) 155 Cal.App.4th 29, 34 [65 Cal.Rptr.3d 701], internal citation and footnote omitted.)

- "Public access computer terminals are increasingly common in the offices of many governmental bodies and agencies, from courthouses to tax assessors. We believe subdivision (c)(7) was designed to criminalize unauthorized access to the software and data in such systems, even where none of the other illegal activities listed in subdivision (c) have occurred." (*People v. Lawton* (1996) 48 Cal.App.4th Supp. 11, 15 [56 Cal.Rptr.2d 521].)

Secondary Sources

1814. Damages for Investigating Violations of Comprehensive Computer Data and Access Fraud Act (Pen. Code, § 502(e)(1))

To recover damages for money spent to investigate or verify whether [*name of plaintiff*]'s computer system, computer network, computer program, or data [was or was not/were or were not] altered, damaged, or deleted by [*name of defendant*]'s access, [*name of plaintiff*] must prove the amount of money reasonably and necessarily spent to conduct such an investigation.

New May 2020

Directions for Use

Give this instruction for violations of the Comprehensive Computer Data and Access Fraud Act in which there is evidence that the plaintiff spent money to investigate or verify the defendant's wrongful conduct. (See Pen. Code, § 502; CACI No. 1812, *Comprehensive Computer Data and Access Fraud Act—Essential Factual Elements*.) In some cases, it may be appropriate to tailor the instruction to specify the technology or data at issue (e.g., the name of a computer program or the plaintiff's data files).

For other damages instructions, see the Damages series, CACI Nos. 3900 et seq.

Punitive or exemplary damages are available for willful violations. (Pen. Code, § 502(e)(4).) For instructions on punitive damages, see CACI Nos. 3940–3949.

Sources and Authority

- Compensatory Damages. Penal Code section 502(e)(1).

Secondary Sources

2511. Adverse Action Made by Decision Maker Without Animus (Cat's Paw)

In this case, the decision to [discharge/[*other adverse employment action*]] [*name of plaintiff*] was made by [*name of decision maker*]. Even if [*name of decision maker*] did not hold any [discriminatory/retaliatory] intent [or was unaware of [*name of plaintiff*]'s conduct on which the claim of retaliation is based], [*name of defendant*] may still be liable for [discrimination/retaliation] if [*name of decision maker*] followed a recommendation from or relied on facts provided by a supervisor who had [discriminatory/retaliatory] intent.

To succeed, [*name of plaintiff*] must prove~~s~~ both of the following:

1. **That [*name of plaintiff*]'s [*specify protected activity or attribute*] was a substantial motivating reason for [*name of supervisor*]'s [*specify acts of supervisor on which decision maker relied*]; and**

2. **That [*name of supervisor*]'s [*specify acts on which decision maker relied*] was a substantial motivating reason for [*name of decision maker*]'s decision to [discharge/[*other adverse employment action*]] [*name of plaintiff*].**

New December 2012; Revised June 2013, May 2020

Directions for Use

Give this instruction if the "cat's paw" rule is a factor in the case. Under the cat's paw rule, the person who actually took the adverse employment action against the employee was not acting out of any improper animus. The decision maker, however, acted on information provided by a supervisor who was acting out of discriminatory or retaliatory animus with the objective of causing the adverse employment action. The decision maker is referred to as the "cat's paw" of the person with the animus. (See *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 100 [16 Cal.Rptr.3d 717].)

The purpose of this instruction is to make it clear to the jury that they are not to evaluate the motives or knowledge of the decision maker, but rather to decide whether the acts of the supervisor with animus actually caused the adverse action. Give the optional language in the second sentence of the first paragraph in a retaliation case in which the decision maker was not aware of the plaintiff's conduct that allegedly led to the retaliation (defense of ignorance). (See *Reeves, supra,* 121 Cal.App.4th at pp. 106–108.)

Element 1 requires that the protected activity or attribute be a substantial motivating reason for the retaliatory acts. Element 2 requires that the supervisor's improper motive be a substantial motivating reason for the decision maker's 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*.)

In both elements 1 and 2, all of the supervisor's specific acts need not be listed in all cases. Depending on the facts, doing so may be too cumbersome and impractical. If the specific acts are listed, the list should

include all acts on which plaintiff claims the decision maker relied, not just the acts admitted to have been relied on by the decision maker.

Sources and Authority

- "This case presents the question whether an employer may be liable for retaliatory discharge when the supervisor who initiates disciplinary proceedings acts with retaliatory animus, but the cause for discipline is separately investigated and the ultimate decision to discharge the plaintiff is made by a manager with no knowledge that the worker has engaged in protected activities. We hold that so long as the supervisor's retaliatory motive was an actuating … cause of the dismissal, the employer may be liable for retaliatory discharge. Here the evidence raised triable issues as to the existence and effect of retaliatory motive on the part of the supervisor, and as to whether the manager and the intermediate investigator acted as tools or 'cat's paws' for the supervisor, that is, instrumentalities by which his retaliatory animus was carried into effect to plaintiff's injury." (*Reeves, supra,* 121 Cal.App.4th at p. 100.)

- "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.)

- "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.)

- "This concept—which for convenience we will call the 'defense of ignorance'—poses few analytical challenges so long as the 'employer' is conceived as a single entity receiving and responding to stimuli as a unitary, indivisible organism. But this is often an inaccurate picture in a world where a majority of workers are employed by large economic enterprises with layered and compartmentalized management structures. In such enterprises, decisions significantly affecting personnel are rarely if ever the responsibility of a single actor. As a result, unexamined assertions about the knowledge, ignorance, or motives of 'the employer' may be fraught with ambiguities, untested assumptions, and begged questions." (*Reeves, supra,* 121 Cal.App.4th at p. 108.)

- "Certainly a defendant does not conclusively negate the element of causation by showing only that some responsible actors, but not all, were ignorant of the occasion for retaliation." (*Reeves, supra,* 121 Cal.App.4th at p. 108.)

- "Here a rational fact finder could conclude that an incident of minor and excusable disregard for a supervisor's stated preferences was amplified into a 'solid case' of 'workplace violence,' and that this metamorphosis was brought about in necessary part by a supervisor's desire to rid himself of

a worker who created trouble by complaining of matters the supervisor preferred to ignore. Since those complaints were protected activities under FEHA, a finder of fact must be permitted to decide whether these inferences should in fact be drawn." (*Reeves, supra,* 121 Cal.App.4th at p. 121.)

- "Our emphasis on the conduct of *supervisors* is not inadvertent. An employer can generally be held liable for the discriminatory or retaliatory actions of supervisors. The outcome is less clear where the only actor possessing the requisite animus is a nonsupervisory coworker." (*Reeves, supra*, 121 Cal.App.4th at p. 109 fn. 9, original italics, internal citation omitted.)

Secondary Sources

8 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Constitutional Law, §§ ~~921~~1025, ~~940~~1026, 1052, 1053

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶ 7:806.5 (The Rutter Group)

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37[3][a] (Matthew Bender)

2521C. Work Environment Harassment—~~Widespread~~ Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff***] claims that [he/she/*nonbinary pronoun*] was subjected to harassment based on ~~widespread~~ sexual favoritism at [***name of defendant***] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant those preferences.**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

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

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

3. ~~**That the sexual favoritism was widespread;**~~

~~4.~~ **That the sexual favoritism was severe or pervasive;**

4~~5~~. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the ~~widespread~~ sexual favoritism;**

5~~6~~. **That [***name of plaintiff***] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the ~~widespread~~ sexual favoritism;**

6~~7~~. **[***Select applicable basis of defendant's liability:***]**

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

[*or***]**

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

7~~8~~. **That [***name of plaintiff***] was harmed; and**

8~~9~~. **That the conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Derived from former CACI No. 2521 December 2007; Revised December 2015, May 2018, July 2019.

May 2020

Directions for Use

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

In element ~~7~~ 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.* If there are both employer and individual supervisor defendants (see CACI No. 2522C, *Work Environment Harassment—~~Widespread~~ Sexual Favoritism—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Declaration of Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).

- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).

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

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

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)

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

- "The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. This is a negligence standard. Because the FEHA imposes this negligence standard only for harassment 'by an employee other than an agent or supervisor', by implication the FEHA makes the employer strictly liable for harassment by a supervisor." (*State Dep't of Health Servs., supra,* 31 Cal.4th at pp. 1040–1041, original italics.)

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

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

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

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

Secondary Sources

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

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

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

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

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*,

§ 115.36 (Matthew Bender)

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

2522C. Work Environment Harassment—~~Widespread~~ Sexual Favoritism—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was subjected to harassment based on ~~widespread~~ sexual favoritism at [*name of employer*] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant these preferences.

To establish this claim, [*name of plaintiff*] must prove all of the following:

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

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

3. ~~**That the sexual favoritism was widespread;**~~

~~4.~~ **That the sexual favoritism was severe or pervasive;**

4~~5~~. **That a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the ~~widespread~~ sexual favoritism;**

5~~6~~. **That [*name of plaintiff*] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the ~~widespread~~ sexual favoritism;**

6~~7~~. **That [*name of defendant*] [participated in/assisted/ [or] encouraged] the sexual favoritism;**

7~~8~~. **That [*name of plaintiff*] was harmed; and**

8~~9~~. **That the conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Derived from former CACI No. 2522 December 2007; Revised December 2015, May 2018, July 2019, May 2020

Directions for Use

This instruction is for use in a hostile work environment case involving ~~widespread~~ sexual favoritism when the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521C, *Work Environment Harassment—~~Widespread~~ Sexual Favoritism—*

Essential Factual Elements—Employer or Entity Defendant. For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

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

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Declaration of Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently

pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)

- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)
- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)

Secondary Sources

~~4~~ 3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

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

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

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

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36[5] (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her/*nonbinary pronoun*] based on [his/her/*nonbinary pronoun*] [history of [a]] [***select term to describe basis of limitations, e.g., physical condition***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That [***name of defendant***] knew that [***name of plaintiff***] had [a history of having] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];**

4. **That [***name of plaintiff***] was able to perform the essential job duties of [his/her/*nonbinary pronoun*] [current position/the position for which [he/she/*nonbinary pronoun*] applied, either with or without reasonable accommodation for [his/her/*nonbinary pronoun*] [*e.g., condition*]~~] [with reasonable accommodation for [his/her] [*e.g., physical condition*]]~~;**

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

   [or]

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

   [or]

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

6. **That [***name of plaintiff***]'s [history of [a]] [***e.g., physical condition***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];**

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

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

[*Name of plaintiff***] does not need to prove that [***name of defendant***] held any ill will or animosity toward [him/her/*nonbinary pronoun*] personally because [he/she/*nonbinary pronoun*] was [perceived to be] disabled. [On the other hand, if you find that [***name of defendant***] did hold ill will or animosity toward [***name of plaintiff***] because [he/she/*nonbinary pronoun*] was [perceived to be] disabled, you may consider this fact, along with all the other evidence, in determining whether [***name of plaintiff***]'s [history of [a]] [***e.g., physical condition***] was a substantial motivating reason for [***name of***

defendant]**'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct].]**

New September 2003; Revised June 2006, December 2007, April 2009, December 2009, June 2010, June 2012, June 2013, December 2014, December 2016, May 2019, May 2020

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

In the introductory paragraph and in elements 3 and 6, select the bracketed language on "history" of disability if the claim of discrimination is based on a history of disability rather than a current actual disability.

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

This instruction is for use by both an employee and a job applicant. Select the appropriate options in elements 2, ~~4,~~ 5, and 6 depending on the plaintiff's status.

Modify elements 3 and 6 if the plaintiff was not actually disabled or had a history of disability, but alleges discrimination because ~~he or she~~ the plaintiff was perceived to be disabled. (See Gov. Code, § 12926(o); see also Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) This can be done with language in element 3 that the employer "treated [*name of plaintiff*] as if [he/she/*nonbinary pronoun*] ..." and with language in element 6 "That [*name of employer*]'s belief that … ."

If the plaintiff alleges discrimination on the basis of ~~his or her~~ the plaintiff's association with someone who was or was perceived to be disabled, give CACI No. 2547, *Disability-Based Associational Discrimination—Essential Factual Elements.* (See *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655−660 [163 Cal.Rptr.3d 392] [claim for "disability based associational discrimination" adequately pled].)

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit "that limited [*insert major life activity*]" in element 3. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

Regarding element 4, it is now settled that the ability to perform the essential duties of the job, with or without reasonable accommodation, is an element of the plaintiff's burden of proof. (See *Green v. State of California* (2007) 42 Cal.4th 254, 257–258 [64 Cal.Rptr.3d 390, 165 P.3d 118].)

Read the first option for element 5 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 5 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 6 if either the second or third option is included for element 5.

Element 6 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

Give the optional sentence in the last paragraph if there is evidence that the defendant harbored personal animus against the plaintiff because of the plaintiff's ~~his or her~~ disability.

If the existence of a qualifying disability is disputed, additional instructions defining "physical disability," "mental disability," and "medical condition" may be required. (See Gov. Code, § 12926(i), (j), (m).)

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Inability to Perform Essential Job Duties. Government Code section 12940(a)(1).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Perception of Disability and Association With Disabled Person Protected. Government Code section 12926(o).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "[T]he plaintiff initially has the burden to establish a prima facie case of discrimination. The plaintiff can meet this burden by presenting evidence that demonstrates, even circumstantially or by inference, that he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability. To establish a prima facie case, a plaintiff must show ' " ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a [prohibited] discriminatory criterion … ." ' " …' The prima facie burden is light; the evidence necessary to sustain the burden is minimal. As noted above, while the elements of a plaintiff's prima facie case can vary considerably, generally an employee need only offer sufficient

circumstantial evidence to give rise to a reasonable *inference* of discrimination." (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310 [115 Cal.Rptr.3d 453], original italics, internal citations omitted.)

- "The distinction between cases involving *direct evidence* of the employer's motive for the adverse employment action and cases where there is only *circumstantial evidence* of the employer's discriminatory motive is critical to the outcome of this appeal. There is a vast body of case law that addresses proving discriminatory intent in cases where there was no direct evidence that the adverse employment action taken by the employer was motivated by race, religion, national origin, age or sex. In such cases, proof of discriminatory motive is governed by the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* [(1973) 411 U.S. 792 [93 S. Ct. 1817, 36 L. Ed. 2d 668]." (*Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 123 [199 Cal.Rptr.3d 462], original italics, footnote and internal citations omitted.)

- "The three-stage framework and the many principles adopted to guide its application do not apply in discrimination cases where, like here, the plaintiff presents direct evidence of the employer's motivation for the adverse employment action. In many types of discrimination cases, courts state that direct evidence of intentional discrimination is rare, but disability discrimination cases often involve direct evidence of the role of the employee's actual or perceived *disability* in the employer's decision to implement an adverse employment action. Instead of litigating the employer's reasons for the action, the parties' disputes in disability cases focus on whether the employee was able to perform essential job functions, whether there were reasonable accommodations that would have allowed the employee to perform those functions, and whether a reasonable accommodation would have imposed an undue hardship on the employer. To summarize, courts and practitioners should not automatically apply principles related to the *McDonnell Douglas* test to disability discrimination cases. Rather, they should examine the critical threshold issue and determine whether there is direct evidence that the motive for the employer's conduct was related to the employee's physical or mental condition." (*Wallace, supra,* 245 Cal.App.4th at p. 123, original italics, footnote and internal citations omitted; cf. *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 234 fn. 3 [206 Cal.Rptr.3d 841] [case did not present so-called "typical" disability discrimination case, as described in *Wallace,* in that the parties disputed the employer's reasons for terminating plaintiff's employment].)

- "If the employee meets this [prima facie] burden, it is then incumbent on the employer to show that it had a legitimate, nondiscriminatory reason for its employment decision. When this showing is made, the burden shifts back to the employee to produce substantial evidence that employer's given reason was either 'untrue or pretextual,' or that the employer acted with discriminatory animus, in order to raise an inference of discrimination." (*Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 744 [151 Cal.Rptr.3d 292], internal citations omitted.)

- "Although the same statutory language that prohibits disability discrimination also prohibits discrimination based on race, age, sex, and other factors, we conclude that disability discrimination claims are fundamentally different from the discrimination claims based on the other factors listed in section 12940, subdivision (a). These differences arise because (1) additional statutory provisions apply to disability discrimination claims, (2) the Legislature made separate findings and declarations about protections given to disabled persons, and (3) discrimination cases involving race, religion, national origin, age and sex, often involve pretexts for the adverse employment action—an issue

about motivation that appears less frequently in disability discrimination cases." (*Wallace, supra,* 245 Cal.App.4th at p. 122.)

- "[Defendant] argues that, because [it] hired plaintiffs as recruit officers, they must show they were able to perform the essential functions of a police recruit in order to be qualified individuals entitled to protection under FEHA. [Defendant] argues that plaintiffs cannot satisfy their burden of proof under FEHA because they failed to show that they could perform those essential functions. [¶] Plaintiffs do not directly respond to [defendant]'s argument. Instead, they contend that the relevant question is whether they could perform the essential functions of the positions to which they sought reassignment. Plaintiffs' argument improperly conflates the legal standards for their claim under section 12940, subdivision (a), for discrimination, and their claim under section 12940, subdivision (m), for failure to make reasonable accommodation, including reassignment. In connection with a discrimination claim under section 12940, subdivision (a), the court considers whether a plaintiff could perform the essential functions of the job held—or for job applicants, the job desired—with or without reasonable accommodation." (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 716–717 [214 Cal.Rptr.3d 113].)

- "Summary adjudication of the section 12940(a) claim … turns on … whether [plaintiff] could perform the essential functions of the relevant job with or without accommodation. [Plaintiff] does not dispute that she was unable to perform the essential functions of her *former* position as a clothes fitter with or without accommodation. Under federal law, however, when an employee seeks accommodation by being reassigned to a vacant position in the company, the employee satisfies the 'qualified individual with a disability' requirement by showing he or she can perform the essential functions of the *vacant position* with or without accommodation. The position must exist and be vacant, and the employer need not promote the disabled employee. We apply the same rule here. To prevail on summary adjudication of the section 12940(a) claim, [defendant] must show there is no triable issue of fact about [plaintiff]'s ability, with or without accommodation, to perform the essential functions of an available vacant position that would not be a promotion." (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 965 [83 Cal.Rptr.3d 190], original italics, internal citations omitted.)

- "To establish a prima facie case of mental disability discrimination under FEHA, a plaintiff must show the following elements: (1) She suffers from a mental disability; (2) she is otherwise qualified to do the job with or without reasonable accommodation; and (3) she was subjected to an adverse employment action because of the disability." (*Higgins-Williams v. Sutter Medical Foundation* (2015) 237 Cal.App.4th 78, 84 [187 Cal.Rptr.3d 745].)

- "At most, [plaintiff] alleges only that he anticipated becoming disabled for some time after the organ donation. This is insufficient. [Plaintiff] cannot pursue a cause of action for discrimination under FEHA on the basis of his 'actual' physical disability in the absence of factual allegations that he was in fact, physically disabled." (*Rope, supra,* 220 Cal.App.4th at p. 659.)

- "[Defendant] asserts the statute's 'regarded as' protection is limited to persons who are denied or who lose jobs based on an employer's reliance on the 'myths, fears or stereotypes' frequently associated with disabilities. … However, the statutory language does not expressly restrict FEHA's protections to the narrow class to whom [defendant] would limit its coverage. To impose such a restriction would

exclude from protection a large group of individuals, like [plaintiff], with more mundane long-term medical conditions, the significance of which is exacerbated by an employer's failure to reasonably accommodate. Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute's plain language leads to the conclusion that the 'regarded as' definition casts a broader net and protects *any* individual 'regarded' or 'treated' by an employer 'as having, or having had, any physical condition that makes achievement of a major life activity difficult' or may do so in the future. We agree most individuals who sue exclusively under this definitional prong likely are and will continue to be victims of an employer's 'mistaken' perception, based on an unfounded fear or stereotypical assumption. Nevertheless, FEHA's protection is nowhere expressly premised on such a factual showing, and we decline the invitation to import such a requirement." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 [43 Cal.Rptr.3d 874], original italics, internal citations omitted.)

- "[T]he purpose of the 'regarded-as' prong is to protect individuals rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities. In other words, to find a perceived disability, the perception must stem from a false idea about the existence of or the limiting effect of a disability." (*Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031, 1037 [101 Cal.Rptr.2d 353], internal citation omitted.)

- "We say on this record that [defendant] took action against [plaintiff] based on concerns or fear about his possible future disability. The relevant FEHA definition of an individual regarded as disabled applies only to those who suffer certain specified physical disabilities or those who have a condition with 'no present disabling effect' but which 'may become a physical disability … .' According to the pleadings, [defendant] fired [plaintiff] to avoid accommodating him because of his association with his physically disabled sister. That is not a basis for liability under the 'regarded as' disabled standard." (*Rope, supra,* 220 Cal.App.4th at p. 659, internal citations omitted.)

- " '[A]n employer "knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation. The employer need only know the underlying facts, not the legal significance of those facts." ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 592 [210 Cal.Rptr.3d 59].)

- " 'An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer. Thus, in order to prove [a discrimination] claim, a plaintiff must prove the employer had knowledge of the employee's disability when the adverse employment decision was made. … While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations … ." … ' " (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008 [93 Cal.Rptr.3d 338].)

- "[W]e interpret FEHA as authorizing an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against coworkers. If employers are not permitted to make this distinction, they are caught on the horns of a dilemma. They may not discriminate against an employee based on a disability but, at the same time, must provide all

employees with a safe work environment free from threats and violence." (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 166 [125 Cal.Rptr.3d 1], internal citations omitted.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra,* 56 Cal.4th at p. 232, original italics.)

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

- "We note that the court in *Harris* discussed the employer's motivation and the link between the employer's consideration of the plaintiff's physical condition and the adverse employment action without using the terms "'animus,'" "'animosity,'" or "'ill will.'" The absence of a discussion of these terms necessarily implies an employer can violate section 12940, subdivision (a) by taking an adverse employment action against an employee "because of" the employee's physical disability even if the employer harbored no animosity or ill will against the employee or the class of persons with that disability." (*Wallace, supra,* 245 Cal.App.4th at p. 128.)

- Based on *Harris,* we conclude that an employer has treated an employee differently 'because of' a disability when the disability is a substantial motivating reason for the employer's decision to subject the [employee] to an adverse employment action. This conclusion resolves how the jury should have been instructed on [defendant]'s motivation or intent in connection with the disability discrimination claim." (*Wallace, supra,* 245 Cal.App.4th at p. 128.)

- "We conclude that where, as here, an employee is found to be able to safely perform the essential duties of the job, a plaintiff alleging disability discrimination can establish the requisite employer intent to discriminate by proving (1) the employer knew that plaintiff had a physical condition that limited a major life activity, or perceived him to have such a condition, and (2) the plaintiff's actual or perceived physical condition was a substantial motivating reason for the defendant's decision to subject the plaintiff to an adverse employment action. … [T]his conclusion is based on (1) the interpretation of section 12940's term 'because of' adopted in *Harris*; (2) our discussion of the meaning of the statutory phrase 'to discriminate against'; and (3) the guidance provided by the current versions of CACI Nos. 2540 and 2507. [¶] Therefore, the jury instruction that [plaintiff] was required to prove that [defendant] 'regarded or treated [him] as having a disability in order to discriminate' was erroneous." (*Wallace, supra,* 245 Cal.App.4th at p. 129.)

- "The word 'animus' is ambiguous because it can be interpreted narrowly to mean 'ill will' or 'animosity' or can be interpreted broadly to mean 'intention.' In this case, it appears [defendant] uses 'animus' to mean something more than the intent described by the substantial-motivating-reason test adopted in *Harris*." (*Wallace, supra,* 245 Cal.App.4th at p. 130, fn. 14, internal citation omitted.)

- " '[W]eight may qualify as a protected "handicap" or "disability" within the meaning of the FEHA if medical evidence demonstrates that it results from a physiological condition affecting one or more of the basic bodily systems and limits a major life activity.'… '[A]n individual who asserts a violation of the FEHA on the basis of his or her weight must adduce evidence of a physiological, systemic basis for the condition.' " (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 928 [227 Cal.Rptr.3d 286].)

- "Being unable to work during pregnancy is a disability for the purposes of section 12940." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1340 [153 Cal.Rptr.3d 367].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1045–1049

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2160–9:2241 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.78–2.80

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.32[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.14, 115.23, 115.34, 115.77[3][a] (Matthew Bender)

California Civil Practice: Employment Litigation § 2:46 (Thomson Reuters)

2545. Disability Discrimination—Affirmative Defense—Undue Hardship

[*Name of defendant*] claims that accommodating [*name of plaintiff*]'s disability would create an undue hardship to the operation of [his/her/*nonbinary pronoun*/its] business. To succeed on this defense, [*name of defendant*] must prove that [an] accommodation[s] would create an undue hardship because it would be significantly difficult or expensive, ~~. In deciding whether an accommodation would create an undue hardship, you may consider the following factors:~~in light of the following factors:

a. The nature and cost of the accommodation;

b. [*Name of defendant*]'s ability to pay for the accommodation;

c. The type of operations conducted at the facility;

d. The impact on the operations of the facility;

e. The number of [*name of defendant*]'s employees and the relationship of the employees' duties to one another;

f. The number, type, and location of [*name of defendant*]'s facilities; and

g. The administrative and financial relationship of the facilities to one another.

New September 2003; Revised November 2019, May 2020

Directions for Use

The issue of whether undue hardship is a true affirmative defense or whether the defendant only has the burden of coming forward with the evidence of hardship as a way of negating the element of plaintiff's case concerning the reasonableness of an accommodation appears to be unclear. (See *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 733 [214 Cal.Rptr.3d 113].)

For an instruction in the religious creed context, see CACI No. 2561, *Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship*.

Sources and Authority

- Employer Duty to Provide Reasonable Accommodation. Government Code section 12940(m).
- "Undue Hardship" Defined. Government Code section 12926(u).
- " 'Undue hardship' means 'an action requiring significant difficulty or expense, when considered in light of the following factors: [¶] (1) The nature and cost of the accommodation needed. [¶] (2) The

overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility. [¶] (3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities. [¶] (4) The type of operations, including the composition, structure, and functions of the workforce of the entity. [¶] (5) The geographic separateness or administrative or fiscal relationship of the facility or facilities.' (§ 12926, subd. (u).) ' "Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case by case basis" ' and 'is a multi-faceted, fact-intensive inquiry.' " (*Atkins, supra, ~~v. City of Los Angeles~~ (2017)* 8 Cal.App.5th ~~696,~~ at p. 733 ~~[214 Cal.Rptr.3d 113]~~.)

- "[U]nder California law and the instructions provided to the jury, an employer must do more than simply assert that it had economic reasons to reject a plaintiff's proposed reassignment to demonstrate undue hardship. An employer must show *why* and *how* asserted economic reasons would affect its ability to provide a particular accommodation." (*Atkins, supra,* 8 Cal.App.5th at p. 734, original italics, internal citation omitted.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2250, 9:2345, 9:2366, 9:2367 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.80

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[4][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.35, 115.54, 115.100 (Matthew Bender)

2560. Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements (Gov. Code, § 12940(*l*))

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her/*nonbinary pronoun*] by failing to reasonably accommodate [his/her/*nonbinary pronoun*] religious [belief/observance]. 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/[***other covered relationship to defendant***]];**

3. **That [***name of plaintiff***] has a sincerely held religious belief that [***describe religious belief, observance, or practice***];**

4. **That [***name of plaintiff***]'s religious [belief/observance] conflicted with a job requirement;**

5. **That [***name of defendant***] knew of the conflict between [***name of plaintiff***]'s religious [belief/observance] and the job requirement;**

6. [**That [***name of defendant***] did not [explore available reasonable alternatives of accommodating [***name of plaintiff***], including excusing [***name of plaintiff***] from duties that conflict with [***name of plaintiff***]'s religious [belief/observance] or permitting those duties to be performed at another time or by another person, or otherwise reasonably accommodate] [***name of plaintiff***]'s religious [belief/observance];]**

   [*or*]

   [That [*name of defendant***] [terminated/refused to hire] [***name of plaintiff***] in order to avoid having to accommodate [***name of plaintiff***]'s religious [belief/observance];]**

7. **That [***name of plaintiff***]'s failure to comply with the conflicting job requirement was a substantial motivating reason for**

   [[*name of defendant***]'s decision to [discharge/refuse to hire/[***specify other adverse employment action***]] [***name of plaintiff***];]**

   [**or**]

   [[*name of defendant***]'s subjecting [him/her/*nonbinary pronoun*] to an adverse employment action;]**

   [**or**]

[[his/her/*nonbinary pronoun*] constructive discharge;]

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

9. **That [*name of defendant*]'s failure to reasonably accommodate [*name of plaintiff*]'s religious [belief/observance] was a substantial factor in causing [his/her/*nonbinary pronoun*] harm.**

A reasonable accommodation is one that eliminates the conflict between the religious practice and the job requirement.

If more than one accommodation is reasonable, an employer satisfies its obligation to make a reasonable accommodation if it selects one of those accommodations in good faith.

New September 2003; Revised June 2012, December 2012, June 2013, November 2019, May 2020

Directions for Use

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).)

Regulations provide that refusing to hire an applicant or terminating an employee in order to avoid the need to accommodate a religious practice constitutes religious creed discrimination. (Cal. Code Regs., tit. 2, § 11062.) Give the second option for element 6 if the plaintiff claims that the employer terminated or refused to hire the plaintiff to avoid a need for accommodation.

Element 7 requires that the plaintiff's failure to comply with the conflicting job requirement be a substantial motivating reason for the employer's 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*.) Read the first option 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 7 and also give CACI No. 2510, *"Constructive Discharge" Explained*.

Federal courts construing Title VII of the Civil Rights Act of 1964 have held that the threat of an adverse employment action is a violation if the employee acquiesces to the threat and foregoes religious observance. (See, e.g., *EEOC v. Townley Engineering & Mfg. Co.* (9th Cir. 1988) 859 F.2d 610, 614 fn. 5.) While no case has been found that construes the FEHA similarly, element 7 may be modified if the court agrees that this rule applies. In the first option, replace "decision to" with "threat to." Or in the second option, "subjecting [*name of plaintiff*] to" may be replaced with "threatening [*name of plaintiff*] with."

Sources and Authority

- Religious Accommodation Required Under Fair Employment and Housing Act. Government Code section 12940(*l*).
- Scope of Religious Protection. Government Code section 12926(q).
- Scope of Religious Protection. Cal. Code Regs., tit. 2, § 11060(b).
- Reasonable Accommodation and Undue Hardship. Cal. Code Regs., tit. 2, § 11062.
- "In evaluating an argument the employer failed to accommodate an employee's religious beliefs, the employee must establish a prima facie case that he or she had a bona fide religious belief, of which the employer was aware, that conflicts with an employment requirement ... . Once the employee establishes a prima facie case, then the employer must establish it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship." (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370 [58 Cal.Rptr.2d 747], internal citation omitted.)
- "Any reasonable accommodation is sufficient to meet an employer's obligations. However, the employer need not adopt the most reasonable accommodation nor must the employer accept the remedy preferred by the employee. The reasonableness of the employer's efforts to accommodate is determined on a case by case basis ... . '[O]nce it is determined that the employer has offered a reasonable accommodation, the employer need not show that each of the employee's proposed accommodations would result in undue hardship.' '[W]here the employer has already reasonably accommodated the employee's religious needs, the ... inquiry [ends].' " (*Soldinger, supra,* 51 Cal.App.4th at p. 370, internal citations omitted.)
- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra,* 56 Cal.4th at p. 232, original italics.)
- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a 'but for' cause." (*Harris, supra,* 56 Cal.4th at p. 229.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 967, 1028, 1052, –1054

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair*

Employment And Housing Act, ¶¶ 7:151, 7:215, 7:305, 7:610–7:611, 7:631–7:634, 7:641 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.52[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35[d], 115.91 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:71–2:73 (Thomson Reuters)

1 Lindemann and Grossman, Employment Discrimination Law (3d ed. 1996) Religion, pp. 219–224, 226–227; *id.* (2000 supp.) at pp. 100–101

2561. Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship (Gov. Code, §§ 12940(*l*)(1), 12926(u))

~~**Please see CACI No. 2545, *Disability Discrimination—Affirmative Defense—Undue Hardship.***~~

[*Name of defendant*] claims that accommodating [*name of plaintiff*]'s [religious belief/religious observance] would create an undue hardship to the operation of [his/her/*nonbinary pronoun*/its] business.

To succeed on this defense, [*name of defendant*] must prove that [he/she/*nonbinary pronoun*/it] considered reasonable alternative options for accommodating the [religious belief/religious observance], including (1) excusing [*name of plaintiff*] from duties that conflict with [his/her/*nonbinary pronoun*] [religious belief/religious observance], (2) permitting those duties to be performed at another time or by another person, or (3) [*specify other reasonable accommodation*].

If you decide that [*name of defendant*] considered but did not adopt [a] reasonable accommodation[s], you must then decide if the accommodation[s] would have created an undue hardship because it would be significantly difficult or expensive, in light of the following factors:

a. The nature and cost of the accommodation;

b. [*Name of defendant*]'s ability to pay for the accommodation;

c. The type of operations conducted at the facility;

d. The impact on the operations of the facility;

e. The number of [*name of defendant*]'s employees and the relationship of the employees' duties to one another;

f. The number, type, and location of [*name of defendant*]'s facilities; and

g. The administrative and financial relationship of the facilities to one another.

New September 2003; Revoked December 2012; Restored and Revised June 2013; Revised November 2019, May 2020

Directions for Use

For religious beliefs and observances, the statute requires the employer (or other covered entity) to demonstrate that the employer explored certain means of accommodating the plaintiff, including two specific possibilities: (1) excusing the plaintiff from duties that conflict with the plaintiff's religious belief or observance or (2) permitting those duties to be performed at another time or by another person.

(Gov. Code, § 12940(*l*)(1).) If there is evidence of another reasonable alternative accommodation, include it as a third means of accommodating the plaintiff.

~~"Undue hardship" for purposes of religious creed discrimination is defined in the same way that it is defined for disability discrimination. (Gov. Code, §§ 12940(*l*)(1); see Gov. Code, § 12926(u).) CACI No. 2545, *Disability Discrimination—Affirmative Defense—Undue Hardship*, may be given in religious accommodation cases also. Replace "disability" with "religious observance" in the first sentence of CACI No. 2545.~~

Sources and Authority

- Religious Accommodation Required Under Fair Employment and Housing Act. Government Code section 12940(*l*)(1).

- "Undue Hardship" Defined. Government Code section 12926(u).

- "If the employee proves a prima facie case and the employer fails to initiate an accommodation for the religious practices, the burden is then on the employer to prove it will incur an undue hardship if it accommodates that belief. '[T]he extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.' ..." (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 371 [58 Cal.Rptr.2d 747], internal citations omitted.)

- "It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far ... ¶¶. [¶¶] Alternatively, the Court of Appeals suggested that [the employer] could have replaced [plaintiff] on his Saturday shift with other employees through the payment of premium wages ... . To require [the employer] to bear more than a de minimus cost ... is an undue hardship. Like abandonment of the seniority system, to require [the employer] to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion." (*TWA v. Hardison* (1977) 432 U.S. 63, 81, 84 [97 S.Ct. 2264, 53 L.Ed.2d 113], footnote omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1025, 1026

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment and Housing Act*, ¶¶ 7:151, 7:215, 7:305, 7:610, 7:631, 7:640−7:641 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.52[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.35[2][a]–[c], 115.54, 115.91 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:71–2:73 (Thomson Reuters)

1 Lindemann and Grossman, Employment Discrimination Law (3d ed.) Religion, pp. 227–234 (2000 supp.) at pp. 100–105

VF-2506A. ~~Hostile~~ Work Environment Harassment—Conduct Directed at Plaintiff—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] [an employee of/a person providing services under a contract with] [*name of defendant*]?**
   ____ Yes ____ No

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

2. **Was [*name of plaintiff*] subjected to ~~unwanted~~ harassing conduct because [he/she/*nonbinary pronoun*] was [*protected status, e.g., a woman*]?**
   ____ Yes ____ No

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

3. **Was the harassment severe or pervasive?**
   ____ Yes ____ No

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

4. **Would a reasonable [*e.g., woman*] in [*name of plaintiff*]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ Yes ____ No

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

5. **Did [*name of plaintiff*] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of defendant*] [or [his/her/*nonbinary pronoun*/its] supervisors or agents] know or should [he/she/*nonbinary pronoun*/it/they] have known of the harassing conduct?
____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [*name of defendant*] [or [his/her/*nonbinary pronoun*/its] supervisors or agents] fail to take immediate and appropriate corrective action?
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

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

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

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

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2506 December 2007; Revised December 2010, June 2013, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 2521A, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

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.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521A. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

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

If specificity is not required, users do not have to itemize all the damages listed in question 9 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.

VF-2506B. ~~Hostile~~ Work Environment Harassment—Conduct Directed at Others—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] [an employee of/a person providing services under a contract with] [*name of defendant*]?**
   ____ Yes ____ No

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

2. **Did [*name of plaintiff*] personally witness harassing conduct that took place in [his/her/*nonbinary pronoun*] immediate work environment?**
   ____ Yes ____ No

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

3. **Was the harassment severe or pervasive?**
   ____ Yes ____ No

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

4. **Would a reasonable [*describe member of protected group, e.g.,* woman] in [*name of plaintiff*]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ Yes ____ No

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

5. **Did [*name of plaintiff*] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [*e.g., women*]?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of defendant*] [or [his/her/*nonbinary pronoun/*its] supervisors or agents] know or should [he/she/*nonbinary pronoun/*it/they] have known of the harassing conduct?
____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [*name of defendant*] [or [his/her/*nonbinary pronoun/*its] supervisors or agents] fail to take immediate and appropriate corrective action?
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

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

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

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

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2506 December 2007; Revised December 2010, June 2013, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*.

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.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521B. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 9 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.

VF-2506C. ~~Hostile~~ Work Environment Harassment—~~Widespread~~ Sexual Favoritism--Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] [an employee of/a person providing services under a contract with] [*name of defendant*]?**
   ____ Yes ____ No

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

2. **Was there sexual favoritism in the work environment?**
   ____ Yes ____ No

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

3. **Was the sexual favoritism ~~widespread, and also~~ severe or pervasive?**
   ____ Yes ____ No

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

4. **Would a reasonable [*describe member of protected group, e.g.,* woman] in [*name of plaintiff*]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ Yes ____ No

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

5. **Did [*name of plaintiff*] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Did [*name of defendant*] [or [his/her/*nonbinary pronoun*/its] supervisors or agents]**

know or should [he/she/*nonbinary pronoun*/it/they] have known of the sexual favoritism?
____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [*name of defendant*] [or [his/her/*nonbinary pronoun*/its] supervisors or agents] fail to take immediate and appropriate corrective action?
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was the sexual favoritism a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

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

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

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

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2506 December 2007; Revised December 2010, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 2521C, ~~*Hostile*~~ *Work Environment Harassment—~~Widespread~~ Sexual Favoritism--Essential Factual Elements—Employer or Entity Defendant*.

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.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521C. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6~~5~~ of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 9 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.

VF-2507A. ~~Hostile~~ Work Environment Harassment—Conduct Directed at Plaintiff—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] [an employee of/a person providing services under a contract with] [*name of employer*]?**
   ____ Yes ____ No

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

2. **Was [*name of plaintiff*] subjected to ~~unwanted~~ harassing conduct because [he/she/*nonbinary pronoun*] was [*protected status, e.g., a woman*]?**
   ____ Yes ____ No

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

3. **Was the harassment severe or pervasive?**
   ____ Yes ____ No

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

4. **Would a reasonable [*e.g., woman*] in [*name of plaintiff*]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ Yes ____ No

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

5. **Did [*name of plaintiff*] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of defendant*] [participate in/assist/ [or] encourage] the harassing conduct?
____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, June 2013, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 2522A, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*.

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.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2522A.

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

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

VF-2507B. ~~Hostile~~ Work Environment Harassment—Conduct Directed at Others—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] [an employee of/a person providing services under a contract with] [*name of employer*]?**
   ____ Yes ____ No

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

2. **Did [*name of plaintiff*] personally witness harassing conduct that took place in [his/her/*nonbinary pronoun*] immediate work environment?**
   ____ Yes ____ No

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

3. **Was the harassment severe or pervasive?**
   ____ Yes ____ No

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

4. **Would a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ Yes ____ No

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

5. **Did [*name of plaintiff*] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [*e.g., women*]?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of defendant*] [participate in/assist/ [or] encourage] the harassing conduct?
____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

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

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

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

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

TOTAL $ _____

Signed: _____

Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, June 2013, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 2522B, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*.

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.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521C, ~~*Hostile*~~ *Work Environment Harassment—*~~*Widespread*~~ *Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

VF-2507C. ~~Hostile~~ Work Environment Harassment—~~Widespread~~ Sexual Favoritism—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] [an employee of/a person providing services under a contract with] [*name of employer*]?**
   ____ Yes ____ No

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

2. **Was there sexual favoritism in the work environment?**
   ____ Yes ____ No

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

3. **Was the sexual favoritism ~~widespread, and also~~ severe or pervasive?**
   ____ Yes ____ No

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

4. **Would a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ Yes ____ No

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

5. **Did [*name of plaintiff*] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Did [*name of defendant*] [participate in/assist/ [or] encourage] the sexual favoritism?**

____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was the sexual favoritism a substantial factor in causing harm to [*name of plaintiff***]?**
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, December 2014, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 2522C, ~~*Hostile*~~ *Work Environment Harassment—~~Widespread~~ Sexual Favoritism—Essential Factual Elements—Individual Defendant*.

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.

Relationships other than employer/employee can be substituted in question 1, as in element 1 in CACI No. 2521C. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances.

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

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

VF-2508. Disability Discrimination—Disparate Treatment

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] [an employer/[***other covered entity***]]?**
   ____ Yes ____ No

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

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**
   ____ Yes ____ No

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

3. **Did [***name of defendant***] [know that [***name of plaintiff***] had/treat [***name of plaintiff***] as if [he/she/***nonbinary pronoun***] had] [a history of having] [a] [***select term to describe basis of limitations, e.g., physical condition***] [that limited [***insert major life activity***]]?**
   ____ Yes ____ No

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

4. **Was [***name of plaintiff***] able to perform the position's essential job duties ~~[with reasonable accommodation] for [his/her] [***e.g., physical condition***]~~without an accommodation?**
   ____ Yes ____ No

   If your answer to question 4 is yes, then ~~answer~~ skip question 5 and answer question 6. If you answered no, then ~~stop here,~~ answer ~~no further~~ question 5~~s, and have the presiding juror sign and date this form~~.

5. **Was [***name of plaintiff***] able to perform the position's essential job duties with reasonable accommodation for [his/her/***nonbinary pronoun***] [***e.g., condition***]?**
   Yes No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of defendant*] [discharge/refuse to hire/[*other adverse employment action*]] [*name of plaintiff*]?
____ Yes ____ No

If your answer to question 6~~5~~ is yes, then answer question 7~~6~~. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7~~6~~. Was [*name of plaintiff*]'s [perceived] [history of [a]] [*e.g., physical condition*] a substantial motivating reason for [*name of defendant*]'s decision to [discharge/refuse to hire/[*other adverse employment action*]] [*name of plaintiff*]?
____ Yes ____ No

If your answer to question 7~~6~~ is yes, then answer question 8~~7~~. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8~~7~~. Was [*name of defendant*]'s [decision/conduct] a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question 8~~7~~ is yes, then answer question 9~~8~~. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9~~8~~. What are [*name of plaintiff*]'s damages?

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

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2007, December 2009, June 2010, December 2010, June 2013, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 2540, *Disability Discrimination—Disparate Treatment—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.

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2540. Depending on the facts of the case, other factual scenarios can be substituted in questions 3 and 6, as in elements 3 and 7~~6~~ of the instruction.

For question 3, select the claimed basis of discrimination: an actual disability, a history of a disability, a perceived disability, or a perceived history of a disability. For an actual disability, select "know that [*name of plaintiff*] had." For a perceived disability, select "treat [*name of plaintiff*] as if [he/she/*nonbinary pronoun*] had."

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit "that limited **[***insert major life activity***]**" in question 3. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (*l*) [no requirement that medical condition limit major life activity].)

If specificity is not required, users do not have to itemize all the damages listed in question 9~~8~~ and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

2705. Affirmative Defense to Labor Code, Unemployment Insurance Code, and Wage Order Violations—Plaintiff Was Not Defendant's Employee (Lab. Code, § 2750.3)

[*Name of defendant***] claims that [he/she/*nonbinary pronoun*/it] is not liable for [***specify violation(s) of the Labor Code, the Unemployment Insurance Code, and/or wage order(s) ~~violations~~, e.g., failure to pay minimum wage***] because [***name of plaintiff***] was not [his/her/*nonbinary pronoun*/its] employee, but rather an independent contractor. To establish this defense, [***name of defendant***] must prove all of the following:**

a. That [*name of plaintiff***] is ~~[~~under the terms of the contract and in fact~~]~~ free from the control and direction of [***name of defendant***] in connection with the performance of the work that [***name of plaintiff***] was hired to do;**

b. That [*name of plaintiff***] performs work for [***name of defendant***] that is outside the usual course of [***name of defendant***]'s business; and**

c. That [*name of plaintiff***] is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed for [***name of defendant***].**

New November 2018; Revised May 2020

Directions for Use

This instruction may be needed if there is a dispute as to whether the defendant was the plaintiff's employer for purposes of a claim covered by the Labor Code, the Unemployment Insurance Code, or a California wage order. ~~The wage orders, which are constitutionally-authorized, quasi-legislative regulations that have the force of law, impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees.~~ (Lab. Code, § 2750.3; s~~S~~ee *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 913–914, & fn. 3 [232 Cal.Rptr.3d 1, 416 P.3d 1].) The defendant has the burden to prove independent contractor status. (Lab. Code, § 2750.3; *Dynamex~~Id.~~, supra,* 4 Cal.5th at p. 916.) This instruction may not be appropriate if the defendant claims independent contractor status based on one of the exceptions listed in Labor Code section 2750.3(b)–(h). For an instruction on employment status under the *Borello* test, see CACI No. 3704, *Existence of "Employee" Status Disputed*.

~~Under the wage orders, "to employ" has three alternative definitions. It means: (a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship. (*Martinez v. Combs* (2010) 49 Cal.4th 35, 64 [109 Cal.Rptr.3d 514, 231 P.3d 259].) In *Dynamex*, the Supreme Court found no need to address definition (a) on exercising control. It acknowledged that definition (c), the common law test, could be used, but held that the controlling test was definition (b), "to suffer or permit to work." It then defined this test, known as the ABC test, as involving the three factors of the instruction. (*Dynamex Operations W., supra,* 4~~

~~Cal.5th at pp. 916–917.)~~

The rule on employment status has been that if there are disputed facts, it's for the jury to decide whether one is an employee or an independent contractor. (*Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 342 [221 Cal.Rptr.3d 1].) However, on undisputed facts, the court may decide that the relationship is employment as a matter of law. (*Dynamex ~~Operations W.~~, supra,* 4 Cal.5th at p. 963.) The court may address the three factors in any order when making this determination, and if the defendant's undisputed facts fail to prove any one of them, the inquiry ends; the plaintiff is an employee as a matter of law and the question does not reach the jury.

If, however, there is no failure of proof as to any of the three factors without resolution of disputed facts, the determination of whether the plaintiff was defendant's employee should be resolved by the jury using this instruction. If the court concludes based on undisputed facts that the defendant *has* proved one or more of the three factors, that factor (or factors) should be removed from the jury's consideration and the jury should only consider whether the employer has proven those factors that cannot be determined without further factfinding.

~~Include the bracketed language in element 1 if there is a contract between the parties covering the work at issue.~~

Sources and Authority

- Worker Status: Employees and Independent Contractors. Labor Code section 2750.3.

- "The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity's business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." (*Dynamex ~~Operations W.~~, supra,* 4 Cal.5th at pp. 955–956.)

- ~~"[W]e conclude that there is no need in this case to determine whether the exercise control over wages, hours or working conditions definition is intended to apply outside the joint employer context, because we conclude that the suffer or permit to work standard properly applies to the question whether a worker should be considered an employee or, instead, an independent contractor, and that under the suffer or permit to work standard, the trial court class certification order at issue here should be upheld. (*Dynamex Operations W., supra,* 4 Cal.5th at p. 943.)~~

- "A business that hires any individual to provide services to it can always be said to knowingly 'suffer or permit' such an individual to work for the business. A literal application of the suffer or permit to work standard, therefore, would bring within its reach even those individuals hired by a business--including unquestionably independent plumbers, electricians, architects, sole practitioner attorneys, and the like--who provide only occasional services unrelated to a company's primary line of business and who have traditionally been viewed as working in their

own independent business." (*Dynamex ~~Operations W.~~, supra,* 4 Cal.5th at pp. 948–949.)

- "A multifactor standard--like the economic reality standard or the *Borello* standard--that calls for consideration of all potentially relevant factual distinctions in different employment arrangements on a case-by-case, totality-of-the-circumstances basis has its advantages. A number of state courts, administrative agencies and academic commentators have observed, however, that such a wide-ranging and flexible test for evaluating whether a worker should be considered an employee or an independent contractor has significant disadvantages, particularly when applied in the wage and hour context." (*Dynamex ~~Operations W.~~, supra,* 4 Cal.5th at p. 954.)

- "Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. In the latter settings, the workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor." (*Dynamex ~~Operations W.~~, supra,* 4 Cal.5th at pp. 959–960, internal citations omitted.)

- "A company that labels as independent contractors a class of workers who are not engaged in an independently established business in order to enable the company to obtain the economic advantages that flow from avoiding the financial obligations that a wage order imposes on employers unquestionably violates the fundamental purposes of the wage order. The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself." (*Dynamex ~~Operations W.~~, supra,* 4 Cal.5th at p. 962.)

- "The trial court's determination of employee or independent contractor status is one of fact if it depends upon the resolution of disputed evidence or inferences and, as such, must be affirmed on appeal if supported by substantial evidence. The question is one of law only if the evidence is undisputed. 'The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.' " (*Espejo, supra,* 13 Cal.App.5th at pp. 342–343.)

- "It bears emphasis that in order to establish that a worker is an independent contractor under the ABC standard, the hiring entity is required to establish the existence of each of the three parts of the ABC standard. Furthermore, inasmuch as a hiring entity's failure to satisfy any one of the three parts itself establishes that the worker should be treated as an employee for purposes of the wage order, *a court* is free to consider the separate parts of the ABC standard in whatever order it chooses. Because in many cases it may be easier and clearer for *a court* to determine whether or not part B or part C of the ABC standard has been satisfied than for *the court* to resolve questions regarding the nature or degree of a worker's freedom from the hiring entity's control for purposes

of part A of the standard, the significant advantages of the ABC standard--in terms of increased clarity and consistency--will often be best served by first considering one or both of the latter two parts of the standard in resolving the employee or independent contractor question." (*Dynamex ~~Operations W.~~, supra,* 4 Cal.5th at p. 963, italics added.)

- "An entity that controls the business enterprise may be an employer even if it did not 'directly hire, fire or supervise' the employees. Multiple entities may be employers where they 'control different aspects of the employment relationship.' 'This occurs, for example, when one entity (such as a temporary employment agency) hires and pays a worker, and another entity supervises the work.' 'Supervision of the work, in the specific sense of exercising control over how services are performed, is properly viewed as one of the "working conditions" … .' " (*Castaneda v. Ensign Group, Inc.* (2014) 229 Cal.App.4th 1015, 1019 [177 Cal.Rptr.3d 581].)

- ~~"[T]he Supreme Court's policy reasons for selecting the 'ABC' test are uniquely relevant to the issue of allegedly misclassified independent contractors. In the joint employment context, the alleged employee is already considered an employee of the primary employer; the issue is whether the employee is also an employee of the alleged secondary employer. Therefore, the primary employer is presumably paying taxes and the employee is afforded legal protections due to being an employee of the primary employer. As a result, the policy purpose for presuming the worker to be an employee and requiring the secondary employer to disprove the worker's status as an employee is unnecessary in that taxes are being paid and the worker has employment protections. [¶] In conclusion, the 'ABC' test set forth in *Dynamex* is directed toward the issue of whether employees were misclassified as independent contractors. Placing the burden on the alleged employer to prove that the worker is not an employee is meant to serve policy goals that are not relevant in the joint employment context. Therefore, it does not appear that the Supreme Court intended for the 'ABC' test to be applied in joint employment cases." (*Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289, 314 [233 Cal.Rptr.3d 295], internal citation omitted.)~~

  ~~" '*Dynamex* did not purport to replace the *Borello* standard in every instance where a worker must be classified as either an independent contractor or an employee for purposes of enforcing California's labor protections.' To the contrary, the Supreme Court recognized that different standards could apply to different statutory claims: '[B]ecause the *Borello* standard itself emphasizes the primacy of statutory purpose in resolving the employee or independent contractor question, when different statutory schemes have been enacted for different purposes, it is possible under *Borello* that a worker may properly be considered an employee with reference to one statute but not another.' " (*Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558, 570 [239 Cal.Rptr.3d 360], internal citations omitted.)~~

- ~~"Key for our purposes, *Dynamex* makes clear that the question in part C is *not* whether [defendant] *prohibited or prevented* [plaintiff] from engaging in an independently established business. Instead, the inquiry is whether [plaintiff] fits the common conception of an independent contractor—'an individual who *independently* has made the decision to go into business for himself or herself' and 'generally takes the usual steps to establish and promote his or her independent business—for example, through incorporation, licensure, advertisements, routine offerings to provide services of the independent business to the public or to a number of potential~~

~~customers, and the like.' " (*Garcia, supra,* 28 Cal.App.5th at p. 573, original italics, internal citation omitted.)~~

Secondary Sources

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-B, ~~Compensation —~~Coverage and Exemptions—In General, ¶ 11:115 et seq. (The Rutter Group)

Wilcox, California Employment Law, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.13 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 1, *Overview of Wage and Hour Laws*, § 1.04 (Matthew Bender)

3020. Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] used excessive force in [arresting/detaining] [him/her/*nonbinary pronoun*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] used force in [arresting/detaining] [*name of plaintiff*];**

2. **That the force used by [*name of defendant*] was excessive;**

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

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

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

Force is not excessive if it is reasonably necessary under the circumstances. In deciding whether force is reasonably necessary or excessive, you should determine, based on all of the facts and circumstances, what force a reasonable law enforcement officer on the scene would have used under the same or similar circumstances. You should consider the following:

(a) Whether [*name of plaintiff*] reasonably appeared to pose an immediate threat to the safety of [*name of defendant*] or others;

(b) The seriousness of the crime at issue; [and]

(c) Whether [*name of plaintiff*] was actively [resisting [arrest/detention]/ [or] attempting to avoid [arrest/detention] by flight][./; and]

(d) [*specify other factors particular to the case*].

New September 2003; Revised June 2012; Renumbered from CACI No. 3001 December 2012; Revised June 2015, June 2016, May 2020

Directions for Use

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

The three factors (a), (b), and (c) listed are often referred to as the "*Graham* factors." (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are not exclusive. (See *Glenn v. Wash. County* (9th Cir. 2011) 661 F.3d 460, 467–468.) Additional factors may be added if appropriate to the facts of the case.

Claims of excessive force against law enforcement officers in the course of making an arrest, investigatory stop, or other seizure are analyzed under the Fourth Amendment's "objective reasonableness" standard. (*Graham, supra,* 490 U.S. at pp. 388, 395 fn.10.) Claims of excessive force brought by pretrial detainees are governed by the Fourteenth Amendment's Due Process Clause and are also analyzed under an objective reasonableness standard. (*Kingsley v. Hendrickson* (2015) -- U.S. --, 135 S.Ct. 2466, 2473 [192 L.Ed.2d 416].) Modify the instruction for use in a case brought by a pretrial detainee involving the use of excessive force after arrest, but before conviction.~~Additional considerations and verdict form questions will be needed if there is a question of fact as to whether the defendant law enforcement officer had time for reflective decision-making before applying force. If the officers' conduct required a reaction to fast-paced circumstances presenting competing public safety obligations, the plaintiff must prove intent to harm. (See *Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1372 [190 Cal.Rptr.3d 693].)~~ For an instruction on an excessive force claim brought by a convicted prisoner, see CACI No. 3042, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Excessive Force (42 U.S.C. § 1983).*

The legality or illegality of the use of deadly force under state law is not relevant to the constitutional question. (Cf. *People v. McKay* (2002) 27 Cal.4th 601, 610 [117 Cal.Rptr.2d 236, 41 P.3d 59] ["[T]he [United States Supreme Court] has repeatedly emphasized that the Fourth Amendment inquiry does not depend on whether the challenged police conduct was authorized by state law"]; see also Pen. Code, § 835a.)

~~No case has yet determined, and therefore it is unclear, whether the defense has either the burden of proof or the burden of producing evidence on reaction to fast-paced circumstances. (See Evid. Code, §§ 500 [party has burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense asserted], 550 [burden of producing evidence as to particular fact is on party against whom a finding on the fact would be required in absence of further evidence].)~~

For an instruction for use in a negligence claim under California common law based on the same event and facts, see CACI No. 440, *Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*. For an instruction for use alleging excessive force as a battery, see CACI No. 1305, *Battery by ~~Police~~ Peace Officer*.

Sources and Authority

- "In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct." (*Graham, supra,* 490 U.S. at p. 395, internal citations and footnote omitted.)

- "Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a

free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons ... against unreasonable ... seizures' of the person." (*Graham, supra,* 490 U.S. at p. 394.)

- "In deciding whether the force deliberately used is, constitutionally speaking, 'excessive,' should courts use an objective standard only, or instead a subjective standard that takes into account a defendant's state of mind? It is with respect to *this* question that we hold that courts must use an objective standard." (*Kingsley v. Hendrickson* (2015) -- U.S. --, 135 S.Ct. 2466, 2472–2473 [192 L.Ed.2d 416], original italics.)

- "[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." (*Graham, supra,* 490 U.S. at p. 395.)

- " 'The intrusiveness of a seizure by means of deadly force is unmatched.' 'The use of deadly force implicates the highest level of Fourth Amendment interests both because the suspect has a "fundamental interest in his own life" and because such force "frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." ' " (*Vos v. City of Newport Beach* (9th Cir. 2018) 892 F.3d 1024, 1031.)

- "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Graham, supra,* 490 U.S. at p. 396.)

- "Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' ... its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra,* 490 U.S. at p. 396, internal citation omitted.)

- "The most important of these [factors from *Graham,* above] is whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553] .)

- "[The *Graham*] factors, however, are not exclusive. We 'examine the totality of the circumstances and consider "whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." ' Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed." (*Glenn, supra,* 661 F.3d at p. 467, internal citations omitted.)

- "With respect to the possibility of less intrusive force, officers need not employ the least intrusive means available[,] so long as they act within a range of reasonable conduct." (*Estate of Lopez v. Gelhaus* (9th Cir. 2017) 871 F.3d 998, 1006.)

- "Although officers are not required to use the least intrusive degree of force available, 'the availability of alternative methods of capturing or subduing a suspect may be a factor to consider[.],' " (*Vos, supra,* 892 F.3d at p. 1033, internal citation omitted.)

- "Courts 'also consider, under the totality of the circumstances, the quantum of force used to arrest the plaintiff, the availability of alternative methods of capturing or detaining the suspect, and the plaintiff's mental and emotional state.' " (*Brooks v. Clark County* (9th Cir. 2016) 828 F.3d 910, 920.)

- "Because the reasonableness standard 'nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.' " (*Torres v. City of Madera* (9th Cir. 2011) 648 F.3d 1119, 1125.)

- "Justice Stevens incorrectly declares [the 'objective reasonableness' standard under *Graham*] to be 'a question of fact best reserved for a jury,' and complains we are 'usurp[ing] the jury's factfinding function.'. At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, the reasonableness of [defendant]'s actions--or, in Justice Stevens' parlance, '[w]hether [respondent's] actions have risen to a level warranting deadly force,' is a pure question of law." (*Scott v. Harris* (2007) 550 U.S. 372, 381, fn. 8 [127 S. Ct. 1769; 167 L. Ed. 2d 686], original italics, internal citations omitted.)

- "Because there are no genuine issues of material fact and 'the relevant set of facts' has been determined, the reasonableness of the use of force is 'a pure question of law.' " (*Lowry v. City of San Diego* (9th Cir. 2017) 858 F.3d 1248, 1256 (en banc).)

- "In assessing the objective reasonableness of a particular use of force, we consider: (1) 'the severity of the intrusion on the individual's Fourth Amendment rights by evaluating the type and amount of force inflicted,' (2) 'the government's interest in the use of force,' and (3) the balance between 'the gravity of the intrusion on the individual' and 'the government's need for that intrusion.' " (*Lowry, supra,* 858 F.3d at p. 1256.)

- "To be sure, the reasonableness inquiry in the context of excessive force balances 'intrusion[s] on the individual's Fourth Amendment interests' against the government's interests. But in weighing the evidence in favor of the officers, rather than the [plaintiffs], the district court unfairly tipped the reasonableness inquiry in the officers' favor." (*Sandoval v. Las Vegas Metro. Police Dep't* (9th Cir. 2014) 756 F.3d 1154, 1167, internal citation omitted.)

- "The district court found that [plaintiff] stated a claim for excessive use of force, but that governmental interests in officer safety, investigating a possible crime, and controlling an interaction with a potential domestic abuser outweighed the intrusion upon [plaintiff]'s rights. In reaching this conclusion, the court improperly 'weigh[ed] conflicting evidence with respect to . . . disputed material fact[s].' " (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 880.)

- "The Fourth Amendment's 'reasonableness' standard is not the same as the standard of 'reasonable care' under tort law, and negligent acts do not incur constitutional liability." (*Hayes v. County of San Diego* 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].)

- "[S]tate negligence law, which considers the totality of the circumstances surrounding any use of deadly force, is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used." (*Hayes, supra,* 57 Cal.4th at p. 639, internal citations omitted.)

- "We are cognizant of the Supreme Court's command to evaluate an officer's actions 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' We also recognize the reality that 'police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.' This does not mean, however, that a Fourth Amendment violation will be found only in those rare instances where an officer and his attorney are unable to find a sufficient number of compelling adjectives to describe the victim's conduct. Nor does it mean that we can base our analysis on what officers actually felt or believed during an incident. Rather, we must ask if the officers' conduct is ' "objectively reasonable" in light of the facts and circumstances confronting them' without regard for an officer's subjective intentions." (*Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, 831, internal citations omitted.)

- "Deadly force is permissible only 'if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm.' " (*A. K. H. v. City of Tustin* (9th Cir. 2016) 837 F.3d 1005, 1011.)

- "[A]n officer may not use deadly force to apprehend a suspect where the suspect poses no immediate threat to the officer or others. On the other hand, it is not constitutionally unreasonable to prevent escape using deadly force '[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.' " (*Wilkinson v. Torres* (9th Cir. 2010) 610 F.3d 546, 550, internal citations omitted.)

- "It is clearly established law that shooting a fleeing suspect in the back violates the suspect's Fourth Amendment rights. 'Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.' " (*Foster v. City of Indio* (9th Cir. 2018) 908 F.3d 1204, 1211.)

- " '[I]f police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.' But terminating a threat doesn't necessarily mean terminating the suspect. If the suspect is on the ground and appears wounded, he may no longer pose a threat; a reasonable officer would reassess the situation rather than continue shooting." (*Zion v. County~~ty.~~ of Orange* (9th Cir. 2017) 874 F.3d 1072, 1076, internal citation omitted.)

- "Resistance, or the reasonable perception of resistance, does not entitle police officers to use any amount of force to restrain a suspect. Rather, police officers who confront actual (or perceived)

resistance are only permitted to use an amount of force that is reasonable to overcome that resistance." (*Barnard v. Theobald* (9th Cir. 2013) 721 F.3d 1069, 1076, internal citations omitted.)

- ~~" In any event, the court correctly instructed the jury on the mental state required in a Fourteenth Amendment excessive use of force case under section 1983 because this case did not involve reflective decisionmaking by the officers, but instead their reaction to fast-paced circumstances presenting competing public safety obligations. Given these circumstances, [plaintiff] was required to prove that the officers acted with a purpose to cause harm to her son." (*Green, supra,* 238 Cal.App.4th at p. 1372.)~~

- "[T]he fact that the 'suspect was armed with a deadly weapon' does *not* render the officers' response per se reasonable under the Fourth Amendment. [¶] This is not to say that the Fourth Amendment always requires officers to delay their fire until a suspect turns his weapon on them. If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat." (*George v. Morris* (9th Cir. 2013) 724 F.3d 1191, 1200, original italics, internal citations omitted.)

- " '[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern.' Here, whether objective factors supported [defendant]'s supposed subjective fear is not a question that can be answered as a matter of law based upon the limited evidence in the record, especially given that on summary judgment that evidence must be construed in the light most favorable to [plaintiff], the non-moving party. Rather, whether [defendant]'s claim that he feared a broccoli-based assault is credible and reasonable presents a genuine question of material fact that must be resolved not by a court ruling on a motion for summary judgment but by a jury in its capacity as the trier of fact." (*Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1163–1164.)

- "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." (*Fetters v. County of Los Angeles* (2016) 243 Cal.App.4th 825, 838 [196 Cal.Rptr.3d 848].)

- "Although *Graham* does not specifically identify as a relevant factor whether the suspect poses a threat to *himself,* we assume that the officers could have used some reasonable level of force to try to prevent [decedent] from taking a suicidal act. But we are aware of no published cases holding it reasonable to use a *significant* amount of force to try to stop someone from attempting suicide. Indeed, it would be odd to permit officers to use force capable of causing serious injury or death in an effort to prevent the possibility that an individual might attempt to harm only himself. We do not rule out that in some circumstances some force might be warranted to prevent suicide, but in cases like this one the 'solution' could be worse than the problem." (*Glenn, supra,* 661 F.3d at p. 468.)

- "This Court has 'refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals.' The Court has, however, 'found that even when an emotionally disturbed individual is acting out and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted . . . with a mentally ill individual.' A reasonable jury could conclude, based upon the information available to

[defendant officer] at the time, that there were sufficient indications of mental illness to diminish the governmental interest in using deadly force." (*Hughes v. Kisela* (9th Cir. 2016) 841 F.3d 1081, 1086.)

- "By contrast, if the officer warned the offender that he would employ force, but the suspect refused to comply, the government has an increased interest in the use of force." (*Marquez v. City of Phoenix* (9th Cir. 2012) 693 F.3d 1167, 1175, internal citation omitted.)

- "[P]reshooting conduct is included in the totality of circumstances surrounding an officer's use of deadly force, and therefore the officer's duty to act reasonably when using deadly force extends to preshooting conduct. But in a case like this one, where the preshooting conduct did not cause the plaintiff any injury independent of the injury resulting from the shooting, the reasonableness of the officers' preshooting conduct should not be considered in isolation. Rather, it should be considered in relation to the question whether the officers' ultimate use of deadly force was reasonable." (*Hayes, supra,* 57 Cal.4th at p. 632, internal citation omitted.)

- "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer by means of physical force or show of authority terminates or restrains his freedom of movement through means intentionally applied." (*Nelson v. City of Davis* (9th Cir. 2012) 685 F.3d 867, 875.)

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

- "We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." (*Heck v. Humphrey* (1994) 512 U.S. 477, 486–487 [114 S.Ct. 2364, 129 L.Ed.2d 383], footnotes and internal citation omitted.)

- "*Heck* requires the reviewing court to answer three questions: (1) Was there an underlying conviction or sentence relating to the section 1983 claim? (2) Would a 'judgment in favor of the plaintiff [in the

section 1983 action] "necessarily imply" … the invalidity of the prior conviction or sentence?' (3) 'If so, was the prior conviction or sentence already invalidated or otherwise favorably terminated?' " (*Fetters, supra,* 243 Cal.App.4th at p. 834.)

- "The *Heck* inquiry does not require a court to consider whether the section 1983 claim would establish beyond all doubt the invalidity of the criminal outcome; rather, a court need only 'consider whether a judgment in favor of the plaintiff would necessarily *imply* the invalidity of his conviction or sentence.' " (*Fetters, supra,* 243 Cal.App.4th at p. 841, original italics.)

- "[A] dismissal under section 1203.4 does not invalidate a conviction for purposes of removing the *Heck* bar preventing a plaintiff from bringing a civil action." (*Baranchik v. Fizulich* (2017) 10 Cal.App.5th 1210, 1224 [217 Cal.Rptr.3d 423].)

- "[Plaintiff]'s section 1983 claim *is* barred to the extent it alleges that [the arresting officer] lacked justification to arrest him or to respond with reasonable force to his resistance. The use of deadly force in this situation, though, requires a separate analysis. 'For example, a defendant might resist a lawful arrest, to which the arresting officers might respond with excessive force to subdue him. The subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer.' " (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 899 [76 Cal.Rptr.3d 787, 183 P.3d 471], original italics.)

- "Plaintiffs contend that the use of force is unlawful because the arrest itself is unlawful. But that is not so. We have expressly held that claims for false arrest and excessive force are analytically distinct." (*Sharp v. County~~ty.~~ of Orange* (9th Cir. 2017) 871 F.3d 901, 916.)

- "[T]he district court effectively required the jury to presume that the arrest *was* constitutionally lawful, and so not to consider facts concerning the basis for the arrest. Doing so removed critical factual questions that were within the jury's province to decide. For instance, by taking from the jury the question whether [officer]'s arrest of [plaintiff] for resisting or obstructing a police officer was lawful, the district judge implied simultaneously that [plaintiff] was in fact resisting or failing to obey the police officer's lawful instructions. Presuming such resistance could certainly have influenced the jury's assessment of 'the need for force,' as well as its consideration of the other *Graham* factors, including 'whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight. By erroneously granting judgment as a matter of law on [plaintiff]'s unlawful arrest claim, the district court impermissibly truncated the jury's consideration of [plaintiff]'s excessive force claim." (*Velazquez v. City of Long Beach* (9th Cir. 2015) 793 F.3d 1010, 1027, original italics.)

Secondary Sources

~~10~~ 8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ ~~888~~981, ~~892 et seq.~~985

Chin et al., California Practice Guide: Employment Litigation, Ch.7-G, ~~*Employment Discrimination—In General—*~~*Unruh Civil Rights Act*, ¶ 7:1526 et seq. (The Rutter Group)

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶¶ 10.00–10.03 (Matthew Bender)

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

3050. Retaliation—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] retaliated against [him/her/*nonbinary pronoun*] for exercising a constitutional right. [By [*specify conduct*], [*name of plaintiff*] was exercising [his/her/*nonbinary pronoun*] constitutionally protected right of [*insert right, e.g., privacy*].] To establish retaliation, [*name of plaintiff*] must prove all of the following:

1. **[That [he/she/*nonbinary pronoun*] was engaged in a constitutionally protected activity;]**
2. **That [*name of defendant*] [*specify alleged retaliatory conduct*];**
3. **That [*name of defendant*]'s acts were motivated, at least in part, by [*name of plaintiff*]'s protected activity;**
4. **That [*name of defendant*]'s acts would likely have deterred a person of ordinary firmness from engaging in that protected activity; and**
5. **That [*name of plaintiff*] was harmed as a result of [*name of defendant*]'s conduct.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] has proven element 1 above. But before I can do so, you must decide whether [*name of plaintiff*] has proven the following:

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

New June 2010; Revised December 2010, Renumbered from CACI No. 3016 and Revised December 2012~~,~~; Revised June 2013, May 2020

Directions for Use

Give this instruction along with CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements,* if the claimed civil rights violation is retaliation for exercising constitutionally protected rights, including exercise of free speech rights as a private citizen. ~~The retaliation should be alleged generally in element 1 of CACI No. 3000.~~For a claim by a public employee who alleges that they suffered an adverse employment action in retaliation for their speech on an issue of public concern, see CACI No. 3053, *Retaliation for Exercise of Free Speech Rights—Public Employee—Essential Factual Elements (42 U.S.C. § 1983).*

The retaliation should be alleged generally in element 1 of CACI No. 3000. The constitutionally protected activity refers back to the right alleged to have been violated in element 3 of CACI No. 3000. Whether plaintiff was engaged in a constitutionally protected activity will usually have been resolved by the court as a matter of law. If so, include the optional statement in the opening paragraph and omit element 1. If there is a question of fact that the jury must resolve with regard to the constitutionally protected activity, include element 1 and give the last part of the instruction.

There is perhaps some uncertainty with regard to the requirement in element 3 that the retaliatory act may be motivated, *in part*, by the protected activity. While the element is so stated in *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1062–1063 [99 Cal.Rptr.3d 661], the court also was of the view that the defendant may avoid liability by proving that, notwithstanding a retaliatory motive, it also had legitimate reasons for its actions and would have taken the same steps for those reasons alone. (*Id.* at pp. 1086–1087, finding persuasive *Greenwich Citizens Comm. v. Counties of Warren & Washington Indus. Dev. Agency* (2d Cir. 1996) 77 F.3d 26, 30.) Therefore, the fact that retaliation may have motivated the defendant only in part may not always be sufficient for liability. In the Ninth Circuit, there is authority for both a "but -for" and a "substantial or motivating factor" standard. (Compare *Karl v. City of Mountlake Terrace* (9th Cir. 2012) 678 F.3d 1062, 1072 [defendant may show that: (1) the adverse employment action was based on protected and unprotected activities; and (2) defendant would have taken the adverse action if the proper reason alone had existed] with *Blair v. Bethel Sch. Dist.* (9th Cir. 2010) 608 F.3d 540, 543 [third element expressed as "there was a substantial causal relationship between the constitutionally protected activity and the adverse action"].)

Sources and Authority

- "Where, as here, the plaintiff claims retaliation for exercising a constitutional right, the majority of federal courts require the plaintiff to prove that (1) he or she was engaged in constitutionally protected activity, (2) the defendant's retaliatory action caused the plaintiff to suffer an injury that would likely deter a person of ordinary firmness from engaging in that protected activity, and (3) the retaliatory action was motivated, at least in part, by the plaintiff's protected activity." (*Tichinin, supra,* 177 Cal.App.4th at pp. 1062–1063.)

- "[A]ctions that are otherwise proper and lawful may nevertheless be actionable if they are taken in retaliation against a person for exercising his or her constitutional rights." (*Tichinin, supra,* 177 Cal.App.4th at p. 1084.)

- "To demonstrate retaliation in violation of the First Amendment, [the plaintiff] must ultimately prove first that [defendant] took action that 'would chill or silence a person of ordinary firmness from future First Amendment activities.' " (*Skoog v. County of Clackamas* (9th Cir. 2006) 469 F.3d 1221, 1231–1232, footnote and citation omitted.)

- "The plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest." (*Nieves v. Bartlett* (2019) — U.S. — [139 S.Ct. 1715, 1724, 204 L.Ed.2d 1].)

- "[A]n individual has a right 'to be free from police action motivated by retaliatory animus but for which there was probable cause.' " (*Ford v. City of Yakima* (9th Cir. 2013) 706 F.3d 1188, 1193.)

- "Probable cause is not irrelevant to an individual's claim that he was booked and jailed in retaliation for his speech. Probable cause for the initial arrest can be evidence of a police officer's lack of retaliatory animus for subsequently booking and jailing an individual. However, that determination should be left to the trier of fact once a plaintiff has produced evidence that the officer's conduct was motivated by retaliatory animus." (*Ford, supra,* 706 F.3d at p. 1194 fn.2,

internal citation omitted.)

- "[T]he evidence of [plaintiff]'s alleged injuries, if believed, is sufficient to support a finding that the retaliatory action against him would deter a person of ordinary firmness from exercising his or her First Amendment rights. [¶] [Defendant] argues that plaintiff did not suffer any injury—i.e., [defendant]'s action did not chill [plaintiff]'s exercise of his rights—because he continued to litigate against [defendant]. However, that [plaintiff] persevered despite [defendant]'s action is not determinative. To reiterate, in the context of a claim of retaliation, the question is not whether the plaintiff was actually deterred but whether the defendant's actions would have deterred a person of ordinary firmness." (*Tichinin, supra,* 177 Cal.App.4th at p. 1082.)

- "Intent to inhibit speech, which 'is an element of the [retaliation] claim,' can be demonstrated either through direct or circumstantial evidence." (*Mendocino Envtl. Ctr. v. Mendocino County* (9th Cir. 1999) 192 F.3d 1283, 1300–1301, internal citation omitted.)

- ~~"To show that retaliation was a substantial or motivating factor behind an adverse employment action, a plaintiff can (1) introduce evidence that the speech and adverse action were proximate in time, such that a jury could infer that the action took place in retaliation for the speech; (2) introduce evidence that the employer expressed opposition to the speech; or (3) introduce evidence that the proffered explanations for the adverse action were false and pretextual." (*Anthoine v. N. Cent. Counties Consortium* (9th Cir. 2010) 605 F.3d 740, 750.)~~

- "To satisfy the [causation] requirement, the evidence must be sufficient to establish that the officers' desire to chill [plaintiff]'s speech was a but-for cause of their conduct. In other words, would [plaintiff] have been booked and jailed, rather than cited and arrested, but for the officers' desire to punish [him] for his speech?" (*Ford, supra,* 706 F.3d at p. 1194.)

- "[Defendant] may avoid liability if he shows that a 'final decision maker's independent investigation and termination decision, responding to a biased subordinate's initial report of misconduct, . . . negate[s] any causal link' between his retaliatory motive and the adverse employment action. This is because a final decision maker's wholly independent investigation and decision establish that 'the employee's protected speech was not a but-for cause of the adverse employment action.' " (*Karl, supra,* 678 F.3d at pp. 1072–1073, internal citation omitted.)

- "While the scope, severity and consequences of [their] actions are belittled by defendants, we have cautioned that 'a government act of retaliation need not be severe . . . [nor] be of a certain kind' to qualify as an adverse action." (*Marez v. Bassett* (9th Cir. 2010), 595 F.3d 1068, 1075.)

- ~~"We employ a 'sequential five-step series of questions' to determine whether an employer impermissibly retaliated against an employee for protected speech: (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." (*Anthoine, supra,* 605 F.3d at p. 748.)~~

Secondary Sources

8 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Constitutional Law, §§ ~~820~~894, ~~885A~~895, 978

2 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Opportunity Laws*, § 40.26 (Matthew Bender)

3 Civil Rights Actions, Ch. 17, *Discrimination in Federally Assisted Programs*, ¶ 17.24B (Matthew Bender)

4 Civil Rights Actions, Ch. 21A, *Employment Discrimination Based on Race, Color, Religion, Sex, or National Origin*, ¶ 21.22(1)(f) (Matthew Bender)

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

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 (Matthew Bender)

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

[*Name of plaintiff*] claims that [*name of defendant*] retaliated against [him/her/*nonbinary pronoun*] because [he/she/*nonbinary pronoun*] exercised [his/her/*nonbinary pronoun*] 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/*nonbinary pronoun*] [*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/*nonbinary pronoun*/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/*nonbinary pronoun*/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/*nonbinary pronoun*] [*e.g., speech*] was within [his/her/*nonbinary pronoun*] 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; Revised May 2020

Directions for Use

This instruction is for use in a claim by ~~a~~ public employees who alleges that ~~he or she~~ they suffered an adverse employment action in retaliation for ~~his or her~~ their 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].) For a claim by a private citizen who alleges retaliation, see CACI No. 3050, *Retaliation—Essential Factual Elements (42 U.S.C. § 1983).*

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.)

- "In a First Amendment retaliation case, an adverse employment action is an act that is reasonably likely to deter employees from engaging in constitutionally protected speech." (*Greisen v. Hanken* (9th Cir. 2019) 925 F.3d 1097, 1113.)

- "*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.)

- "Whether speech is on a matter of public concern is a question of law, determined by the court…. The speech need not be entirely about matters of public concern, but it must 'substantially involve' such matters. '[S]peech warrants protection when it "seek[s] to bring to light actual or potential wrongdoing or breach of public trust." ' " (*Greisen, supra,* 925 F.3d at p. 1109.)

- "[Defendant] may avoid liability if he shows that a 'final decision maker's independent investigation and termination decision, responding to a biased subordinate's initial report of misconduct, . . . negate[s] any causal link' between his retaliatory motive and the adverse employment action. This is because a final decision maker's wholly independent investigation and decision establish that 'the employee's protected speech was not a but-for cause of the adverse employment action.' " (*Karl v. City of Mountlake Terrace* (9th Cir. 2012) 678 F.3d 1062, 1072–1073, internal citation omitted.)

- "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.)

- "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.)

- "To show that retaliation was a substantial or motivating factor behind an adverse employment action, a plaintiff can (1) introduce evidence that the speech and adverse action were proximate in time, such that a jury could infer that the action took place in retaliation for the speech; (2) introduce evidence that the employer expressed opposition to the speech; or (3) introduce evidence that the proffered explanations for the adverse action were false and pretextual." (*Anthoine v. N. Cent. Counties Consortium* (9th Cir. 2010) 605 F.3d 740, 750.)

- "[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~~ 8 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)

VF-3012. Unreasonable Search or Seizure—Search or Seizure Without a Warrant (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [search/seize] [***name of plaintiff***]'s [person/home/automobile/office/property/[***insert other***]] without a warrant?**
   ____ Yes ____ No

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

2. **Was [***name of defendant***] acting or purporting to act in the performance of [his/her/***nonbinary pronoun***] official duties?**
   ____ 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 [search/seizure] a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ Yes ____ No

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

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

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

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010; Renumbered from CACI No. VF-3003 December 2012; Revised December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 3023, *Unreasonable Search or Seizure—Search or Seizure Without a Warrant—Essential Factual Elements.*

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

If 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.

VF-3501. Fair Market Value Plus Severance Damages

We answer the questions submitted to us as follows:

1. What was the fair market value of the property taken on [*date of valuation*]?

$_____

Answer question 2.

2. What was the fair market value of the remaining property on [*date of valuation*]?

$_____

Answer question 3.

3. What ~~will~~ would the fair market value of the remaining property have been on [*date of valuation*] if ~~be after~~ the [*name of public entity*]'s proposed project ~~is~~ were completed as planned?

$_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised December 2010, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 3501, *"Fair Market Value" Explained,* and CACI No. 3511, *Permanent Severance Damages*.

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. For example, if the public entity's project was completed before the date of valuation, modify question 3 accordingly.

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.

3704. Existence of "Employee" Status Disputed

[*Name of plaintiff***] must prove that [***name of agent***] was [***name of defendant***]'s employee.**

In deciding whether [*name of agent***] was [***name of defendant***]'s employee, the most important factor is whether [***name of defendant***] had the right to control how [***name of agent***] performed the work, rather than just the right to specify the result. One indication of the right to control is that the hirer can discharge the worker [without cause]. It does not matter whether [***name of defendant***] exercised the right to control.**

In deciding whether [*name of defendant***] was [***name of agent***]'s employer, in addition to the right of control, you must consider the full nature of their relationship. You should take into account the following additional factors, which, if true, may show that [***name of defendant***] was the employer of [***name of agent***]. No one factor is necessarily decisive. Do not simply count the number of applicable factors and use the larger number to make your decision. It is for you to determine the weight and importance to give to each of these additional factors based on all of the evidence.**

(a) **[***Name of defendant***] supplied the equipment, tools, and place of work;**

(b) **[***Name of agent***] was paid by the hour rather than by the job;**

(c) **[***Name of defendant***] was in business;**

(d) **The work being done by [***name of agent***] was part of the regular business of [***name of defendant***];**

(e) **[***Name of agent***] was not engaged in a distinct occupation or business;**

(f) **The kind of work performed by [***name of agent***] is usually done under the direction of a supervisor rather than by a specialist working without supervision;**

(g) **The kind of work performed by [***name of agent***] does not require specialized or professional skill;**

(h) **The services performed by [***name of agent***] were to be performed over a long period of time; [and]**

(i) **[***Name of defendant***] and [***name of agent***] believed that they had an employer-employee relationship[./; and]**

(j) **[***Specify other factor***].**

New September 2003; Revised December 2010, June 2015, December 2015, November 2018, May 2020

Directions for Use

This instruction is based on *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354–355 [256 Cal.Rptr. 543, 769 P.2d 399] and the Restatement Second of Agency, section 220. It is sometimes referred to as the *Borello* test or the common law test. (See *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 934 [232 Cal.Rprt.3d 1, 416 P.3d 1].) It is intended to address the employer-employee relationship for purposes of assessing vicarious responsibility on the employer for the employee's acts. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships, see CACI No. 3705, *Existence of "Agency" Relationship Disputed.*

Secondary factors (a)–(i) come from the Restatement section 220. (See also *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532 [173 Cal.Rptr.3d 332, 327 P.3d 165]; Rest.3d Agency, § 7.07, com. f,) They have been phrased so that a yes answer points toward an employment relationship. Omit any that are not relevant. Additional factors have been endorsed by the California Supreme Court and may be included if applicable. (See *S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at pp. 354–355.) Therefore, an "other" option (j) has been included.

Borello was a workers' compensation case. In *Dynamex, supra,* the court, in holding that *Borello* did not control the specific wage order dispute at issue, noted that "it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue." (*Dynamex ~~Operations W.~~*, *supra*, 4 Cal.5th at p. 934.) The court also said that "[t]he *Borello* decision repeatedly emphasizes statutory purpose as the touchstone for deciding whether a particular category of workers should be considered employees rather than independent contractors for purposes of social welfare legislation." (*Id.* at p. 935.) With respondeat superior, there is no statutory provision or social welfare legislation to be considered. (Cf. Lab. Code, § 2750.3 ~~*Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558, 571 [239 Cal.Rptr.3d 360] [no reason to apply *Dynamex* categorically to every working relationship~~[codifying *Dynamex* for purposes of the provisions of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission, with limited exceptions for specified occupations].)

Sources and Authority

- Principal-Agent Relationship. Civil Code section 2295.
- Rebuttable Presumption that Contractor Is Employee Rather Than Independent Contractor; Proof of Independent Contractor Status. Labor Code section 2750.5.
- "[S]ubject to certain policy considerations, a hirer … cannot be held vicariously liable for the negligence of his independent contractors." (*Blackwell v. Vasilas* (2016) 244 Cal.App.4th 160, 168 [197 Cal.Rptr.3d 753].)
- "Whether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control how the end result is achieved." (*Ayala, supra,* 59 Cal.4th at p. 528.)

- "However, the courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the 'most important' or 'most significant' consideration, the authorities also endorse several 'secondary' indicia of the nature of a service relationship." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 350, internal citations omitted.)

- "While the extent of the hirer's right to control the work is the foremost consideration in assessing whether a common law employer-employee relationship exists, our precedents also recognize a range of secondary indicia drawn from the Second and Third Restatements of Agency that may in a given case evince an employment relationship. Courts may consider '(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.' " (*Ayala, supra,* 59 Cal.4th at p. 532.)

- " 'Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' " (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 351, internal citations omitted.)

- "[T]he Restatement guidelines heretofore approved in our state remain a useful reference." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 354.)

- "We also note the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation. Besides the 'right to control the work,' the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. [¶] As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at pp. 354–355, internal cross-reference omitted.)

- "[A]t common law the problem of determining whether a worker should be classified as an employee or an independent contractor initially arose in the tort context--in deciding whether the hirer of the worker should be held vicariously liable for an injury that resulted from the worker's actions. In the vicarious liability context, the hirer's right to supervise and control the details of the worker's actions was reasonably viewed as crucial, because ' "[t]he extent to which the employer had a right to control [the details of the service] activities was . . . highly relevant to the question whether the employer ought to be legally liable for them . . . ." ' For this reason, the question whether the hirer controlled the details of the worker's activities became the primary common law standard for determining

whether a worker was considered to be an employee or an independent contractor." (*Dynamex ~~Operations W.~~, supra,* 4 Cal.5th at p. 927, internal citations omitted.)

- "[A]lthough we have sometimes characterized *Borello* as embodying the common law test or standard for distinguishing employees and independent contractors, it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue. In other words, *Borello* calls for application of a *statutory purpose* standard that considers the control of details and other potentially relevant factors identified in prior California and out-of-state cases in order to determine which classification (employee or independent contractor) best effectuates the underlying legislative intent and objective of the statutory scheme at issue." (*Dynamex ~~Operations W.~~, supra,* 4 Cal.5th at p. 934, original italics, internal citation omitted.)

- ~~" '*Dynamex* did not purport to replace the *Borello* standard in every instance where a worker must be classified as either an independent contractor or an employee for purposes of enforcing California's labor protections.' To the contrary, the Supreme Court recognized that different standards could apply to different statutory claims: … ." (*Garcia, supra,* 28 Cal.App.5th at p. 570, internal citation omitted.)~~

- ~~"In the absence of an argument that the statutory purposes underlying those claims compel application of a different standard, we conclude *Borello* furnishes the proper standard as to non-wage order claims." (*Garcia, supra,* 28 Cal.App.5th at p. 571.)~~

- "The trial court's determination of employee or independent contractor status is one of fact if it depends upon the resolution of disputed evidence or inferences. ' "Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact … ." ' The question is one of law only if the evidence is undisputed." (*Linton v. DeSoto Cab Co., Inc.* (2017) 15 Cal.App.5th 1208, 1225 [223 Cal.Rptr.3d 761.)

- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)

- "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 349.)

- "[A]lthough the Caregiver Contract signed by Plaintiff stated she was an independent contractor, not an employee, there is evidence of other indicia of employment and Plaintiff averred in her declaration that the Caregiver Contract was presented to her 'on a take it or leave it basis.' 'A party's use of a label to describe a relationship with a worker … will be ignored where the evidence of the parties' actual conduct establishes that a different relationship exists.' " (*Duffey v. Tender Heart Home Care Agency, LLC* (2019) 31 Cal.App.5th 232, 257–258 [242 Cal.Rptr.3d 460].)

- "It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an

agency relationship." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)

- " '[W]hat matters is whether a hirer has the "legal right to control the activities of the alleged agent" … . That a hirer chooses not to wield power does not prove it lacks power.' " (*Duffey, supra,* 31 Cal.App.5th at p. 257.)

- "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because '[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities.' " (*Ayala, supra,* 59 Cal.4th at p. 531.)

- "The worker's corresponding right to leave is similarly relevant: ' "An employee may quit, but an independent contractor is legally obligated to complete his contract." ' " (*Ayala, supra,* 59 Cal.4th at p. 531 fn. 2.)

- "A finding of employment is supported where the workers are 'a regular and integrated portion of [the] business operation.' " (*Garcia v. Seacon Logix Inc.* (2015) 238 Cal.App.4th 1476, 1487 [190 Cal.Rptr.3d 400].)

- "Where workers are paid weekly or by the hour, rather than by the job, it suggests an employment relationship." (*Garcia, supra,* 238 Cal.App.4th at p. 1488.)

- "In cases where there is a written contract, to answer that question [the right of control] without full examination of the contract will be virtually impossible. … [¶] … [T]he rights spelled out in a contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms." (*Ayala, supra,* 59 Cal.4th at p. 535.)

- "[T]he right to exercise complete or authoritative control must be shown, rather than mere suggestion as to detail. A worker is an independent contractor when he or she follows the employer's desires only in the result of the work, and not the means by which it is achieved." (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1179 [183 Cal.Rptr.3d 394].)

- " '[T]he owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect [citation], … the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation]—without changing the relationship from that of owner and independent contractor … .' " (*Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138, 1143 [159 Cal.Rptr.3d 102], quoting *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790 [285 P.2d 902].)

- "Agency and independent contractorship are not *necessarily* mutually exclusive legal categories as independent contractor and servant or employee are. In other words, an agent may also be an independent contractor. One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*Jackson, supra,* 233 Cal.App.4th at p. 1184, original italics, internal citations omitted].)

- "[W]hen a statute refers to an 'employee' without defining the term, courts have generally applied the common law test of employment to that statute." (*Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 586 [135 Cal.Rptr.3d 213].)

- "[A] termination at-will clause for both parties may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee." (*Arnold, supra,* 202 Cal.App.4th at p. 589.)

- Restatement Second of Agency, section 220, provides: "
- (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control. [¶]
- (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: [¶]
- (a) the extent of control which, by the agreement, the master may exercise over the details of the work; [¶]
-
- (b) whether or not the one employed is engaged in a distinct occupation or business; [¶]
-
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; [¶]
-
- (d) the skill required in the particular occupation; [¶]
-
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; [¶]
-
- (f) the length of time for which the person is employed; [¶]
-
- (g) the method of payment, whether by the time or by the job; [¶]
-
- (h) whether or not the work is a part of the regular business of the employer; [¶]
-
- (i) whether or not the parties believe they are creating the relation of master and servant; and [¶]
-
- (j) whether the principal is or is not in business."

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 2–45

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2] (Matthew Bender)

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, §§ 248.15, 248.22, 248.51 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.13 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, §§ 100A.25, 100A.34 (Matthew Bender)

1 California Civil Practice: Torts §§ 3:5–3:6 (Thomson Reuters)

3903C. Past and Future Lost Earnings (Economic Damage)

[*Insert number, e.g.,* "3."**] [Past] [and] [future] lost earnings.**

[To recover damages for past lost earnings, [*name of plaintiff***] must prove the amount of [***insert one or more of the following:* **income/earnings/salary/wages] that [he/she/***nonbinary pronoun***] has lost to date.]**

[To recover damages for future lost earnings, [*name of plaintiff***] must prove the amount of [***insert one or more of the following:* **income/earnings/salary/wages] [he/she/***nonbinary pronoun***] will be reasonably certain to lose in the future as a result of the injury.]**

New September 2003; Revised May 2020

Directions for Use

This instruction is not intended for use in employment cases.

Use this instruction along with CACI No. 3906, *Lost Earnings and Lost Earning Capacity—Jurors Not to Consider Race, Ethnicity, or Gender (Economic Damages).*

Sources and Authority

- "We know of no rule of law that requires that a plaintiff establish the amount of his actual earnings at the time of the injury in order to obtain recovery for loss of wages although, obviously, the amount of such earnings would be helpful to the jury in particular situations." (*Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 656 [151 Cal.Rptr. 399].)

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

- " 'Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury." ' " (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368, 695 P.2d 665], internal citations omitted.)

- "Requiring the plaintiff to prove future economic losses are reasonably certain 'ensures that the jury's fixing of damages is not wholly, and thus impermissibly, speculative.' " (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 738 [214 Cal.Rptr.3d 113].)

- "[T]he majority view is that no deduction is made for the injured party's expected living expenses

during the lost years." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 171 [87 Cal.Rptr.2d 626], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1842, 1843

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.39–1.41

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.10–52.11 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages,* § 177.46 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort,* § 64.190 (Matthew Bender)

1 California Civil Practice: Torts, § 5:15 (Thomson Reuters)

3903D. Lost Earning Capacity (Economic Damage)

[*Insert number, e.g.,* "4."**] The loss of [***name of plaintiff***]'s ability to earn money.**

To recover damages for the loss of the ability to earn money as a result of the injury, [*name of plaintiff***] must prove:**

1. **That it is reasonably certain that the injury that [***name of plaintiff***] sustained will cause [him/her/*nonbinary pronoun*] to earn less money in the future than [he/she/*nonbinary pronoun*] otherwise could have earned; and**

2. **The reasonable value of that loss to [him/her/*nonbinary pronoun*].**

In determining the reasonable value of the loss, compare what it is reasonably probable that [*name of plaintiff***] could have earned without the injury to what [he/she/*nonbinary pronoun*] can still earn with the injury. [Consider the career choices that [***name of plaintiff***] would have had a reasonable probability of achieving.] It is not necessary that [he/she/*nonbinary pronoun*] have a work history.**

New September 2003; Revised April 2004, April 2008, May 2017, May 2020

Directions for Use

This instruction is not intended for use in employment cases.

Use this instruction along with CACI No. 3906, *Lost Earnings and Lost Earning Capacity—Jurors Not to Consider Race, Ethnicity, or Gender (Economic Damages).*

If lost profits are asserted as an element of damages, see CACI No. 3903N, *Lost Profits (Economic Damage)*.

If there is a claim for both lost future earnings and lost earning capacity, give also CACI No. 3903C, *Past and Future Lost Earnings (Economic Damage)*. The verdict form should ensure that the same loss is not computed under both standards.

In the last paragraph, include the bracketed sentence if the plaintiff is of sufficient age that reasonable probabilities can be projected about career opportunities.

Sources and Authority

- "Before [lost earning capacity] damages may be awarded, a jury must (1) find the injury that the plaintiff sustained will result in a loss of earning capacity, and (2) assign a value to that loss by comparing what the plaintiff could have earned without the injury to what she can still earn with the injury." (*Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881, 887 [208 Cal.Rptr.3d 170].)

- "Loss of earning power is an element of general damages which can be inferred from the nature of the injury, without proof of actual earnings or income either before or after the injury, and damages in this respect are awarded for the loss of ability thereafter to earn money." (*Connolly v. Pre-Mixed Concrete Co.* (1957) 49 Cal.2d 483, 489 [319 P.2d 343].)

- "Because these damages turn on the plaintiff's earning capacity, the focus is 'not [on] what the plaintiff would have earned in the future[,] but [on] what she could have earned.' Consequently, proof of the plaintiff's prior earnings, while relevant to demonstrate earning capacity, is not a prerequisite to the award of these damages, nor a cap on the amount of those damages. Indeed, proof that the plaintiff had any prior earnings is not required because the 'vicissitudes of life might call upon [the plaintiff] to make avail of her capacity to work,' even if she had not done so previously." (*Licudine, supra,* 3 Cal.App.5th at pp. 893−894, internal citations omitted.)

- "Such damages are '. . . awarded for the purpose of *compensating* the plaintiff for injury suffered, i.e., restoring . . . [her] as nearly as possible to . . . [her] former position, or giving . . . [her] some pecuniary equivalent.' Impairment of the capacity or power to work is an injury separate from the actual loss of earnings." (*Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 412 [196 Cal.Rptr. 117], original italics, internal citations omitted.)

- "[T]he jury must fix a plaintiff's future earning capacity based on what it is 'reasonably probable' she could have earned." (*Licudine, supra,* 3 Cal.App.5th at p. 887.)

- "A plaintiff's earning capacity without her injury is a function of two variables—the career(s) the plaintiff could have pursued and the salaries attendant to such career(s)." (*Licudine, supra,* 3 Cal.App.5th at p. 894.)

- "How is the jury to assess what career(s) are available to the plaintiff? Is the sky the limit? In other words, can a plaintiff urge the jury to peg her earning capacity to the salary of a world-class athlete, neuroscientist, or best-selling author just by testifying that is what she wanted to do? Or must the jury instead determine a plaintiff's earning capacity by reference to the career choices the plaintiff stood a realistic chance of accomplishing? We conclude some modicum of scrutiny by the trier of fact is warranted, and hold that the jury must look to the earning capacity of the career choices that the plaintiff had a reasonable probability of achieving." (*Licudine, supra,* 3 Cal.App.5th at p. 894.)

- "Once the jury has determined which career options are reasonably probable for the plaintiff to achieve, how is the jury to value the earning capacity of those careers? Precedent suggests three methods: (1) by the testimony of an expert witness; (2) by the testimony of lay witnesses, including the plaintiff; or (3) by proof of the plaintiff's prior earnings in that same career. As these options suggest, expert testimony is not always required." (*Licudine, supra,* 3 Cal.App.5th at p. 897.)

- "[E]xpert testimony is not vital to a claim for loss of earning capacity." (*Lewis v. Ukran* (2019) 36 Cal.App.5th 886, 893 [248 Cal.Rptr.3d 839].)

- "A trier of fact may draw the inference that the plaintiff has suffered a loss of earning capacity from the nature of the injury, but it is not required to draw that inference." (*Martinez v. State Dept. of*

Health Care Services (2017) 19 Cal.App.5th 370, 374 [227 Cal.Rptr.3d 483].)

- " 'Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury." ' " (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368, 695 P.2d 665], internal citations omitted.)

- "[T]he majority view is that no deduction is made for the injured party's expected living expenses during the lost years." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 175 [87 Cal.Rptr.2d 626], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1666, 1667

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.42

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.10, 52.11 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.140, 64.175 (Matthew Bender)

1 California Civil Practice: Torts, § 5:15 (Thomson Reuters)

3904A. Present Cash Value

[*Name of defendant*] claims that [*name of plaintiff*]'s future [economic] damages for [loss of earnings/future medical expenses/lost profits/[*insert other economic damages*]], if any, should be reduced to present cash value. This is because money received now will, through investment, grow to a larger amount in the future.

[[*Name of defendant*] must prove, through expert testimony, the present cash value of [*name of plaintiff*]'s future [economic] damages. It is up to you to decide the present cash value of [*name of plaintiff's*] future [economic] damages in light of all the evidence presented by the parties.]
~~**If you decide that [*name of plaintiff*]'s harm includes future [economic] damages for [loss of earnings/future medical expenses/lost profits/[*insert other economic damages*]], then the amount of those future damages must be reduced to their present cash value. This is necessary because money received now will, through investment, grow to a larger amount in the future. [*Name of defendant*] must prove the amount by which future damages should be reduced to present value.**~~

~~**To find present cash value, you must determine the amount of money that, if reasonably invested today, will provide [*name of plaintiff*] with the amount of [his/her/its] future damages.**~~

~~**[You may consider expert testimony in determining the present cash value of future [economic] damages.] [**~~**[If you decide that [*name of plaintiff*]'s harm includes future [economic] damages for [loss of earnings/future medical expenses/lost profits/[*insert other economic damages*]], then you must reduce the amount of those future damages to their present cash value.** **You must [use the interest rate of __ percent/ [and] [*specify other stipulated information*]] as agreed to by the parties in determining the present cash value of future [economic] damages.]**

New September 2003; Revised April 2008; Revised and renumbered from former CACI No. 3904 December 2010; Revised June 2013, May 2020

Directions for Use

Give this instruction if future economic damages are sought and there is evidence from which a reduction to present value can be made. Include "economic" if future noneconomic damages are also sought. Future noneconomic damages are not reduced to present cash value because 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]; CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*.)

The defendant bears the burden of presenting expert evidence of an appropriate present value calculation, including the appropriate discount rate, to enable the fact finder to make a rational determination on the issue. (*Lewis v. Ukran* (2019) 36 Cal.App.5th 886, 896 [248 Cal.Rptr.3d 839].) ~~Give the next-to-last sentence if there has been expert testimony on reduction to present value.~~ Unless there is a stipulation, expert testimony ~~will usually be~~ is required to accurately establish present values for future economic losses. (*Id.*) ~~Give the last sentence if there has been a stipulation as to the interest rate to use or any other~~

~~facts related to present cash value.~~

~~It would appear that because reduction to present value benefits the defendant, the defendant bears the burden of proof on the discount rate. (See *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 613–614 [102 Cal.Rptr. 31] [no error to refuse instruction on reduction to present value when defendant presented no evidence].)~~ Give the last bracketed paragraph if there has been a stipulation as to the interest rate to use or any other facts related to present cash value, and omit the second paragraph to account for the parties' stipulation.

The parties may stipulate to use p~~P~~resent-value tables ~~may~~ to assist the jury in making its determination of present cash value. Tables, worksheets, and an instruction on how to use them are provided in CACI No. 3904B, *Use of Present-Value Tables*.

Sources and Authority

- "The present value of a gross award of future damages is that sum of money prudently invested at the time of judgment which will return, over the period the future damages are incurred, the gross amount of the award. 'The concept of present value recognizes that money received after a given period is worth less than the same amount received today. This is the case in part because money received today can be used to generate additional value in the interim.' The present value of an award of future damages will vary depending on the gross amount of the award, and the timing and amount of the individual payments." (*Holt v. Regents of the University of California* (1999) 73 Cal.App.4th 871, 878 [86 Cal.Rptr.2d 752], internal citations omitted.)

- "[I]n a contested case, a party (typically a defendant) seeking to reduce an award of future damages to present value bears the burden of proving an appropriate method of doing so, including an appropriate discount rate. A party (typically a plaintiff) who seeks an upward adjustment of a future damages award to account for inflation bears the burden of proving an appropriate method of doing so, including an appropriate inflation rate. This aligns the burdens of proof with the parties' respective economic interests. A trier of fact should not reduce damages to present value, or adjust for inflation, absent such evidence or a stipulation of the parties." (*Lewis, supra,* 36 Cal.App.5th at p. 889.)

- "[W]e hold a defendant seeking reduction to present value of a sum awarded for future damages has the burden of presenting expert evidence of an appropriate present value calculation, including the appropriate discount rate, to enable the fact finder to make a rational determination on the issue." (*Lewis, supra,* 36 Cal.App.5th at p. 896.)

- "Exact actuarial computation should result in a lump-sum, present-value award which if prudently invested will provide the beneficiaries with an investment return allowing them to regularly withdraw matching support money so that, by reinvesting the surplus earnings during the earlier years of the expected support period, they may maintain the anticipated future support level throughout the period and, upon the last withdrawal, have depleted both principal and interest." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 521 [196 Cal.Rptr. 82].)

- "[I]t is not a violation of the plaintiff's jury trial right for the court to submit only the issue of the gross amount of future economic damages to the jury, with the timing of periodic payments—and

hence their present value—to be set by the court in the exercise of its sound discretion." (*Salgado, supra,* 19 Cal.4th at p. 649, internal citation omitted.)

- "Neither party introduced any evidence of compounding or discounting factors, including how to calculate an appropriate rate of return throughout the relevant years. Under such circumstances, the 'jury would have been put to sheer speculation in determining ... "the present sum of money which ... will pay to the plaintiff ... the equivalent of his [future economic] loss ... . " ' " (*Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 877 [9 Cal.Rptr.2d 716], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Torts, § ~~1552~~1719

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.96

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.21–52.22 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

1 California Civil Practice: Torts § 5:22 (Thomson Reuters)

3906. Lost Earnings and Lost Earning Capacity—Jurors Not to Consider Race, Ethnicity, or Gender (Economic Damage)

In determining a reasonable amount of [*name of plaintiff*]'s [[lost earnings] [*and/or*] [lost ability to earn money]], you must not consider race, ethnicity, or gender.

New May 2020

Directions for Use

Give this instruction in cases where the plaintiff seeks damages for lost earnings and/or lost earning capacity from personal injury or wrongful death. Depending on the circumstances, select the type(s) of damages at issue: lost earnings, lost ability to earn money, or both. If this instruction is used, it should follow the applicable instruction(s) in the items of economic damage series (see CACI No. 3903C, *Past and Future Lost Earnings (Economic Damage)*; CACI No. 3903D, *Lost Earning Capacity (Economic Damage)*).

Sources and Authority

- Estimations, Measures, or Calculations of Past, Present, or Future Damages. Civil Code section 3361.

Secondary Sources

4106. Breach of Fiduciary Duty by Attorney—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she/*nonbinary pronoun*/it] was harmed because [***name of defendant***] breached an attorney's duty [***describe duty, e.g., "not to represent clients with conflicting interests"***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] breached the duty of an attorney [***describe duty***];**

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; Revised April 2004; Renumbered from CACI No. 605 December 2007; Revised May 2019, May 2020

Directions for Use

The existence of a fiduciary relationship is a question of law. Whether an attorney has breached that fiduciary duty is a question of fact. (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890 [250 Cal.Rptr. 339], disapproved on other grounds in *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239 [191 Cal.Rptr.3d 536, 354 P.3d 334].)

Give CACI No. 430, *Causation: Substantial Factor*, with this instruction.

~~If the attorney's breach of duty is negligent rather than intentional or fraudulent, the "but for" ("would have happened anyway") causation standard applicable to legal malpractice (see *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046]) applies. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1093–1094 [236 Cal.Rptr.3d 473].) If so, the optional last sentence of CACI No. 430, *Causation: Substantial Factor*, should be given: "Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct."~~

The causation standard for an attorney's intentional breach of fiduciary duty differs from that for a negligent breach. If the plaintiff alleges an attorney's intentional breach of duty, do not include the optional last sentence of CACI No. 430, *Causation: Substantial Factor* on "but for" causation. The "but for" causation standard does not apply to an intentional breach of fiduciary duty. If the plaintiff alleges an attorney's negligent breach of duty, the "but for" ("would have happened anyway") causation standard applies. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1093–1094 [236 Cal.Rptr.3d 473]; see *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046].) If the plaintiff alleges a negligent breach of duty, give the optional last sentence of CACI No. 430: "Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct."

If the plaintiff alleges both negligent breach and intentional or fraudulent breach, the jury must be instructed on both causation standards and it should be made clear which causation standard applies to which claim.

If the harm allegedly caused by the defendant's conduct involves the outcome of a legal claim, the jury should be instructed with CACI No. 601, *Damages for Negligent Handling of Legal Matter*, for the "but for" standard. (See *Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 928, 933–937 [125 Cal.Rptr.3d 210] [discussing circumstances when a client need not show that they objectively would have obtained a better result in the underlying case in the absence of the attorney's breach (the trial-within-a-trial method)].)

Sources and Authority

- " 'The relation between attorney and client is a fiduciary relation of the very highest character.' " (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189 [98 Cal.Rptr. 837, 491 P.2d 421].)

- " 'The breach of fiduciary duty can be based upon either negligence or fraud depending on the circumstances. It has been referred to as a species of tort distinct from causes of action for professional negligence [citation] and from fraud [citation].' 'The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages.' " (*Knutson, supra,* 25 Cal.App.5th at pp. 1093–1094, internal citation omitted.)

- "Substantial factor causation is the correct causation standard for an intentional breach of fiduciary duty." (*Knutson, supra,* 25 Cal.App.5th at p. 1094.)

- "The trial court applied the legal malpractice standard of causation to [plaintiff]'s intentional breach of fiduciary duty cause of action. The court cited The Rutter Group's treatise on professional responsibility to equate causation for legal malpractice with causation for all breaches of fiduciary duty: ' "The rules concerning causation, damages, and defenses that apply to lawyer negligence actions … also govern actions for breach of fiduciary duty." ' This statement of the law is correct, however, only as to claims of breach of fiduciary duty arising from negligent conduct." (*Knutson, supra,* 25 Cal.App.5th at p. 1094, internal citations omitted.)

- "Expert testimony is not required, but is admissible to establish the duty and breach elements of a cause of action for breach of fiduciary duty where the attorney conduct is a matter beyond common knowledge." (*Stanley, supra,* 35 Cal.App.4th at p. 1087, internal citations omitted.)

- "The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, 'together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client.' " (*Stanley, supra,* 35 Cal.App.4th at p. 1087.)

Secondary Sources

1 Witkin, California Procedure (45th ed. ~~1996~~2008) Attorneys, § ~~118~~ 90

Vapnek et al., California Practice Guide: Professional Responsibility ~~(The Rutter Group)~~ ¶ 6:425 (The Rutter Group)

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.02 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, § 76.150 (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, §§ 24A.27[3][d], 24A.29[3][j] (Matthew Bender)

4300. Introductory Instruction

This is an action for what is called unlawful detainer. [*Name of plaintiff***], the [landlord/tenant], claims that [***name of defendant***] is [his/her/nonbinary pronoun/its] [tenant/subtenant] under a [lease/rental agreement/sublease] and that [***name of defendant***] no longer has the right to occupy the property [by subleasing to [***name of subtenant***]]. [***Name of plaintiff***] seeks to recover possession of the property from [***name of defendant***]. [***Name of defendant***] claims that [he/she/nonbinary pronoun/it] still has the right to occupy the property because [***insert defenses at issue***].**

The property involved in this case is [*describe property: e.g., "an apartment," "a house," "space in a commercial building"***] located in [***city or area***] at [***address***].**

New August 2007

Directions for Use

If the plaintiff is the landlord or owner and the defendant is the tenant, select "landlord" and "tenant," in the first sentence. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "tenant" and "subtenant." (Code Civ. Proc., § 1161(3).)

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the first sentence. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease."

If the defendant is a tenant who has subleased the premises to someone else, add the bracketed language in the first paragraph referring to subleasing.

Sources and Authority

- Right to Jury Trial. Code of Civil Procedure section 1171.
- Right of Tenant to Bring Unlawful Detainer Against Subtenant. Code of Civil Procedure section 1161(3).
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- Definition of "Just Cause." Civil Code section 1946.2(b).
- "The remedy of unlawful detainer is designed to provide means by which the timely possession of premises which are wrongfully withheld may be secured to the person entitled thereto." (*Knowles v. Robinson* (1963) 60 Cal.2d 620, 625 [36 Cal.Rptr. 33, 387 P.2d 833].)

- "Chapter 4 of title 3 of part 3 of the Code of Civil Procedure is commonly known as the Unlawful Detainer Act (hereafter, the Act). The Act is broad in scope and available to both lessors and lessees who have suffered certain wrongs committed by the other. Procedures and proceedings in unlawful detainer were not known at common law and are entirely creatures of statute. As such, they are governed solely by the statutes which created them. Thus, where the Act 'deals with matters of practice, its provisions supersede the rules of practice contained in other portions of the code.' " (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 113 [78 Cal.Rptr.2d 799], internal citations omitted.)

Secondary Sources

12 Witkin, Summary of California Law (~~10~~11th ed. ~~2006~~2017) Real Property, § ~~703~~734

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 9.5, 9.34–9.36

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 1.4–1.5

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.01 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.02

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.12 (Matthew Bender)

Miller & Starr California Real Estate 4th, §§ 34:195, 34:200, 34:205 ~~, California Real Estate, Ch. 19, *Landlord-Tenant*, § 19:214~~ (Thomson Reuters)

4301. Expiration of Fixed-Term Tenancy—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because the [lease/rental agreement/sublease] has ended. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**

2. **That [***name of plaintiff***] [leased/subleased] the property to [***name of defendant***] until [***insert end date***];**

3. **That [***name of plaintiff***] did not give [***name of defendant***] permission to continue occupying the property after the [lease/rental agreement/sublease] ended; and**

4. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

New August 2007; Revised June 2011, May 2020

Directions for Use

If the plaintiff is the landlord or owner, select "lease" or "rental agreement" in the first sentence and in element 3 as appropriate, "owns" in element 1, and "leased" in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease" in the first paragraph and in element 3, "leases" in element 1, and "subleased" in element 2. (Code Civ. Proc., § 1161(3).)

If persons other than the tenant-defendant are occupying the premises, include the bracketed language in the first paragraph and in element 4.

The Tenant Protection Act of 2019 imposes additional requirements for the termination of a rental agreement for certain residential tenancies. (Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Sources and Authority

- Holding Over After Expiration of Lease Term. Code of Civil Procedure section 1161.
- Conversion to Ordinary Civil Action If Possession Not at Issue. Civil Code section 1952.3(a).

- Tenant Protection Act of 2019. Civil Code section 1946.2.

- " 'In order that such an action may be maintained the conventional relation of landlord and tenant must be shown to exist. In other words, the action is limited to those cases in which the tenant is estopped to deny the landlord's title.' " (*Fredericksen v. McCosker* (1956) 143 Cal.App.2d 114, 116 [299 P.2d 908], internal citations omitted.)

- "The most important difference between a periodic tenancy and a tenancy for a fixed term—such as six months—is that the latter terminates at the end of such term, without any requirement of notice as in the former. In order to create an estate for a definite period, the duration must be capable of exact computation when it becomes possessory, otherwise no such estate is created." (*Camp v. Matich* (1948) 87 Cal.App.2d 660, 665–666 [197 P.2d 345], internal citations omitted.)

- "It is well established that it is the duty of the tenant as soon as his tenancy expires by its own limitations, to surrender the possession of the premises and that no notice of termination is necessary, the lease itself terminating the tenancy; and if he continues in possession beyond that period without the permission of the landlord, he is guilty of unlawful detainer, and an action may be commenced against him at once, under the provisions of subdivision 1 of section 1161 of the Code of Civil Procedure, without the service upon him of any notice." (*Ryland v. Appelbaum* (1924) 70 Cal.App. 268, 270 [233 P. 356], internal citations omitted.)

- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

Secondary Sources

12 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2006~~2017) Real Property, §§ ~~664~~691, ~~678~~705, ~~721~~754

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) § 8.82

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.4, 7.8

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.42 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

Miller & Starr, California Real Estate 4th ~~(3d ed. 2008) Ch. 19, *Landlord-Tenant*~~, § 19:43 (Thomson Reuters)

4303. Sufficiency and Service of Notice of Termination for Failure to Pay Rent

[*Name of plaintiff***] contends that [he/she/*nonbinary pronoun*/it] properly gave [***name of defendant***] three days' notice to pay the rent or vacate the property. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that [he/she/*nonbinary pronoun*/it] must pay the amount due within three days or vacate the property;**

2. **That the notice stated [no more than/a reasonable estimate of] the amount due, and the name, telephone number, and address of the person to whom the amount should be paid, and**

   [*Use if payment was to be made personally***:**

   the usual days and hours that the person would be available to receive the payment; and]

   [*or: Use if payment was to be made into a bank account:*

   the number of an account in a bank located within five miles of the rental property into which the payment could be made, and the name and street address of the bank; and]

   [*or: Use if an electronic funds transfer procedure had been previously established:*

   that payment could be made by electronic funds transfer; and]

3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***].**

[The three-day notice period excludes Saturdays, Sundays, and judicial holidays, but otherwise begins the day after the notice to pay the rent or vacate the property was given to [*name of defendant***].]**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s residence or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her/*nonbinary pronoun*] residence/the commercial property]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail][./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[A notice stating a reasonable estimate of the amount of rent due that is within 20 percent of the amount actually due is reasonable unless [*name of defendant***] proves that it was not reasonable. In determining the reasonableness of the estimate, you may consider whether calculating the amount of rent required information primarily within the knowledge of [***name of defendant***] and whether [***name of defendant***] accurately furnished that information to [***name of plaintiff***].]**

New August 2007; Revised December 2010; June 2011, December 2011, November 2019, May 2020

Directions for Use

Use the reasonable-estimate option in the first sentence of element 2 and include the final paragraph only in cases involving commercial leases. (Code Civ. Proc., § 1161.1(a); see also Code Civ. Proc., § 1161.1(e) [presumption that if amount found to be due is within 20 percent of amount stated in notice, then estimate was reasonable].)

In element 2, select the applicable manner in which the notice specifies that payment is to be made; directly to the landlord, into a bank account, or by electronic funds transfer. (Code Civ. Proc., § 1161(2).)

Select the manner of service used: personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial rental property, or substituted service by posting on the property. (See Code Civ. Proc., § 1162.)

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second, third, and fourth bracketed options for the manner of service.

Read the paragraph that follows the elements if any of the three days of the notice period fell on a Saturday, Sunday, or judicial holiday. (See Code Civ. Proc., § 1161(2).) Judicial holidays are shown on the judicial branch website, www.courts.ca.gov/holidays.htm.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout, provided that it is not less than three days.

Defective service may be waived if defendant admits receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

The Tenant Protection Act of 2019 and/or ~~L~~local ordinances may impose additional notice requirements for the termination of a rental agreement. (See Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Sources and Authority

- Conclusive Presumption of Receipt of Rent Sent to Address Provided in Notice. Code of Civil Procedure section 1161(2).
- Commercial Tenancy: Estimate of Rent Due in Notice. Code of Civil Procedure 1161.1.
- Manner of Service of Notice. Code of Civil Procedure section 1162.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- " '[P]roper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. [Citations.]' [Citation.] 'A lessor must allege and prove proper service of the

requisite notice. [Citations.] Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained. [Citations.]' " (*Borsuk v. Appellate Division of Superior Court* (2015) 242 Cal.App.4th 607, 611 [195 Cal.Rptr.3d 581].)

- "A three-day notice must contain 'the amount which is due.' A notice which demands rent in excess of the amount due does not satisfy this requirement. This rule ensures that a landlord will not be entitled to regain possession in an unlawful detainer action unless the tenant has had the opportunity to pay the delinquent rent." (*Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 697 [32 Cal.Rptr.2d 635], internal citations and footnote omitted.)

- "As compared to service of summons, by which the court acquires personal jurisdiction, service of the three-day notice is merely an element of an unlawful detainer cause of action that must be alleged and proven for the landlord to acquire possession." (*Borsuk, supra,* 242 Cal.App.4th at pp. 612–613.)

- "[W]e do not agree that a proper notice may not include anything other than technical rent. It is true that subdivision 2 of Code of Civil Procedure section 1161 relates to a default in the payment of rent. However, the subdivision refers to the 'lease or agreement under which the property is held' and requires the notice state 'the amount which is due.' The language is not 'the amount of rent which is due' or 'the rent which is due.' We think the statutory language is sufficiently broad to encompass any sums due under the lease or agreement under which the property is held." (*Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 492 [144 Cal.Rptr. 474].)

- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)

- "We … hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)

- "We … hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)

- "An unlawful detainer action based on failure to pay rent must be preceded by a three-day notice to the tenant to pay rent or quit the premises. Failure to state the exact amount of rent due in the notice is fatal to the subsequent unlawful detainer action." (*Lynch & Freytag v. Cooper* (1990) 218 Cal.App.3d 603, 606, fn. 2 [267 Cal.Rptr. 189], internal citations omitted.)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 753, 755–758, 760~~745–760~~

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.26–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.10–6.30, Ch. 8

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶¶ 5:224.3, 5:277.1 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:98.10, 7:327 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.22 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.13, 236.13A (Matthew Bender)

Miller & Starr, California Real Estate 4th ~~(2015)~~, §§ 34:183-34:187 ~~(Ch. 34, *Landlord-Tenant)*~~ (Thomson Reuters)

4304. Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has failed to perform [a] requirement(s) under [his/her/*nonbinary pronoun*/its] [lease/rental agreement/sublease]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**

2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***];**

3. **That under the [lease/rental agreement/sublease], [***name of defendant***] agreed [***insert required condition(s) that were not performed***];**

4. **That [***name of defendant***] failed to perform [that/those] requirement(s) by [***insert description of alleged failure to perform***];**

5. **That [***name of plaintiff***] properly gave [***name of defendant***] [and [***name of subtenant***]] three days' written notice to [either [***describe action to correct failure to perform***] or] vacate the property; [and]**

[6. That [*name of defendant***] did not [***describe action to correct failure to perform***]; and]**

7. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

[[*Name of defendant***]'s failure to perform the requirement(s) of the [lease/rental agreement/sublease] must not be trivial, but must be a substantial violation of [an] important obligation(s).]**

New August 2007; Revised June 2010, December 2010, June 2011, December 2011, May 2020

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph, in element 5, and in the last element if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the opening paragraph and in element 3, "owns" in element 1, and "rented" in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease" in the opening paragraph and in element 3, "leases" in element 1, and "subleased" in element 2. (Code Civ. Proc., § 1161(3).)

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 5.

If the violation of the condition or covenant involves assignment, sublet, or waste, or if the breach cannot be cured, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4); *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 [64 Cal.Rptr. 246].) In such a case, omit the bracketed language in element 5 and also omit element 6. If the violation involves nuisance or illegal activity, give CACI No. 4308, *Termination for Nuisance or Unlawful Use—Essential Factual Elements*.

Include the last paragraph if the tenant alleges that the violation was trivial. (See *Boston LLC v. Juarez* (2016) 245 Cal.App.4th 75, 81 [199 Cal.Rptr.3d 452].) It is not settled whether the landlord must prove the violation was substantial or the tenant must prove triviality as an affirmative defense. (See *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051 [241 Cal.Rptr. 487]; *Keating v. Preston* (1940) 42 Cal.App.2d 110, 118 [108 P.2d 479].)

The Tenant Protection Act of 2019 and/or ~~L~~local or federal law may impose additional requirements for the termination of a rental agreement based on breach of a condition. (See, e.g., Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

See CACI No. 4305, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement*, for an instruction on proper written notice.

See also CACI No. 312, *Substantial Performance*.

Sources and Authority

- Unlawful Detainer Based on Failure to Perform Conditions. Code of Civil Procedure section 1161(3), (4).

- Tenant Protection Act of 2019. Civil Code section 1946.2.

- Conversion of Unlawful Detainer to Ordinary Civil Action if Possession No Longer at Issue. Civil Code section 1952.3(a).

- "[Code of Civil Procedure section 1161(3)] provides, that where the conditions or covenants of a lease can be performed, a lessee may within three days after the service of the notice perform them, and so save a forfeiture of his lease. By performing, the tenant may defeat the landlord's claim for possession. Where, however, the covenants cannot be performed, the law recognizes that it would be an idle and useless ceremony to demand their performance, and so dispenses with the demand to do so. And this is all that it does dispense with. It does not dispense with the demand for the possession of the premises. It requires that in any event. If the covenants can be performed, the notice is in the alternative, either to perform them or deliver possession. When the covenants are beyond performance an alternative notice would be useless, and demand for possession alone is necessary. Bearing in mind that the object of this statute is to speedily permit a landlord to obtain possession of his premises where the tenant has violated the covenants of the lease, the only reasonable interpretation of the statute is, that before bringing suit he shall take that means which should be most effectual for the purpose of obtaining possession, which is to demand it. If upon demand the tenant surrenders possession, the necessity for any summary proceeding is at an end, and by the demand is accomplished what the law otherwise would accord him under the proceeding." (*Schnittger v. Rose* (1903) 139 Cal. 656, 662 [73 P. 449].)

- "It is well settled that the notice required under [Code Civ. Proc., § 1161] subdivisions 2 and 3 (where the condition or covenant assertedly violated is capable of being performed) must be framed in the alternative, viz., pay the rent *or* quit, perform the covenant *or* quit, and a notice which merely directs the tenant to quit is insufficient to render such tenant guilty of unlawful detainer upon his continued possession." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 27 [341 P.2d 749], original italics.)

- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman, supra,* 172 Cal.App.2d at p. 29.)

- "The law sensibly recognizes that although every instance of noncompliance with a contract's terms constitutes a breach, not every breach justifies treating the contract as

terminated. Following the lead of the Restatements of Contracts, California courts allow termination only if the breach can be classified as 'material,' 'substantial,' or 'total.' " (*Superior Motels, Inc., supra,* 195 Cal.App.3d at p. 1051, internal citations omitted.)

- " '[A] lease may be terminated only for a substantial breach thereof, and not for a mere technical or trivial violation.' This materiality limitation even extends to leases which contain clauses purporting to dispense with the materiality limitation." (*Boston LLC, supra,* 245 Cal.App.4th at p. 81, internal citation omitted.)

- " 'Normally the question of whether a breach of an obligation is a material breach … is a question of fact,' however ' "if reasonable minds cannot differ on the issue of materiality, the issue may be resolved as a matter of law." ' " (*Boston LLC, supra,* 245 Cal.App.4th at p. 87.)

- "As to the substantiality of the violation, the evidence shows that the violation was wilful. Therefore, the court will not measure the extent of the violation." (*Hignell v. Gebala* (1949) 90 Cal.App.2d 61, 66 [202 P.2d 378].)

- "Where a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action." (*Salton Community Services Dist., supra,* 256 Cal.App.2d at p. 529.)

- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra,* 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil

Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2005) Real Property, §§ 720, 726

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.50–8.54

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.38–6.49

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 12-G, *"Section 8" Government-Subsidized Housing—Termination of Section 8 Tenancies*, ¶ 12:200 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Terminating the Tenancy and Related Remedies—Bases For Terminating Tenancy*, ¶ 7:93 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.20 (Matthew Bender)

Miller & Starr California Real Estate 4th, ~~Ch. 34, *Landlord-Tenant,*~~ § 34.182 (Thomson Reuters)

4305. Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement

[*Name of plaintiff***] contends that [he/she/*nonbinary pronoun*/it] properly gave [***name of defendant***] three days' notice to [either comply with the requirements of the [lease/rental agreement/sublease] or] vacate the property. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that [he/she/*nonbinary pronoun*/it] must, within three days, [either comply with the requirements of the [lease/rental agreement/sublease] or] vacate the property;**

2. **That the notice described how [***name of defendant***] failed to comply with the requirements of the [lease/rental agreement/sublease] [and how to correct the failure];**

3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***].**

[The three-day notice period excludes Saturdays, Sundays, and judicial holidays, but otherwise begins on the day after the notice to correct the failure or vacate the property was given to [*name of defendant***].]**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s home or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her/*nonbinary pronoun*] residence/the commercial property]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail][./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

New August 2007; Revised December 2010, June 2011, December 2011, November 2019, May 2020

Directions for Use

If the violation of the condition or covenant involves assignment, subletting, or waste, or if the breach cannot be cured, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4); *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 [64 Cal.Rptr. 246].) In such a case, omit the bracketed language in the first paragraph and in elements 1 and 2. If the violation involves nuisance or illegal activity, give CACI No. 4309, *Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use*.

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the optional language in the opening paragraph and in elements 1 and 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease." (Code Civ. Proc., § 1161(3).)

Select the manner of service used: personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial rental property, or substituted service by posting on the property. (See Code Civ. Proc., § 1162.)

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second, third, and fourth bracketed options for the manner of service.

Read the paragraph that follows the elements if any of the three days of the notice period fell on a Saturday, Sunday, or judicial holiday. (See Code Civ. Proc., § 1161(3).) Judicial holidays are shown on the judicial branch website, www.courts.ca.gov/holidays.htm.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout the instruction, provided that it is not less than three days.

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

The Tenant Protection Act of 2019 and/or ~~L~~local ordinances may impose additional notice requirements for the termination of a rental agreement. (See, e.g., Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Sources and Authority

- Unlawful Detainer Based on Failure to Perform Conditions. Code of Civil Procedure section 1161(3), (4).
- Manner of Service of Notice. Code of Civil Procedure section 1162.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)
- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)
- "We … hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three

days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)

- "We … hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)

- "It is well settled that the notice required under [Code Civ. Proc., § 1161] subdivisions 2 and 3 (where the condition or covenant assertedly violated is capable of being performed) must be framed in the alternative, viz., pay the rent *or* quit, perform the covenant *or* quit, and a notice which merely directs the tenant to quit is insufficient to render such tenant guilty of unlawful detainer upon his continued possession." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 27 [341 P.2d 749], original italics.)

- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman, supra,* 172 Cal.App.2d at p. 29.)

- "Where a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action." (*Salton Community Services Dist., supra,* 256 Cal.App.2d at p. 529.)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 753, 759, 760~~745–760~~

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.26–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.10–6.16, 6.25–6.29, 6.38–6.49, Ch. 8

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.12 (Matthew Bender)

Miller & Starr, California Real Estate 4th ~~(2015)~~, §§ 34:182, 34:183, 34:187 ~~34:183–34:187 (Ch. 34, *Landlord–Tenant*)~~ (Thomson Reuters)

4306. Termination of Month-to-Month Tenancy—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] [and [*name of subtenant*], a subtenant of [*name of defendant*],] no longer [has/have] the right to occupy the property because the tenancy has ended. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] [owns/leases] the property;**

2. **That [*name of plaintiff*] [rented/subleased] the property to [*name of defendant*] under a month-to-month [lease/rental agreement/sublease];**

3. **That [*name of plaintiff*] gave [*name of defendant*] proper [30/60] days' written notice that the tenancy was ending; and**

4. **That [*name of defendant*] [or subtenant [*name of subtenant*]] is still occupying the property.**

New August 2007; Revised June 2011, December 2011, May 2020

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph and in element 4 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1 and "rented" and either "lease" or "rental agreement" in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select "leases" in element 1 and "subleased" and "sublease" in element 2. (Code Civ. Proc., § 1161(3).)

In element 3, select the applicable number of days' notice required by statute. Thirty days is sufficient for commercial tenancies, residential tenancies of less than a year's duration, and certain transfers of the ownership interest to a bona fide purchaser. For residential tenancies of a year or more's duration, 60 days' notice is generally required. (Civ. Code, §§ 1946, 1946.1(b)–(d).) The Tenant Protection Act of 2019 may impose additional requirements for the termination of a residential tenancy. (Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property*

Investments, LLC v. Yadegar (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

Do not give this instruction to terminate a tenancy if the tenant is receiving federal financial assistance through the Section 8 program. (See *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1115 [29 Cal.Rptr.3d 262, 112 P.3d 647]; Civ. Code, § 1954.535 (90 days' notice required).) Specific grounds for terminating a federally subsidized low-income housing tenancy are required and must be set forth in the notice. (See, e.g., 24 C.F.R. § 982.310.)

See CACI No. 4307, *Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy,* for an instruction on proper advanced written notice.

Sources and Authority

- Unlawful Detainer Based on Holdover After Expiration of Term. Code of Civil Procedure section 1161(1).
- Automatic Renewal Absent Notice of Termination on Expiration of Term. Civil Code section 1946.
- Time and Manner of Giving Notice of Termination. Civil Code section 1946.1.
- Presumption That Term Is Based on Period for Which Rent Is Paid. Civil Code section 1944.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- Conversion of Unlawful Detainer to Ordinary Civil Action if Possession Not at Issue. Civil Code section 1952.3(a).
- " 'In order that such an action may be maintained the conventional relation of landlord and tenant must be shown to exist. In other words, the action is limited to those cases in which the tenant is estopped to deny the landlord's title.' " (*Fredericksen v. McCosker* (1956) 143 Cal.App.2d 114, 116 [299 P.2d 908], internal citations omitted.)
- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

- "The Act provides that as a prerequisite to filing an unlawful detainer action based on a terminated month-to-month tenancy, the landlord must serve the tenant with a 30-day written notice of termination." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 113 [78 Cal.Rptr.2d 799], internal citations omitted.)

- "Proper service on the lessee of a valid … notice … is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a … notice … by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra,* 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the … notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a … notice … provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the … notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Real Property, § ~~680~~707 et seq.

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 8-B, *Unlawful Detainer Complaint*, ¶ 8:85 (The Rutter Group)

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.69–8.80

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.3, 7.5, 7.11

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.40 (Matthew Bender)

Miller & Starr~~,~~ California Real Estate ~~3d~~ 4th, § 34:147 ~~19:188~~ (Thomson Reuters)

4307. Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy

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[*Name of plaintiff***] contends that [he/she/*nonbinary pronoun*/it] properly gave [***name of defendant***] written notice that the tenancy was ending. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that the tenancy would end on a date at least [30/60] days after notice was given to [him/her/*nonbinary pronoun*/it];**

2. **That the notice was given to [***name of defendant***] at least [30/60] days before the date that the tenancy was to end; and**

3. **That the notice was given to [***name of defendant***] at least [30/60] days before [***insert date on which action was filed***];**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[the notice was sent by certified or registered mail in an envelope addressed to [*name of defendant***], in which case notice is considered given on the date the notice was placed in the mail[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s home or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her/*nonbinary pronoun*] residence/the commercial property]. In this case, notice is considered given on the date the second notice was placed in the mail[./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was placed in the mail.]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant*]. In this case, notice is considered given on the date the second notice was placed in the mail.]

[The [30/60]-day notice period begins on the day after the notice was given to [*name of defendant*]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [*name of defendant*]'s time to vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]

New August 2007; Revised December 2010, June 2011, December 2011, May 2020

Directions for Use

Select the applicable number of days' notice required by statute. Thirty days is sufficient for commercial tenancies, residential tenancies of less than a year's duration, and certain transfers of the ownership interest to a bona fide purchaser. For residential tenancies of a year or more's duration, 60 days is generally required. (Civ. Code, §§ 1946, 1946.1(b)–(d).)

If 30 days' notice is sufficient and the lease provided for a notice period other than the statutory 30-day period (but not less than 7), insert that number instead of "30" or "60" throughout the instruction. (Civ. Code, § 1946.)

Select all manners of service used, including personal service, certified or registered mail, substituted service by leaving the notice at the defendant's home or place of work or at the rental property, and substituted service by posting on the property. (See Civ. Code, §§ 1946, 1946.1(f); Code Civ. Proc., § 1162.)

Read the next-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

The Tenant Protection Act of 2019 and/or ~~L~~local ordinances may impose additional ~~notice~~ requirements for the termination of a rental agreement. (See, e.g., Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Sources and Authority

- Automatic Renewal of Tenancy at End of Term. Civil Code section 1946.
- Time and Manner of Giving Notice of Termination. Civil Code section 1946.1.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- Manner of Service of Notice. Code of Civil Procedure section 1162.
- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)
- "Section 1162 does not authorize service of a … notice … by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)
- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)
- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the … notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a … notice … provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)
- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the … notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be

shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2005) Real Property, §§ 680, 727

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 8-B, *Unlawful Detainer Complaint*, ¶¶ 8:68, 8:69 (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:119, 7:190 et seq. (The Rutter Group)

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.69–8.80

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) § 5.3, Ch. 7

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.10–236.12 (Matthew Bender)

Miller & Starr~~,~~ California Real Estate ~~3d~~ 4th, §§ 34:175, 34:181, 34:182 ~~19:188, 19:192~~ (Thomson Reuters)

4308. Termination for Nuisance or Unlawful Use—Essential Factual Elements (Code Civ. Proc., § 1161(4))

[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has [created a nuisance on the property/ [or] used the property for an illegal purpose]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**

2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***];**

3. **That [***name of defendant***] [***include one or both of the following:***]**

   created a nuisance on the property by [*specify conduct constituting nuisance***];**

   [or]

   used the property for an illegal purpose by [*specify illegal activity***];**

4. **That [***name of plaintiff***] properly gave [***name of defendant***] [and [***name of subtenant***]] three days' written notice to vacate the property; and**

5. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

New December 2010; Revised June 2011, December 2011, May 2020

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph and in elements 4 and 5 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1, and "rented" in element 2.

If the plaintiff is a tenant seeking to recover possession from a subtenant, include the bracketed language on subtenancy in the opening paragraph and in element 4, "leases" in element 1, and "subleased" in element 2. (Code Civ. Proc., § 1161(3).)

Certain conduct or statutory violations that constitute or create a rebuttable presumption of a nuisance are set forth in Code of Civil Procedure section 1161(4). If applicable, insert the appropriate ground in element 3. (See also Health & Saf. Code, § 17922 [adopting various uniform housing and building codes].)

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 4.

For nuisance or unlawful use, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4).)

The Tenant Protection Act of 2019, l~~L~~ocal law, and/or federal law may impose additional requirements for the termination of a rental agreement based on nuisance or illegal activity. (See Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined], (b)(1)(C) [nuisance is "just cause"], (b)(1)(I) [unlawful purpose is "just cause"].) This instruction should be modified accordingly if applicable.

See CACI No. 4309, *Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use,* for an instruction on proper written notice.

See also CACI No. 312, *Substantial Performance*.

Sources and Authority

- Unlawful Detainer Based on Tenant Conduct. Code of Civil Procedure section 1161(4).
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- "Nuisance" Defined. Civil Code section 3479.
- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter

to allege such facts, but this he did not do." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 29 [341 P.2d 749].)

- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra,* 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 674, 726

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.55, 8.58, 8.59

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.46, 6.48, 6.49

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶ 7:136 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination of Tenancies*, § 200.38 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.23

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.11 (Matthew Bender)

Miller & Starr~~,~~ California Real Estate 4th, § 34:181 ~~(3d ed. 2008) Ch. 19, Landlord-Tenant, §§ 19:200–19.205~~ (Thomson Reuters)

4309. Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use

[*Name of plaintiff***] contends that [he/she/*nonbinary pronoun*/it] properly gave [***name of defendant***] three days' notice to vacate the property. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that [he/she/*nonbinary pronoun*/it] must vacate the property within three days;**

2. **That the notice described how [***name of defendant***] [created a nuisance on the property/ [or] used the property for an illegal purpose]; and**

3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***].**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s residence or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her/*nonbinary pronoun*] residence/the commercial property]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail][./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[The three-day notice period begins on the day after the notice was given to [*name of defendant*]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [*name of defendant*]'s time to correct the failure or to vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]

New December 2010; Revised June 2011, December 2011, May 2020

Directions for Use

Select the manner of service used: personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial property, or substituted service by posting on the property. (See Code Civ. Proc., § 1162.)

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second, third, and fourth bracketed options for the manner of service.

Read the next-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout the instruction, provided that it is not less than three days.

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

The Tenant Protection Act of 2019 and/or ~~L~~local ordinances may impose additional notice requirements for the termination of a rental agreement. (See, e.g., Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Sources and Authority

- Unlawful Detainer Based on Tenant Conduct. Code of Civil Procedure section 1161(4).
- Manner of Service of Notice. Code of Civil Procedure section 1162.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)
- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)
- "We … hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)
- "We … hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)
- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 29 [341 P.2d 749].)
- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the … notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a … notice … provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the … notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (~~10~~11th ed. ~~2006~~2017) Real Property, §§ 701, 759, 760 ~~674, 726, 727~~

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.62–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.25–6.29

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:98.5 et seq., 7:137 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.23

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.11 (Matthew Bender)

Miller & Starr~~,~~ California Real Estate 4th~~(3d ed. 2008) Ch. 19, Landlord-Tenant~~, §§ 34:182, 34:183 ~~19:200–19:205~~ (Thomson Reuters)

4325. Affirmative Defense—Failure to Comply With Rent Control Ordinance/Tenant Protection Act

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[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/*nonbinary pronoun*] because [***name of plaintiff***] violated [[***insert name of local governmental entity***]'s rent control law]/[the Tenant Protection Act]. To succeed on this defense, [***name of defendant***] must prove the following:**

[*Insert elements of rent control defense.***]**

New August 2007; Revised May 2020

Directions for Use

Insert the elements of the Tenant Protection Act of 2019 and/or the relevant local rent control law into this instruction.

Sources and Authority

- Tenant Protection Act of 2019. Civil Code section 1946.2.
- "[T]he statutory remedies for recovery of possession and of unpaid rent do not preclude a defense based on municipal rent control legislation enacted pursuant to the police power imposing rent ceilings and limiting the grounds for eviction for the purpose of enforcing those rent ceilings." (*Birkenfeld v. Berkeley* (1976) 17 Cal.3d 129, 149 [130 Cal.Rptr. 465, 550 P.2d 1001], internal citations and footnote omitted.)
- "Although municipalities have power to enact ordinances creating substantive defenses to eviction, such legislation is invalid to the extent it conflicts with general state law." (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 697 [209 Cal.Rptr. 682, 693 P.2d 261]~~, affd. (1986) 475 U.S. 260 [106 S.Ct. 1045, 89 L.Ed.2d 206]~~, internal citations omitted.)

Secondary Sources

12 Witkin, Summary of California Law (~~10~~11th ed. ~~2006~~2017) Real Property, § 618~~594~~

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 7.53–7.76

2 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 17

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*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.74 (Matthew Bender)

Miller & Starr~~,~~ California Real Estate 4th, §§ 34:204, 34:256 (Thomson ~~West~~Reuters) ~~Ch. 19, *Landlord-Tenant*, § 19:102~~

4575. Right to Repair Act—Affirmative Defense—Failure to ~~Properly~~ Follow Recommendations or to Maintain ~~Home~~ (Civ. Code, § 945.5(c))

[*Name of defendant*] claims that [he/she/*nonbinary pronoun*/it] is not responsible for [*name of plaintiff*]'s harm because [*name of plaintiff*] failed to properly maintain the home. To establish this defense, [*name of defendant*] must prove [all/both] of the following:

1. That [*name of plaintiff*] failed to follow [[*name of defendant*]'s/ [or] a manufacturer's] recommendations/ [or] commonly accepted homeowner maintenance obligations];

[2. That [*name of plaintiff*] had written notice of [*name of defendant*]'s recommended maintenance schedules;~~]~~

~~[~~3. That the recommendations and schedules were reasonable at the time they were issued;]

4. That [*name of plaintiff*]'s harm was caused by [his/her/*nonbinary pronoun*] failure to follow [[*name of defendant*]'s/ [or] a manufacturer's] recommendations/ [or] commonly accepted homeowner maintenance obligations].

New November 2019; Revised May 2020

Directions for Use

This instruction sets forth a builder's affirmative defense to a homeowner's construction defect claim under the Right to Repair Act, asserting that the homeowner failed to follow the builder's or manufacturer's recommendations, or properly maintain the property. The homeowner is responsible for any maintenance failures by any of ~~his or her~~ the homeowner's agents, employees, general contractors, subcontractors, independent contractors, or consultants. (Civ. Code, § 945.5(c).) Include elements 2 and 3 if the defendant contractor is relying on its own recommended maintenance schedule.

Sources and Authority

- Right to Repair Act Affirmative Defense of Homeowner's Failure to Maintain. Civil Code section 945.5(c).

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1310 et seq.

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.263-104.265 (Matthew Bender)

9 California Legal Forms Transaction Guide, Ch. 23, *Real Property Sales Agreements*, § 23.20A (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.70 (Matthew Bender)

Miller & Starr California Real Estate 4th, § 33:4 (Thomson Reuters)

4603. Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5)

[*Name of plaintiff***] claims that [***name of defendant***] [discharged/[***other adverse employment action***]] [him/her/***nonbinary pronoun***] in retaliation for [his/her/***nonbinary pronoun***] [disclosure of information of/refusal to participate in] an unlawful act. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s employer;**

2. **[That [[***name of plaintiff***] disclosed]/[[***name of defendant***] believed that [***name of plaintiff***] [had disclosed/might disclose] to a [government agency/law enforcement agency/person with authority over [***name of plaintiff***]/ [or] an employee with authority to investigate, discover, or correct legal [violations/noncompliance]] that [***specify information disclosed***]];]**

   [*or***]**

   [That [*name of plaintiff***] [provided information to/testified before] a public body that was conducting an investigation, hearing, or inquiry;]**

   [*or***]**

   [That [*name of plaintiff***] refused to [***specify activity in which plaintiff refused to participate***];]**

3. **[That [***name of plaintiff***] had reasonable cause to believe that the information disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

   [*or***]**

   [That [*name of plaintiff***] had reasonable cause to believe that the [information provided to/testimony before] the public body disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

   [*or***]**

   [That [*name of plaintiff***]'s participation in [***specify activity***] would result in [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

4. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**

5. **That [***name of plaintiff***]'s [disclosure of information/refusal to [***specify***]] was a contributing factor in [***name of defendant***]'s decision to [discharge/[***other adverse employment action***]] [***name of plaintiff***];**

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

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

[The disclosure of policies that an employee believes to be merely unwise, wasteful, gross misconduct, or the like, is not protected. Instead, [*name of plaintiff*] must have reasonably believed that [*name of defendant*]'s policies violated federal, state, or local statutes, rules, or regulations.]

[It is not [*name of plaintiff*]'s motivation for [his/her/*nonbinary pronoun*] disclosure, but only the content of that disclosure, that determines whether the disclosure is protected.]

[A disclosure is protected even though disclosing the information may be part of [*name of plaintiff*]'s job duties.]

New December 2012; Revised June 2013, December 2013; Revoked June 2014; Restored and Revised December 2014; Renumbered from CACI No. 2730 and Revised June 2015; Revised June 2016, November 2019, May 2020

Directions for Use

The whistleblower protection statute of the Labor Code prohibits retaliation against an employee who, or whose family member, discloses information about, or refuses to participate in, an illegal activity. (Lab. Code, § 1102.5(b), (c), (h).) Liability may be predicated on retaliation by "any person acting on behalf of the employer." (Lab. Code, § 1102.5(a)–(d).) Select any of the optional paragraphs as appropriate to the facts of the case. For claims under Labor Code section 1102.5(c), the plaintiff must show that the activity in question actually would result in a violation of or noncompliance with a statute, rule, or regulation, which is a legal determination that the court is required to make. (*Nejadian v. County of Los Angeles* (2019) 40 Cal.App.5th 703, 719 [253 Cal.Rptr.3d 404].)

Modifications to the instruction may be required if liability is predicated on an agency theory and the agent is also a defendant. Modifications will also be required if the retaliation is against an employee whose family member engaged in the protected activity.

Select the first option for elements 2 and 3 for claims based on actual disclosure of information or a belief that plaintiff disclosed or might disclose information. (Cf. *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648–649 [163 Cal.Rptr.3d 392] [under prior version of statute, no liability for anticipatory or preemptive retaliation based on fear that plaintiff might file a complaint in the future].) Select the second options for providing information to or testifying before a public body conducting an investigation, hearing, or inquiry. Select the third options for refusal to participate in an unlawful activity, and instruct the jury that the court has made the determination that the specified activity would have been unlawful. ~~In the first option for element 2, choose "might disclose" if the allegation is that the employer believed that the employee might disclose the information in the future. (Cf. *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648–649 [163 Cal.Rptr.3d 392] [under prior version of statute, no liability for anticipatory or preemptive retaliation based on fear that plaintiff might file a complaint in the future].)~~

It has been held that a report of publicly known facts is not a protected disclosure. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858 [136 Cal.Rptr.3d 259].) Another court, however, has held that protection is not necessarily limited to the first public employee to report unlawful acts to the employer. (*Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548−1553 [176 Cal.Rptr.3d 268]; see Lab. Code, § 1102.5(b), (e).)

"Adverse employment action" is viewed the same as it is under the Fair Employment and Housing Act. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387 [37 Cal.Rptr.3d 113]; see CACI No. 2505, *Retaliation—Essential Factual Elements.*) Element 4 may be modified to allege constructive discharge or adverse acts that might not be obviously prejudicial. See CACI No. 2509, *"Adverse Employment Action" Explained,* and CACI No. 2510, *"Constructive Discharge" Explained,* for instructions that may be adapted for use with this instruction.

The employee must demonstrate by a preponderance of evidence that a protected activity was a contributing factor in the adverse action against the employee. The employer may then attempt to prove by clear and convincing evidence that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. (See Lab. Code, § 1102.6; CACI No. 4604, *Affirmative Defense—Same Decision*.)

Sources and Authority

- Retaliation Against Whistleblower Prohibited. Labor Code section 1102.5.
- Affirmative Defense: Same Decision. Labor Code section 1102.6.
- "The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. [¶] We are concerned here with the first element of a section 1102.5(b) retaliation claim, establishing a prima facie case of retaliation. To do that, a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*Patten, supra,* 134 Cal.App.4th at p. 1384, internal citations omitted.)
- "In order to prove a claim under section 1102.5(b), the plaintiff must establish a prima facie case of retaliation. It is well-established that such a prima facie case includes proof of the plaintiff's employment status." (*Bennett v. Rancho California Water Dist.* (2019) 35 Cal.App.5th 908, 921 [248 Cal.Rptr.3d 21, 31], internal citations omitted.)
- "In 1984, our Legislature provided 'whistle-blower' protection in section 1102.5, subdivision (b), stating that an employer may not retaliate against an employee for disclosing a violation of state or federal regulation to a governmental or law enforcement agency. This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. Section 1102.5, subdivision (b), concerns employees who report to public agencies. It does not protect plaintiff, who reported his suspicions directly to his employer.

Nonetheless, it does show the Legislature's interest in encouraging employees to report workplace activity that may violate important public policies that the Legislature has stated. The state's whistle-blower statute includes administrative regulations as a policy source for reporting an employer's wrongful acts and grants employees protection against retaliatory termination. Thus, our Legislature believes that fundamental public policies embodied in regulations are sufficiently important to justify encouraging employees to challenge employers who ignore those policies." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76–77 [78 Cal.Rptr.2d 16, 960 P.2d 1046].)

- "[T]he purpose of … section 1102.5(b) 'is to ' "encourag[e] workplace whistle-blowers to report unlawful acts without fearing retaliation." ' " (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 923 [180 Cal.Rptr.3d 359].)

- "Once it is determined that the activity would result in a violation or noncompliance with a statute, rule, or regulation, the jury must then determine whether the plaintiff refused to participate in that activity and, if so, whether that refusal was a contributing factor in the defendant's decision to impose an adverse employment action on the plaintiff." (*Nejadian, supra,* 40 Cal.App.5th at p. 719.)

- "As a general proposition, we conclude the court could properly craft instructions in conformity with law developed in federal cases interpreting the federal whistleblower statute. As the court acknowledged, it was not bound by such federal interpretations. Nevertheless, the court could properly conclude that the jury required guidance as to what did and did not constitute 'disclosing information' or a 'protected disclosure' under the California statutes." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 847.)

- "The court erred in failing to distinguish between the disclosure of policies that plaintiff believed to be unwise, wasteful, gross misconduct or the like, which are subject to the [debatable differences of opinion concerning policy matters] limitation, and the disclosure of policies that plaintiff reasonably believed violated federal or state statutes, rules, or regulations, which are not subject to this limitation, even if these policies were also claimed to be unwise, wasteful or to constitute gross misconduct." (*Mize-Kurzman, supra,* 202 Cal.App.4th at pp. 852–853.)

- "[I]t is not the *motive* of the asserted whistleblower, but the nature of the communication that determines whether it is covered." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 852, original italics.)

- "[I]f we interpret section 1102.5 to require an employee to go to a different public agency or directly to a law enforcement agency before he or she can be assured of protection from retaliation, we would be encouraging public employees who suspected wrongdoing to do nothing at all. Under the scenario envisioned by the [defendant], if the employee reports his or her suspicions to the agency, … , he or she will *have to suffer any retaliatory* conduct with no legal recourse. If the employee reports suspicions to an outside agency or law enforcement personnel, he or she risks subjecting the agency to negative publicity and loss of public support which could ensue without regard to whether the charges prove to be true. At the same time, a serious rift in the employment relationship will have occurred because the employee did not go through official

channels within the agency which was prepared to investigate the charges. We see no reason to interpret the statute to create such anomalous results." (*Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 243 [101 Cal.Rptr.2d 893].)

- "Labor Code section 1102.5, subdivision (b) protects employee reports of unlawful activity by third parties such as contractors and employees, as well unlawful activity by an employer. In support of our conclusion, we note that an employer may have a financial motive to suppress reports of illegal conduct by employees and contractors that reflect poorly on that employer." (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471 [152 Cal.Rptr.3d 595], internal citation omitted.)

- "We are persuaded that [instructing the jury that reporting publicly known facts is not a protected disclosure] was a proper limitation on what constitutes disclosure protected by California law." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 858.)

- "The report of 'publicly known' information or 'already known' information is distinct from a rule in which only the first employee to report or disclose unlawful conduct is entitled to protection from whistleblower retaliation." (*Hager, supra,* 228 Cal.App.4th at p. 1552.)

- "Protection only to the first employee to disclose unlawful acts would defeat the legislative purpose of protecting workplace whistleblowers, as employees would not come forward to report unlawful conduct for fear that someone else already had done so. The 'first report' rule would discourage whistleblowing. Thus, the [defendant]'s interpretation is a disincentive to report unlawful conduct. We see no such reason to interpret the statute in a manner that would contradict the purpose of the statute." (*Hager, supra,* 228 Cal.App.4th at p. 1550.)

- "Matters such as transferring employees, writing up employees, and counseling employees are personnel matters. 'To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected "whistleblowers" arising from the routine workings and communications of the job site. … ' " (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 [98 Cal.Rptr.3d 281].)

- " 'A wrongful termination action is viable where the employee alleges he [or she] was terminated for reporting illegal activity which could cause harm, not only to the interests of the employer but also to the public.' 'An action brought under the whistleblower statute is inherently such an action.' To preclude a whistleblower from revealing improper conduct by the government based on confidentiality would frustrate the legislative intent underlying the whistleblower statutes. For reasons of public policy, actions against a public entity for claims of discharge from or termination of employment grounded on a whistleblower claim are not barred by governmental immunity." (*Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, 365 [225 Cal.Rptr.3d 321], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 373, 374

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(~~2~~II)-B, ~~*Retaliation Claims:*~~ *Retaliation Under Other Whistleblower Statutes*, ¶ 5:1740 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.42 et seq. (Matthew Bender)

VF-4602. Whistleblower Protection—Affirmative Defense of Same Decision (Lab. Code, §§ 1102.5, 1102.6)

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] [***name of plaintiff***]'s employer?**
____ Yes ____ No

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

2. **Did [[***name of plaintiff***] disclose/[***name of defendant***] believe that [***name of plaintiff***] [had disclosed/might disclose]] to a [government agency/law enforcement agency/person with authority over [***name of plaintiff***]/ [or] an employee with authority to investigate, discover, or correct legal [violations/noncompliance]] that [***specify information disclosed***]?**
____ Yes ____ No

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

[3. **Did [***name of plaintiff***] have reasonable cause to believe that the information disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation]?**
____ Yes ____ No

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

4. **Did [***name of defendant***] [discharge/***specify other adverse action***] [***name of plaintiff***]?**
____ Yes ____ No

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

5. **Was [***name of plaintiff***]'s disclosure of information a contributing factor in [***name of defendant***]'s decision to [discharge/***other adverse action***] [him/her/***nonbinary pronoun***]?**
____ Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Would [*name of defendant***] have [discharged/***specify other adverse action***] [***name of plaintiff***] anyway at that time, for legitimate, independent reasons?**
____ Yes ____ No

If your answer to question 7 is no, then answer question 8. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

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

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

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

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

TOTAL $ _____

Signed: _____

Presiding Juror

Dated: _____

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

New December 2015; Revised December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 4603, *Whistleblower Protection—Essential Factual Elements*, and CACI No. 4604, *Affirmative Defense—Same Decision*.

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.

Questions 2 and 3 may be replaced with one of the other options for elements 2 and 3 in CACI No. 4603. ~~If the third options are used, replace "disclosure of information" in question 5 with "refusal to (*specify*).~~" Omit question 3 entirely, however, if the plaintiff allegedly refused to participate in an activity that would result in a violation or noncompliance with a statute, rule, or regulation. (*Nejadian v. County of Los Angeles* (2019) 40 Cal.App.5th 703, 719 [253 ~~—~~ Cal.Rptr.3d 404 ~~—~~].) ~~If the third options are used,~~ If the plaintiff allegedly refused to participate in an activity that would result in a violation or noncompliance with a statute, rule, or regulation, replace "disclosure of information" in question 5 with "refusal to [~~(~~*specify activity employee refused to participate in and what specific statute, rule, or regulation would be violated by that activity*].~~)~~."

Questions 4 and 5 may be modified to allege constructive discharge. Questions 2 through 5 of CACI No. VF-2408, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy*, should be adapted and included in such a case.

Question 7 presents the employer's affirmative defense that it would have made the same decision anyway for legitimate reasons even though the jury finds that retaliation for whistleblowing was also a contributing factor for the adverse action. Question 7 must be proved by clear and convincing evidence. (See Lab. Code, § 1102.6.)

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

4920. Wrongful Foreclosure—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongly foreclosed on [***name of plaintiff***]'s [home/***specify other real property***]. In order to establish a wrongful foreclosure, [***name of plaintiff***] must prove all of the following:**

1. That [*name of defendant***] caused a foreclosure sale of [***name of plaintiff***]'s [home/***specify other real property***] under a power of sale in a [mortgage/deed of trust];**

2. That this sale was wrongful because [*specify reason(s) supporting illegality, fraud, or willful oppression***];**

3. That [*name of plaintiff***] [tendered all amounts that were due under the loan secured by the [mortgage/deed of trust], but [***name of defendant***] [refused the tender]/[was excused from tendering all amounts that were due under loan secured by the [mortgage/deed of trust]];**

4. [That [*name of plaintiff***] was not materially in breach of any other condition and had not failed to perform any other material requirement of the loan agreement that would otherwise justify the foreclosure;]**

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

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

New May 2020

Directions for Use

Use this instruction for a claim for wrongful foreclosure.

For element 3, use the optional language depending on the circumstances. If plaintiff claims that tender is excused, give CACI No. 4921, *Wrongful Foreclosure—Tender Excused*.

There is a split in authority as to whether the plaintiff must prove element 4. (Compare *Turner v. Seterus, Inc.* (2018) 27 Cal.App.5th 516, 525 [238 Cal.Rptr.3d 528] [stating the elements of a wrongful foreclosure claim without element 4] with *Majd v. Bank of America, N.A.* (2015) 243 Cal.App.4th 1293, 1306-1307 [197 Cal.Rptr.3d 151] [including element 4 as a basic element of a wrongful foreclosure claim].) If the defendant does not claim that the plaintiff is in material breach of some loan condition, however, omit element 4.

Sources and Authority

- Curing Default. Civil Code section 2924c.

- "The elements of the tort of wrongful foreclosure are: ' "(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering" '; and (4) ' "no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the power of sale." ' " (*Majd, supra,* 243 Cal.App.4th at pp. 1306-1307 [197 Cal.Rptr.3d 151].)

- " 'The basic elements of a tort cause of action for wrongful foreclosure track the elements of an equitable cause of action to set aside a foreclosure sale. They are: "(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering." ' " (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1184–1185 [201 Cal.Rptr.3d 390, 421].)

- "Justifications for setting aside a trustee's sale from the reported cases, which satisfy the first element, include the trustee's or the beneficiary's failure to comply with the statutory procedural requirements for the notice or conduct of the sale. Other grounds include proof that (1) the trustee did not have the power to foreclose; (2) the trustor was not in default, no breach had occurred, or the lender had waived the breach; or (3) the deed of trust was void." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 104-105 [134 Cal.Rptr.3d 622], internal citations omitted.)

- "Wrongful foreclosure is a common law tort claim." (*Turner, supra,* 27 Cal.App.5th at p. 525.)

- "[A] trustee or mortgagee may be liable to the trustor or mortgagor for damages sustained where there has been an illegal, fraudulent or wil[l]fully oppressive sale of property under a power of sale contained in a mortgage or deed of trust. [Citations.] This rule of liability is also applicable in California, we believe, upon the basic principle of tort liability declared in the Civil Code that every person is bound by law not to injure the person or property of another or infringe on any of his rights." (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408 [186 Cal.Rptr.3d 625].)

- "To successfully challenge a foreclosure sale based on a procedural irregularity, the plaintiff must show both that there was a failure to comply with the procedural requirements for the foreclosure sale and that the irregularity prejudiced the plaintiff." (*Citrus El Dorado, LLC v. Chicago Title Co.* (2019) 32 Cal.App.5th 943, 950 [244 Cal.Rptr.3d 372].)

- "[M]ere technical violations of the foreclosure process will not give rise to a tort claim; the foreclosure must have been entirely unauthorized on the facts of the case. This is a sound addition." (*Miles, supra,* 236 Cal.App.4th at p. 409.)

- " '[O]nly the entity currently entitled to enforce a debt may foreclose on the mortgage or deed of trust

securing that debt … .' 'It is no mere "procedural nicety," from a contractual point of view, to insist that only those with authority to foreclose on a borrower be permitted to do so.' " (*Sciarratta v. U.S. Bank National Assn*. (2016) 247 Cal.App.4th 552, 562 [202 Cal.Rptr.3d 219], internal citation omitted.)

- "[W]here a mortgagee or trustee makes an unauthorized sale under a power of sale he and his principal are liable to the mortgagor for the value of the property at the time of the sale in excess of the mortgages and liens against said property." (*Miles, supra,* 236 Cal.App.4th at p. 409.)

- "[L]ost equity in the property … is a recoverable item of damages. It is not, however, the *only* recoverable item of damages. Wrongfully foreclosing on someone's home is likely to cause other sorts of damages, such as moving expenses, lost rental income (which plaintiff claims here), and damage to credit. It may also result in emotional distress (which plaintiff also claims here). As is the case in a wrongful eviction cause of action, ' "The recovery includes all consequential damages occasioned by the wrongful eviction (personal injury, including infliction of emotional distress, and property damage) … and, upon a proper showing … , punitive damages." ' " (*Miles, supra,* 236 Cal.App.4th at p. 409.)

- "Civil Code section 2924c thus limits the beneficiary's contractual power of sale by giving the trustor a right to cure a default and reinstate the loan within the stated time, even if the beneficiary does not voluntarily agree. ' "The law does not require plaintiff to tender the purchase price to a trustee who has no right to sell the property at all." ' To adequately plead a cause of action for wrongful foreclosure, all plaintiffs had to allege was that they met their statutory obligation by timely tendering the amount required by Civil Code section 2924c to stop the foreclosure sale, but [defendant] refused that tender and thus allowed the foreclosure sale to go forward when [defendant] should have accepted their tender and canceled the sale. Plaintiffs did so. If [defendant] had accepted the tender, which [defendant's employee] stated was sufficient to cure the default, a rescission of the foreclosure sale and reinstatement of the loan was *mandatory,* and the subsequent sale was without legal basis and void. (*Turner, supra,* 27 Cal.App.5th at pp. 530–531, original italics, internal citations omitted.)

- " '[A] tender is an *offer* of performance ....' Subdivision (a)(1) of Civil Code section 2924c provides in pertinent part that '[w]henever all or a portion of the principal sum of any obligation secured by deed of trust ... has ... been declared due by reason of default in payment of interest or of any installment of principal ..., the trustor ... may pay to the beneficiary ... the entire amount due, at the time payment is tendered ... other than the portion of principal as would not then be due had no default occurred, and thereby cure the default theretofore existing, and thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and deed of trust ... shall be reinstated and shall be and remain in force and effect ....' Here, for purposes of Civil Code section 2924c, [plaintiff] effectively tendered payment of the amount then due when he told [an agent of defendant] that he would like to pay off the entire amount of the default. Actual submission of a payment was not required." (*Turner, supra,* (2018) 27 Cal.App.5th pp. 531–532.)

- "A tender is an unconditional offer to perform an order to extinguish an obligation." (*Crossroads Investors, L.P. v. Federal National Mortgage Association* (2017) 13 Cal.App.5th 757, 783 [222 Cal.Rptr.3d 1, 24].)

- "The third element--tender--requires the trustor to make 'an offer to pay the full amount of the debt for which the property was security.' " (*Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 11 [183 Cal.Rptr.3d 638, 644].)

- " 'A full tender must be *made* to set aside a foreclosure sale, based on equitable principles.' Courts, however, have not required tender when the lender has not yet foreclosed and has allegedly violated laws related to avoiding the necessity for a foreclosure." (*Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1280 [150 Cal.Rptr.3d 673], original italics.)

- "*Pfeifer*[*, supra,* 211 Cal.App.4th 1250] and the other tender cases are inapplicable here because [plaintiff] has not sued to set aside or prevent a foreclosure sale. In the sixth cause of action, he sought to quiet title to the property, which he cannot do without paying the outstanding indebtedness." (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 87 [163 Cal.Rptr.3d 804, 836].)

- "Here, neither the deed of trust nor the governing statutes expressly create a duty on the part of [defendant] to verify that the beneficiary received a valid assignment of the loan or to verify the authority of the person who signed the substitution of trustee. [Plaintiff] has not cited, and we have not discovered, any authority holding a trustee liable for wrongful foreclosure or any other cause of action based on similar purported failures to investigate. To the contrary, the trustee generally 'has no duty to take any action except on the express instructions of the parties or as expressly provided in the deed of trust and the applicable statutes.' " (*Citrus El Dorado, LLC, supra,* 32 Cal.App.5th at pp. 948–949.)

Secondary Sources

4921. Wrongful Foreclosure—Tender Excused

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was not required to tender all amounts that were due under loan secured by the [mortgage/deed of trust]. Tender is excused if [***insert one or more of the following***]:**

a. The underlying debt was not valid because [*specify reason(s)***];**

b. [*Name of plaintiff***] has a claim for money against [***name of defendant***] and the claim, if valid, would completely offset the amount due on the loan secured by the [mortgage/deed of trust];**

c. It would be unfair to require tender of [*name of plaintiff***] because [***specify reason(s)***];**

d. The trust deed is void on its face because [*specify reason(s)***];**

e. The loan was illegal or made in violation of [the loan agreement/an agreement to modify the loan] because [*specify reason(s)***]; or**

f. [*Name of plaintiff***] was not in default and there is no basis for a foreclosure.**

New May 2020

Directions for Use

Give this instruction if the plaintiff alleges that tender is excused in element 3 of CACI No. 4920, *Wrongful Foreclosure—Essential Factual Elements*.

Sources and Authority

- "Courts have applied equitable exceptions to the tender rule, such as: '(1) where the borrower's action attacks the validity of the underlying debt, tender is not required since it would constitute affirmation of the debt; (2) when the person who seeks to set aside the trustee's sale has a counter-claim or set-off against the beneficiary, the tender and the counter-claim offset each other and if the offset is greater than or equal to the amount due, tender is not required; (3) a tender may not be required if it would be 'inequitable' to impose such a condition on the party challenging the sale; … (4) tender is not required where the trustor's attack is based not on principles of equity but on the basis that the trustee's deed is void on its face (such as where the original trustee had been substituted out before the sale occurred)[;] [(5)] when the loan was made in violation of substantive law, or in breach of the loan agreement or an agreement to modify the loan[;] [and (6)] when the borrower is not in default and there is no basis for the foreclosure … .' " (*Turner v. Seterus, Inc.* (2018) 27 Cal.App.5th 516, 525–526 [238 Cal.Rptr.3d 528].)

- "Because [plaintiff] alleges a void as distinguished from a voidable assignment, she is excused from having to allege tender as an element of her wrongful foreclosure cause of action." (*Sciarratta v. U.S.*

Bank National Association (2016) 247 Cal.App.4th 552, 565, fn. 10 [202 Cal.Rptr.3d 219].)

Secondary Sources

Guide for Using Judicial Council of California Civil Jury Instructions

USER GUIDE

USER GUIDE

Ease of understanding by jurors, without sacrificing accuracy, is the primary goal of these Judicial Council instructions. A secondary goal is ease of use by lawyers. This guide provides an introduction to the instructions, explaining conventions and features that will assist in the use of both the print and electronic editions.

Jury Instructions as a Statement of the Law: While jury instructions are not a primary source of the law, they are a statement or compendium of the law, a secondary source. That the instructions are in plain English does not change their status as an accurate statement of the law.

Instructions Approved by Rule of Court: Rule 2.1050 of the California Rules of Court provides: "The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California … The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law … Use of the Judicial Council instructions is strongly encouraged."

Absence of Instruction: The fact that there is no CACI instruction on a claim, defense, rule, or other situation does not indicate that no instruction would ever be appropriate.

Using the Instructions

Revision Dates: The original date of approval and all revision dates of each instruction are presented. An instruction is considered as having been revised if there is a nontechnical change to the title, instruction text, or Directions for Use. Additions or changes to the Sources and Authority and Secondary Sources do not generate a new revision date.

Directions for Use: The instructions contain Directions for Use. The directions alert the user to special circumstances involving the instruction and may include references to other instructions that should or should not be used. In some cases the directions include suggestions for modifications or for additional instructions that may be required. Before using any instruction, reference should be made to the Directions for Use.

Sources and Authority: Each instruction sets forth the primary sources that present the basic legal principles that support the instruction. Applicable statutes are listed along with quoted material from cases that pertain to the subject matter of the instruction. Authorities are included to support the text of the instruction, the burden of proof, and matters of law and of fact.

Cases included in the Sources and Authority should be treated as a digest of relevant citations. They are not meant to provide a complete analysis of the legal subject of the instruction. Nor does the inclusion of an excerpt necessarily mean that the committee views it as binding authority. Rather, they provide a starting point for further legal research on the subject. The standard is that the committee believes that the excerpt would be of interest and relevant to CACI users.

Secondary Sources are also provided for treatises and practice guides from a variety of legal

publishers.

Instructions for the Common Case: These instructions were drafted for the common type of case and can be used as drafted in most cases. When unique or complex circumstances prevail, users will have to adapt the instructions to the particular case.

Multiple Parties: Because jurors more easily understand instructions that refer to parties by name rather than by legal terms such as "plaintiff" and "defendant," the instructions provide for insertion of names. For simplicity of presentation, the instructions use single party plaintiffs and defendants as examples. If a case involves multiple parties or cross-complaints, the user will usually need to modify the parties in the instructions. Rather than naming a number of parties in each place calling for names, the user may consider putting the names of all applicable parties in the beginning and thereafter identifying them as "plaintiffs," "defendants," "cross-complaints," etc. Different instructions often apply to different parties. The user should only include the parties to whom each instruction applies.

Personal Pronouns: Many CACI instructions include an option to insert the personal pronouns "he/she/*nonbinary pronoun*," "his/her/*nonbinary pronoun*," or "him/her/*nonbinary pronoun*." ~~The committee does not intend these options to be limiting.~~ It is the policy of the State of California that intersex, transgender, and nonbinary people are entitled to full legal recognition and equal treatment under the law. In accordance with this policy, attorneys and courts should take affirmative steps to ensure that they are using ~~litigants'~~ individuals' ~~preferred~~ correct personal pronouns. Although the advisory committee acknowledges a trend for the use of "they," "their," and "them" as singular personal pronouns, the committee also recognizes these same pronouns have plural denotations with the potential to confuse jurors. For clarity in the jury instructions, the committee recommends using an individual's name rather than a personal nonbinary pronoun (such as "they") if the pronoun's use could result in confusion.

Reference to "Harm" in Place of "Damage" or "Injury": In many of the instructions, the word harm is used in place of damage, injury, or other similar words. The drafters of the instructions felt that this word was clearer to jurors.

Substantial Factor: The instructions frequently use the term "substantial factor" to state the element of causation, rather than referring to "cause" and then defining that term in a separate instruction as a "substantial factor." An instruction that defines "substantial factor" is located in the Negligence series. The use of the instruction is not intended to be limited to cases involving negligence.

Listing of Elements and Factors: For ease of understanding, elements of causes of action or affirmative defenses are listed by numbers (*e.g.*, 1, 2, 3) and factors to be considered by jurors in their deliberations are listed by letters (*e.g.*, a, b, c).

Uncontested Elements: Although some elements may be the subject of a stipulation that the element has been proven, the instruction should set forth all of the elements and indicate those that are deemed to have been proven by stipulation of the parties. Omitting uncontested elements may leave the jury with an incomplete understanding of the cause of action and the plaintiff's full burden of proof. It is better to include all the elements and then indicate the parties have agreed that one or more of them has been established and need not be decided by the jury. One possible approach is as follows:

To establish this claim, [plaintiff] must prove all of the following:

1. That [plaintiff] and [defendant] entered into a contract (which is not disputed in this case);

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

3. That all conditions required for [defendant]'s performance had occurred (which is also not disputed in this case).

Irrelevant Factors: Factors are matters that the jury might consider in determining whether a party's burden of proof on the elements has been met. A list of possible factors may include some that have no relevance to the case and on which no evidence was presented. These irrelevant factors may safely be omitted from the instruction.

Burdens of Proof: The applicable burden of proof is included within each instruction explaining a cause of action or affirmative defense. The drafters felt that placing the burden of proof in that position provided a clearer explanation for the jurors.

Affirmative Defenses: For ease of understanding by users, all instructions explaining affirmative defenses use the term "affirmative defense" in the title.

Titles and Definitions

Titles of Instructions: Titles to instructions are directed to lawyers and sometimes use words and phrases not used in the instructions themselves. Since the title is not a part of the instruction, the titles may be removed before presentation to the jury.

Definitions of Legal Terms: The instructions avoid separate definitions of legal terms whenever possible. Instead, definitions have been incorporated into the language of the instructions. In some instances (*e.g.*, specific statutory definitions) it was not possible to avoid providing a separate definition.

Evidence

Circumstantial Evidence: The words "indirect evidence" have been substituted for the expression "circumstantial evidence." In response to public comment on the subject, however, the drafters added a sentence indicating that indirect evidence is sometimes known as circumstantial evidence.

Preponderance of the Evidence: To simplify the instructions' language, the drafters avoided the phrase preponderance of the evidence and the verb preponderate. The instructions substitute in place of that phrase reference to evidence that is "more likely to be true than not true."

Using Verdict Forms

Verdict Forms are Models: A large selection of special verdict forms accompanies the instructions. Users of the forms must bear in mind that these are models only. Rarely can they be used without modifications to fit the circumstances of a particular case.

Purpose of Verdict Forms: The special verdict forms generally track the elements of the applicable cause of action. Their purpose is to obtain the jury's finding on the elements defined in the instructions. "The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law." (Code Civ. Proc., § 624; *see Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285 [73 Cal.Rptr.2d 596].) Modifications made to the instructions in particular cases ordinarily will require corresponding modifications to the special verdict form.

Multiple Parties: The verdict forms have been written to address one plaintiff against one defendant. In nearly all cases involving multiple parties, the issues and the evidence will be such that the jury could reach different results for different parties. The liability of each defendant should always be evaluated individually, and the damages to be awarded to each plaintiff must usually be determined separately. Therefore, separate special verdicts should usually be prepared for each plaintiff with regard to each defendant. In some cases, the facts may be sufficiently simple to include multiple parties in the same verdict form, but if this is done, the transitional language from one question to another must be modified to account for all the different possibilities of yes and no answers for the various parties.

Multiple Causes of Action: The verdict forms are self-contained for a particular cause of action. When multiple causes of action are being submitted to the jury, it may be better to combine the verdict forms and eliminate duplication.

Modifications as Required by Circumstances: The verdict forms must be modified as required by the circumstances. It is necessary to determine whether any lesser or greater specificity is appropriate. The question in special verdict forms for plaintiff's damages provides an illustration. Consistent with the jury instructions, the question asks the jury to determine separately the amounts of past and future economic loss, and of past and future noneconomic loss. These four choices are included in brackets. In some cases it may be unnecessary to distinguish between past and future losses. In others there may be no claim for either economic or noneconomic damages. In some cases the court may wish to eliminate the terms "economic loss" and "noneconomic loss" from both the instructions and the verdict form. Without defining those terms, the court may prefer simply to ask the jury to determine the appropriate amounts for the various components of the losses without categorizing them for the jury as economic or noneconomic. The court can fix liability as joint or several under Civil Code sections 1431 and 1431.2, based on the verdicts. A more itemized breakdown of damages may be appropriate if the court is concerned about the sufficiency of the evidence supporting a particular component of damages. Appropriate special verdicts are preferred when periodic payment schedules may be required by Code of Civil Procedure section 667.7. (*Gorman v. Leftwich* (1990) 218 Cal.App.3d 141, 148–150 [266 Cal. Rptr. 671].)

May ~~2019~~2020

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

ITC CACI20-01
Civil Jury Instructions - CACI
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
N/A	Joshua Ingram, Rancho Cordova	[Comment received from private citizen that was unrelated to civil jury instructions.]	No response required.
113. *Bias*	SacLEGAL by Lexi P. Howard, Sacramento	"We agree with the addition of 'gender identity' and 'gender expression' throughout."	No response required.
		"We agree with the changes in places that revise 'him or her' or 'he or she' to either 'their' or 'the homeowner's' or another noun that describes the person. (See also changes to Jury Instructions 1305, 2540, 3053, and 4575)"	Nonsubstantive changes like these are being made throughout CACI.
118. *Personal Pronouns*	Association of Southern California Defense Counsel by Lisa Perrochet, Burbank	New CACI 118 offers a useful template for counsel and courts to use when addressing questions that may arise concerning pronoun usage. We offer one suggestion, however, which would help trial lawyers—like those who are ASCDC's members—when customizing jury instructions. Instead of instructions and verdict forms that refer to "[him/her/nonbinary pronoun/it]," or "[he/she/nonbinary pronoun]," or "[his/her/nonbinary pronoun/its]," they could instead refer simply to "[pronoun]." The proposed Directions for Use accompanying CACI 118 explains that, throughout CACI, the "instructions have been expanded to include "nonbinary pronoun" to indicate that personal pronoun choices may be made. The suggestion to use party names where to do so would foster clarity is a good one, but the proposal to expand the already cumbersome bracketed selections does not similarly foster clarity. If anything, it makes it somewhat more difficult as a practical matter for those who wish to "search and replace" to substitute the appropriate pronoun. Using "[pronoun]" instead should not cause any confusion, and will streamline the CACI text in a way that makes it easier to read and modify. Moreover, the proposed change would have the salutary effect of avoiding the placement throughout of 'he' before "she" in each option, which is a default convention that some might say is not supported by the rationale underlying the proposed revisions. Although it seems highly unlikely that users would have difficulty selecting the	The committee notes the commenter's support for the substance of instruction 118. With respect to the commenter's suggestion to offer only [pronoun] without any further information, the committee concluded that this option would not assist users in making the appropriate personal pronoun selections, and that eliminating personal pronoun brackets may affect the way pronouns are generated in automated software. The committee appreciates the commenter's concern about the work required to find and replace pronouns in each instruction and verdict form, but the committee is not persuaded that the proposed alternatives would improve the situation. The committee also acknowledges that the sequence of personal pronouns may be anachronistic. However, given the overwhelming support for the change, the committee favors an incremental change to the commenter's alternative.

Instruction(s)	Commenter	Comment	Committee Response
		grammatically correct pronoun without prompts, any concerns the Committee might have on that score could be remedied by inserting "[subjective pronoun]," "[objective pronoun]" and "[possessive pronoun]." Also, if the Committee wishes to capture the idea of using party names as an alternative, it could substitute "[pronoun/name]" throughout. The Association does not recommend these alternatives, because "[pronoun]" alone should suffice. But the alternatives would be preferable to the proposal that is out for comment—and indeed would be preferable to the formulations as they appear in CACI as currently framed.	Adding *nonbinary pronoun* in each bracket is a uniform change throughout CACI's two volumes, which are comprised of over 1,000 instructions. And the committee recognizes that not all CACI users are sophisticated grammarians, so simplifying all brackets to [pronoun] would leave too much room for error.
	Bruce Greenlee	"Excellent"	No response required.
	Legal Aid Association of California (LAAC) by Salena Copeland, Executive Director, Oakland	By recognizing the pronouns of non-binary, transgender, and gender nonconforming people in the court system, the Judicial Council is both abiding by California law (Gender Recognition Act of 2019) and making the choice to ensure equitable access and the removal of discriminatory barriers for all. Our one suggestion is to remove the term "preferred" before "personal pronouns" in accordance with the now-common practice to recognize pronouns as not just a "preference." California here takes an important affirmative step to ensure that attorneys and courts are using the appropriate pronouns. Thank you again for this opportunity to comment, and your efforts to ensure the California court system is an inclusive, accessible place for all.	The committee acknowledges LAAC's support for these changes. See response to SacLEGAL's comment, below, with respect to use of the word *preferred*.
	SacLEGAL by Lexi P. Howard, Sacramento	"It is not clear to us what problem this suggested revision would resolve, where this would result in the court highlighting for the jury that someone involved in the case has a particular gender, gender identity, or gender expression. If 'they' is the personal pronoun used by the person, we agree that 'they' should be used unless it is confusing, in which case the person's name should be used. While we appreciate the intent of the instruction, given the possibility of confusion, and the disparate treatment that may result depending on a variety of factors, including the geographic area or jury composition, we respectfully suggest	The committee appreciates the concerns raised by the commenter, and has made revisions as suggested to the instruction. The instruction will no longer highlight a person's gender or gender identity. The Directions for Use will advise courts that they should consult with the individual(s) if possible.

Instruction(s)	Commenter	Comment	Committee Response
		that such an instruction should be given only in very limited circumstances, where there is a valid reason that can be clearly elucidated that it necessary to raise gender with the jury. The mere fact that an individual is nonbinary, nonconforming, etc. should not generally suffice to require the instruction to be given. We suggest that the Directions to the instruction more clearly indicate to the court the limited circumstances when the instruction should be given. As the California Legislature stated in passing the Gender Recognition Act, 'gender identification is fundamentally personal.' For that reason, we also suggest that, where possible, the court should consult with not only the attorneys in the case but also with the individual(s) whose pronouns are being discussed to ensure the court acts in a way that protects the individual's dignity and privacy. Further to this, we recommend the following changes, which we think would accomplish the goal without drawing undue attention to identifying the details of the person's gender/gender identity/gender expression. Recommended additions are underscored, deletions are in strikethrough: **One of the [parties/witnesses/attorneys** */specify other participant in the case*] **in this case <u>uses the personal pronouns of [</u>***<u>specify the person's pronouns</u>*<u>]</u> ~~**identifies as [gender nonbinary/gender nonconforming/gender fluid]**~~**. You may hear the judge and attorneys refer to [***name of person***] using the pronouns [***specify the person's ~~preferred~~ pronouns***].**"	

Instruction(s)	Commenter	Comment	Committee Response
		"With regard to the use of the term 'preferred personal pronouns' or 'preferred pronouns', we agree that the use of a person's personal pronouns is very important. However, we are concerned that as used here, the word 'preferred' could result in a misunderstanding about the use of the person's pronouns as something that that person would 'prefer', or even that using the correct personal pronoun is optional. For this reason, we recommend that where the word 'preferred' is used, it be stricken, and replaced with only 'personal pronouns' or 'pronouns'. For similar reasons, where an instruction refers to an individual's gender identity, we suggest any instruction or comment state, for example, that the individual 'is gender nonbinary,' rather than 'identifies as gender nonbinary.' "	The committee has revised the instruction to eliminate use of the word *preferred* and the concept of gender identity.
118. *Personal Pronouns* and User Guide	Legal Aid Association of California (LAAC) by Salena Copeland, Executive Director, Oakland	Ensuring an inclusive and accessible civil justice system comes down to the fine procedural details, including civil jury instructions. We would like to commend the Judicial Council for additions and modifications to the civil jury instructions regarding personal pronouns. Specifically, we write in support of the changes to the "Personal Pronouns" section of the "User Guide" to the instructions as well as the addition of section 118, regarding "Personal Pronouns."	The committee acknowledges LAAC's support for these changes.
420. *Negligence per se: Rebuttal of the Presumption of Negligence—Violation Excused*	American Property Casualty Insurers Association by Denneile Ritter Assistant Vice President, Sacramento	A proposed revision to the Sources and Authority section of this jury instruction is a detailed reference to the Restatement Second of Torts. We respectfully submit that this reference should be moved from Sources and Authority to the Secondary Sources section as a restatement is neither case law nor statute.	CACI treats Restatements as authoritative (as do most courts) and includes them in its Sources and Authority. (See, e.g., CACI Nos. 307, 401, 908, 4408.)
	Association of Southern California	We offer conditional support for the Advisory Committee's proposed revision to CACI 420, 'Negligence per se: Rebuttal of the Presumption of Negligence—Violation Excused.'	The committee notes the commenter's conditional support. See responses

Instruction(s)	Commenter	Comment	Committee Response
	Defense Counsel (ASCDC) by Mark A. Kressel, Horvitz & Levy LLP, Burbank		below to ASCDC's substantive comments.
		The current version of CACI 420 refers to these lettered bases as 'subparagraphs,' but the proposed revision aptly refers to them as 'factors.' The revision further clarifies that it is the party who claims the violation was excused who bears the burden to prove the elements of that defense This is a salutary revision because it guides the parties and the jury on who bears the burden of proof. The current version of CACI 420 lacks that guidance	No response required.
		"The proposed revision also removes the word 'or' from all but the second-to-last factor. Although the current version's use of "or" after every one of the factors reminds jurors that the party need prove only one of the factors to prove that the violation of the law is excused, the proposed revision is more consistent with proper grammatical convention and the structure of many other CACI instructions. Counsel may highlight for the jury the disjunctive nature of the applicable factors during closing argument."	For clarity, the committee has restored the "or" after each factor.
		ASCDC's concern lies with the discussion in the Sources and Authorities regarding factor (b), which provides that a violation of a law is excused if, "[d]espite using reasonable care, [name of plaintiff/name of defendant] was not able to obey the law." Revisions to the proposed fourth bulleted summary of authority along these lines would provide helpful clarification: • Where a party invokes the excuse set forth in factor (b), "[a]An excuse instruction is improper unless special circumstances exist." (*Baker-Smith*, supra, 37 Cal.App.5th at p. 345.) Our reasoning is as follows. Of the five factors, factor (b) is unique in that it invokes the concept of reasonable care. Under factor (b), once the party who invokes the negligence per se doctrine against an opponent has demonstrated a violation of law, the opponent charged with the presumption of negligence now has the burden to prove it did use reasonable care but was	Although the suggested language may be helpful to understanding the *Baker-Smith* court's statement concerning factor (b), the format for Sources and Authority are direct quotes. Adding an editorial clarification would not follow that format.

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		nevertheless "not able to obey the law." For this reason, as explained in *Baker-Smith v. Skolnick* (2019) 37 Cal.App.5th 340, 347, and *Casey v. Russell* (1982) 138 Cal.App.3d 379, 385, factor (b) should be used only in special cases where there is evidence from which a jury could find that the party requesting the instruction actually attempted to obey the law or use due care. Without the changes suggested here, some courts may be misled to believe that evidence of "special circumstances" (*Baker-Smith*, *supra*, 37 Cal.App.5th at p. 345) or "unusual circumstances" (*Casey*, supra, 138 Cal.App.3d at p. 384) must exist to give this instruction under any circumstances, regardless of which factors are applicable to a particular case. The requirement of special or unusual circumstances discussed in *Baker-Smith* and *Casey* was addressed to only factor (b), and does not apply to the other factors. In other words, if a party intends to argue that a violation of law was excused because of the party's capacity (factor (a)), because the party faced an emergency not caused by its own misconduct (factor (c)), or because obeying the law would have involved a greater risk of harm to that party or to others (factor (d)), the instruction is appropriate even if there is no evidence of other "special" or "unusual" circumstances. The proposed further revisions to the Sources & Authorities outlined here would make that clear. [footnote omitted]" The Committee's proposed revisions to Sources and Authority include commentary from Baker-Smith and *Casey* regarding the burden of proving "special" or "unusual" circumstances without clarifying that this burden applies only with respect to factor (b). The fourth bulleted summary of authority misleadingly states, "An excuse instruction is improper unless special circumstances exist," citing *Baker-Smith*, *supra*, 37 Cal.App.5th at p. 345. ASCDC generally supports the Committee's proposed revision to CACI 420 but requests that the Committee revise the proposed new fourth bulleted summary of authority as just discussed to avoid confusion."	

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		The committee's proposed revision omits the "37" for the volume number of the official reporter.	The committee has corrected the citation to include the volume number.
	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsberg, Chair, Sacramento	We believe stating "or" after each item in the series is helpful and does not detract from this instruction. It makes it clear to the jury that the list is disjunctive without having to refer back to the introductory sentence or forward to the penultimate item.	For clarity, the committee has restored the "or" after each factor.
		We believe the term "factors" should be reserved for matters for the jury to consider in making a finding, as stated on page 2 of the User Guide. In the Directions for Use, we would refer to (a) through (e) as items, not factors.	The items listed in CACI No. 420 are factors for the jury to consider in determining an excuse. The committee does not view the use here as inconsistent with the User Guide, and does not see a meaningful improvement in identifying them as items, instead of factors, in the Directions for Use.
	Civil Justice Association of California by Jaime Huff, Vice President and Counsel, Public Policy, Sacramento	"The proposed revisions delete 'or' after three rebuttable presumptions of negligence. CJAC recommends restoring each 'or' to emphasize to the jury that the defendant need only prove one of the five excuses." The additional punctuation and second set of brackets proposed to be added around the fourth "[or]" is confusing and should be removed. When listening to the jury instructions, keeping the "or" after each line makes it clear to jurors that each excuse stands on its own, and if proven, is sufficient to rebut the presumption. Each excuse presents a very different legal theory, so the "or" provides a needed break between each.	For clarity, the committee has restored the "or" after each factor.
	Bruce Greenlee	Revise first sentence of the DforU to read: "The party claiming an excuse for a violation of the law has the burden to prove the excuse."	As proposed, the Directions for Use note the shifting burden of proof. The commenter's suggested language addresses only the burden for establishing an excuse. While the suggestion clearly supports CACI No. 420, the committee favors noting both

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			parties' burdens in the Directions for Use.
		I'm having trouble coming up with any scenario when the plaintiff would be the one asserting excuse. If it's because it could be on comparative fault, I don't think that CACI usually makes this distinction. I would just include [name of defendant]. And then note as above in the DforU that it's "the party claiming."	The committee chose to place the party name options in brackets because, for example, a defendant might assert a cross-claim for negligence per se.
		Baker-Smith notes that CACI No. 418 also does not include a burden of proof. While I don't think that either instruction is terribly deficient without a burden of proof, as both are obvious, if you are going to add it to 420, why not add "[name of plaintiff] must prove" to 418.	This comment concerning CACI No. 418 is beyond the scope of the invitation to comment. The committee will consider this suggestion in a future release cycle.
440. *Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*	Bruce Greenlee	"I would revise the sentence in the DforU to read: 'For cases involving the use of deadly force, Penal Code section 835a requires a different instruction.' "	Penal Code section 835a applies only to peace officers. (See Pen. Code, §§ 830–831.7.) The Directions for Use, as proposed, states that limitation. CACI No. 440 addresses the use of force by law enforcement officers who may or may not qualify as peace officers under the Penal Code.
		Is such an instruction under consideration for a future release? If not, I suggest that it should be. I don't think that the statutory change from 'reasonable' to 'necessary' can be accomplished by a modification of 440. Suggest 440A and a new 440B.	The committee will continue to monitor developments in this area and will consider revisions and/or new instructions in future release cycles.
	Tony M. Sain, Esq., Partner Manning & Kass, Ellrod, Ramirez, Trester, LLP, Los Angeles	"The proposed 2020 revisions are a step in the right direction. However, some additional revisions are needed to make the instruction consistent with prevailing law."	See responses to each substantive comment, below.
		Add to factor (d): "In evaluating the reasonableness of the [*name of defendant officer's*] use of force, you may only consider the tactical conduct and decisions that the defendant law enforcement officer(s) made before using force on [*name of plaintiff*] if you find that the pre-force tactical conduct or pre-force tactical decisions by the defendant law enforcement officer(s) unreasonably provoked or caused [*name of plaintiff*]	This comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in a future release cycle.

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		to take a specific action that, in turn, the defendant law enforcement officer(s) asserts was one of the reasons the defendant law enforcement officer(s) subsequently used force on [*name of plaintiff*].]" [Legal authority omitted.]	
		Add "only" to last paragraph of the Directions for Use: "Give optional factor (d) only if…"	This comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in a future release cycle.
		Do not delete the case excerpt from *Hayes* from the Sources and Authority; this guiding instruction for use is still legally applicable and helpful.	The committee has retained citations to *Hayes* in the Directions for Use and in the Sources and Authority. Contrary to the commenter's suggestion, however, the committee has elected to delete the final quote from *Hayes* in the Sources and Authority, not because *Hayes* is no longer applicable, but because the relevance of this excerpt to the instruction is unclear considering recent amendments to Penal Code, § 835a.
		Add to the Sources and Authority: "[A] court should not consider this [pre-shooting conduct] in isolation: it must not "divide plaintiff's cause of action artificially into a series of decisional moments." [citing *Hayes* at pp. 632, 637-638] This would wrongly allow a plaintiff "to litigate each decision in isolation, when each is part of a continuum of circumstances surrounding a single use of deadly force." [ibid.] Therefore, [for a preshooting tactical negligence claim] when the preshooting conduct did not independently injure the plaintiff, a court should consider the preshooting conduct only to determine whether deadly force was reasonable…. Here, the officers' preshooting conduct and use of deadly force were both objectively reasonable under California negligence law. First, the officers' preshooting conduct was reasonable. The officers did not provoke Vos; they instead set up outside and waited for him….	The Sources and Authority are direct quotes from cases. This suggested addition is not a direct quote from *Vos* or any of the other cases identified.

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		Second, the officers' use of deadly force was objectively reasonable because Vos threatened them with a deadly weapon. (*Vos v. City of Newport Beach* (9th Cir. 2018) 892 F.3d 1024, 1028-1034, 1037-1038 [other citations omitted].	
	City and County of San Francisco, Office of the City Attorney by Margaret W. Baumgartner, Deputy City Attorney	"Instruction 440 does not accurately reflect the law regarding negligence liability for peace officers for four reasons: (1) it fails to accurately set forth the circumstances when the Legislature has granted law enforcement the privilege to use force; (2) it misapplies the holding in *Hayes v. County of San Diego*, 57 Cal.4th 622 (2013) to the use of non-deadly force; (3) it misstates an officer's privilege to use reasonable rather than just necessary force; and (4) it prevents a jury from understanding the role of comparative negligence."	See responses to each substantive comment by the Office of the City Attorney, below.
		Instruction 440 should include other circumstances when an officer may use force. Instruction 440's introductory paragraph lists only one of the three circumstances in which the Legislature has granted officers the privilege to use force: to effectuate an arrest or detention. California Penal Code § 835a also grants an officer the authority to use force to overcome resistance or to prevent escape. Although Instruction 440 includes resistance and attempts to escape as factors to consider as part of the reasonableness analysis, the instruction does not state that, as a matter of law, an officer has the right to use reasonable force in those circumstances. Instruction 440 should add those circumstances under which an officer has the legislative authority to use force.	This comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in a future release cycle.
		The Instruction should inform a jury that an officer has no duty to retreat, and should limit reference to pre-force tactical conduct to cases involving the use of deadly force. Instruction 440 compounds the potential for a jury to misunderstand an officer's liability for negligence by: (1) including pre-force tactical conduct as a factor for the jury to consider in all cases, not just deadly force cases; and (2) failing to include Section 835a's statement that an officer has no duty to retreat in the face of threatened or actual resistance. Particularly when read	This comment is beyond the scope of the invitation to comment. The committee will consider these suggestions in future release cycles. The committee notes that factor (d), however, encapsulates the Supreme Court's decision in *Hayes*, and is an optional bracketed factor; the Directions for Use note this.

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		together, this combination of errors creates a high likelihood that a jury will find liability when it does not exist. First, in *Hayes v. County of San Diego*, 57 Cal.4th 622 (2013), the California Supreme Court answered only the question of whether pre-force tactical conduct should be considered in deadly force cases. The Supreme Court held that it did. No court has yet applied *Hayes* to a non-deadly force case alleging negligence. See *Mulligan v. Nicols*, 835 F.3d 983 n.7 (9th Cir. 2016) (noting that *Hayes* is limited to use of deadly force). *Hayes*, on its own terms, applies only to deadly force cases. Yet Instruction 440 specifically applies Hayes to non-deadly force cases. This is also inconsistent with the amendments to Penal Code Section 835a, which create different standards for deadly and non-deadly force. Accordingly, the Committee should revise the instruction to include the words "deadly force" in the instruction. Second, instructing a jury to consider pre-force tactical conduct, without instructing the jury that an officer does not have a duty to retreat, misstates an officer's duty of care. A private citizen may be held liable for continuing to act in a manner that causes foreseeable harm. See *Cabral v. Ralphs Grocery Co.*, 51 Cal.4th 764, 771 (2011) (discussing foreseeability of harm as an element in deciding whether a defendant has a duty of care). But an officer does not have a duty to retreat. Penal Code § 835a. Because an officer has no duty to retreat, an officer may lawfully make tactical decisions that foreseeably will result in using force. Instruction 440 fails to state this fact. By focusing the jury on pre-force tactical conduct as a factor in determining reasonableness, the instruction invites a jury to decide that an officer's "tactical decision" to engage the suspect rather than retreat could be negligent. That is not the law. This concern is not trivial. Negligence claims based on an officer's use of force almost always involve claims that a suspect resisted or tried to escape and that the officer knew his decision to take action would create the need to use force. Instructing the jury to consider pre-	

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		force tactical decisions as an element of the analysis, while failing to instruct that an officer lacks a duty to retreat, fails to accurately state the limitations on an officer's duty to avoid foreseeable harm. The instruction should inform the jury that an officer has no duty to retreat, and that an officer cannot be held liable just based on the officer's tactical decision not to retreat.	
		The Instruction should state that an officer may use objectively reasonable force, not just necessary force. Instruction 440 misstates the standard for assessing an officer's negligence liability for using force. It states that an officer may use only "necessary" force instead of objectively reasonable force as set forth in Section 835a. Specifically, Instruction 440 states that an officer "may use that degree of force *necessary* to accomplish the [arrest/detention]" (emphasis added). But the requirement that an office use only "necessary" force, rather than objectively reasonable force, applies to an officer's use of deadly force only. Section 835a(b) sets forth the general standard for use of force: "any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use **objectively reasonable force** to effect the arrest, to prevent escape, or to overcome resistance." (Emphasis added.) As amended in 2019, Section 835a now creates an exception to the general standard of objectively reasonable force for use of deadly force only, stating that "notwithstanding subdivision (b), a peace officer is justified in using deadly force only when the officer reasonably believes that such force is *necessary*" to accomplish certain goals. (Emphasis added.) Moreover, the Legislature stated its intent that "peace officers use deadly force only when *necessary* in defense of human life." (Emphasis added.) Section 835a thus sets different standards for use of deadly and non-deadly force. The instruction should maintain the different standards set by the Legislature for use of deadly force and non-deadly force.	This comment is beyond the scope of the invitation to comment. The recent amendments to Penal Code section 835a principally concern the use of deadly force, which was added to the Directions for Use. The committee will continue to monitor developments in this area and will consider revisions and/or new instructions in future release cycles. With respect to the general standard for use of force, this instruction has existed since 2016, and has been based on section 835a. The committee will consider whether the Legislature's addition of the modifier *objectively* to section 835a(b)'s reasonable force provision warrants further revision in the next release cycle.

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		Amending Instruction 440 to instruct the jury to consider pre-force tactical conduct in its reasonableness analysis, yet requiring the jury to decide whether the force was "necessary," allows a jury to decide the officer should have avoided acting altogether. That is not the law. Instruction 440 should therefore reflect the Legislature's grant of authority to use objectively reasonable, not just necessary, force, except in deadly force situations.	This comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in future release cycles.
		The Ninth Circuit's Model Instruction on Use of Force does not use the phrase "necessary force," rather, consistently with Penal Code § 835a, references objectively reasonable force.	The committee is not persuaded that it should look to the Ninth Circuit's model instructions, which do not cover excessive force under state negligence law.
		Instruction 440 should reference negligence. Instruction 440, except for the title, never references negligence or uses the phrase "due care." The lack of this touchstone legal concept in the instruction may cause jury confusion when a jury must also consider corollary negligence instructions, such as comparative fault or alternative causation instructions, both of which use the term "negligence." Absent parallel language, jurors may not understand that the instructions work together to address the same legal source of liability.	This comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in a future release cycle.
1100. *Dangerous Condition on Public Property—Essential Factual Elements (Gov. Code, § 835)*	American Property Casualty Insurers Association by Denneile Ritter Assistant Vice President, Sacramento	"The revision to this jury instruction, dealing with claims of being harmed by the dangerous conditions on public property, exchanges the word "injury" for the word "incident" in its listing of elements for a successful claim, i.e. "That the property was in a dangerous condition at the time of the incident injury." Using the word "injury" here in the jury instruction unnecessarily (and to the defendant's disadvantage) presupposes that an injury in fact occurred. Keeping the word "incident" avoids that concern."	The statute uses the word "injury." Government Code, § 835. The jury instruction's terminology was changed from incident to injury to reflect the Legislature's word choice.
	California Lawyers Association,	"We agree with the proposed revisions. Although not encompassed in the proposed revisions, we note that the term 'dangerous condition' appears several times in this instruction.	Because the dangerous condition will not always be a jury issue, the Directions for Use cross-reference

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	Litigation Section, Jury Instructions Committee by Reuben A. Ginsberg, Chair, Sacramento	That term is defined by statute. We believe CACI No. 1102, Definition of "Dangerous Condition,' should always be given with this instruction and would modify the Directions for Use accordingly: '~~See also~~ Give this instruction with CACI No. 1102, Definition of "Dangerous Condition,." ~~and~~ See also CACI No. 1103, Notice.' "	CACI No. 1102 without advising that that instruction must be given with CACI No. 1100.
1102. *Definition of "Dangerous Condition" (Gov. Code, § 830(a))*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair, Sacramento	"The first sentence of the Directions for Use essentially repeats the first sentence of the instruction and does not seem helpful. We believe a more helpful direction would be to give this instruction with CACI No. 1100. Accordingly, we would delete the first sentence and replace it with the following: 'Give this instruction if CACI No. 1100, Dangerous Condition on Public Property—Essential Factual Elements, is given.' "	The Directions for Use note that there is this instruction for conditions on public property, and there is CACI No. 1125, for conditions on adjacent property. Because the dangerous condition will not always be a jury issue, the Directions for Use do not instruct to give this instruction if CACI No. 1100 is given.
	Bruce Greenlee	"Good addition to the DforU. BUT get rid of 'where' used as a conditional. First, it's legalese. Second, 'where' designates a place. It's particularly inappropriate here because the instruction involves a physical location (of the dangerous condition), but the use of 'where' has no reference to any location."	"When" has been substituted for "where."
VF-1100. *Dangerous Condition of Pubic Property*	Civil Justice Association of California by Jaime Huff, Vice President and Counsel, Public Policy, Sacramento	"The proposed revisions replace the word 'incident' with the word 'injury.' CJAC's recommendation is that no change be made to the existing wording. 'Incident' should be retained and 'injury' should be removed: 2. Was the property in a dangerous condition at the time of the incident ~~injury~~? ____ 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.	The statute uses the word "injury." Government Code, § 835. Like CACI No. 1100, the verdict form's terminology was changed to reflect the Legislature's word choice. That legislative choice is not one for the committee to try to improve on.

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		3. Did the dangerous condition create a reasonably foreseeable risk that this kind of <u>incident</u> ~~injury~~ would occur? ____ Yes ____ No Whether there was an injury or the extent of a claimed injury is often in dispute. Using the word "injury" presupposes that an injury in fact did occur and gives the plaintiff an unfair advantage. 'Incident' is a neutral term that is fair to both sides and should be restored."	
VF-1201. *Strict Products Liability—Design Defect—Affirmative Defense—Misuse or Modification*	Orange County Bar Association by Scott B. Garner, President	There does not appear to be any case law to justify changing the language in element 6. Further, the instruction regarding how the trier of fact should act in response to answering questions 5 and 6 could be made more clear.	It was observed that the question in CACI No. VF-1201 flips the substantive instruction, see CACI No. 1204 ("the defendant has the burden to 'prove[] that the benefits of the [product's] design outweigh the risks of the design"). Question 6 asked if the risks of the product's design outweigh the benefits of the design. Because a 'no' answer could result in a vague verdict, the committee rephrased the question to correspond to the case law. (See, e.g., Sources and Authority for CACI No. 1204.) To the extent the transitional instruction is complex, the commenter has not suggested any improvement, and the committee has not conceived of a better formulation.
1305. *Battery by Police Officer*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A.	We agree with the proposed revisions, but we suggest that a CACI instruction be drafted for cases involving use of deadly force because we believe the modifications needed may be extensive.	The committee will consider revisions and new instructions for cases involving use of deadly force in future release cycles.
		Although not encompassed in the proposed revisions, this instruction states the essential factual elements of the cause of action, so we believe the title should include the words "Essential Factual Elements."	The committee has added the suggested language to the title.

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	Ginsberg, Chair, Sacramento		
	Bruce Greenlee	Same point as for 440.	The committee will consider revisions and new instructions for cases involving use of deadly force in future release cycles.
Right of Privacy series, instructions 1811–1814	Bruce Greenlee	"Suggest start numbering with 1830."	The suggestion has been considered and rejected.
1813. *Definition of "Access" (Pen. Code, § 502(b)(1))*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsberg, Chair, Sacramento	"We suggest the following changes for clarity and consistency with Penal Code section 502, subdivision (b)(1): 'The term "access" means ~~that [*name of defendant*] did something~~ to [[gain entry to], [instruct], [cause input to], [cause output from], [cause data processing with], [~~and/~~or] [communicate with]] the logical, arithmetical, or memory function resources of a computer, computer system, or computer network."	To improve clarity, the committee has made both suggested deletions.
	Bruce Greenlee	The various options in the first paragraph should be separated by front slashes (/) not each in brackets.	The brackets have been eliminated to more closely track the statute.
		The "[and/or]" needs clarification. If the user selects more than one option and puts "and," then both options must be present in order to constitute access. That's probably not what the statute envisions; any one of the options constitutes access. Unless there is something unusual about this statute, the "and" should be removed and only "or" should be presented. Assuming that multiple options are possible (an "all that apply" multiple choice), then the "or" should be in roman and in brackets "[or]". When only one of options should be selected ("one only" multiple choice), which is probably not the situation here, then the "or" is italicized "[*or*]".	See response to the comment from the California Lawyers Association, above.

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	Orange County Bar Association by Scott B. Garner, President	At "Directions for Use," third line, it is suggested "the computer" be replaced with the phrase "a computer, computer system, or computer network" in order to be consistent with the language of the Instruction and the Act.	This suggested change has been made to more closely track the statute.
		At "Sources and Authority," it is suggested that the definitions of "computer system" and "computer network" (Penal Code, sections 502(b)(5) and 502(b)(2), respectively), be referenced here, along with "access," as both these terms are incorporated in the Instruction explaining "access" and in the Act's definition of "access."	Those statutory terms are referenced in the Directions for Use in CACI No. 1812, *Comprehensive Computer Data and Access Fraud Act—Essential Factual Elements (Pen. Code, § 502)*, which this instruction cross-references.
1814. *Damages for Investigating Violations of Comprehensive Computer Data and Access Fraud Act (Pen. Code, § 502(e)(1)*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	"We agree with the proposed new instruction and the Directions for Use. In the Sources and Authority, we would strike the reference to punitive damages and Penal Code section 502, subdivision (e)(4). This instruction is for compensatory damages, and the statutory provision on punitive damages is not authority for the instruction."	The citation has been relocated to the Directions for Use as authority for the note concerning the availability of punitive damages.
	Bruce Greenlee	"Same issue with '[and/or]'. If 'and' is selected, then all that precede and follow must be present. Most likely, only one need be at issue."	The suggested change has been made to track the statute.
	Orange County Bar Association by Scott B. Garner, President	The Act allows a plaintiff to recover compensatory damages for expenditures reasonably and necessarily incurred to investigate and verify that a system, network, program, or data was or was not altered, damaged or deleted by a defendant's access (emphasis added). At the first line of the Instruction, the word "whether" is used in the sense of finding "whether or not" there was alteration, damage, or deletion. It is believed this distinction may not be appreciated by a jury which might understand the Instruction to be saying only if an investigation found alteration, damage, or deletion could the plaintiff recover associated expenses. Accordingly, it is suggested that the word "whether"	The bracketed choices have been expanded to include the negative, i.e. was or was not/were or were not.

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		be replaced with "that" and the second line of the Instruction include after the bracketed phrase "[was/were]," the additional bracketed phrase "[was not/were not]."	
		"In a number of violations set forth in subdivision (c), 'access' is not required. The civil remedies of subdivision (e)(1), including compensatory damages for the expense of an investigation, are available for violations of any provision of subdivision (c). At the third line of the Instruction, reference is made to defendant's 'access.' While the word 'access' is used within subdivision (e)(1), it is believed its use could confuse the jury. Accordingly, it is suggested that here, though understood to be a departure from the language of the Act, defendant's 'conduct' should be referenced so as to have application to all violations of subdivision (c)."	The statutory language of subdivision (e)(1) uses the term *access*. The committee agrees that not all violations of subdivision (c) involve access, as that term is defined in the statute, but the committee favored hewing to the language of the damages provision in subdivision (e)(1).
		"At 'Directions for Use,' first paragraph, last line, within the parenthetical, examples are given of the technology or data which may be at issue. One example provided is 'the defendant's data files.' It would seem more likely that it would be plaintiff's data files which would be at issue in a case involving allegations of alteration, damage, or deletion and, accordingly, reflected in an instruction."	The Directions for Use have been revised as suggested.
2511. *Adverse Action Made by Decision Maker Without Animus (Cat's Paw)*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We would strike "In this case," at the beginning of the instruction as superfluous and unnecessary.	The prepositional phrase is used here to distinguish the instruction from the instruction on direct disparate treatment, which is likely to be given with the cat's paw instruction.
		The discriminatory actor in *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95 was a supervisor, and *Reeves* stated the cat's paw rule in terms of a discriminatory supervisor (id. at p. 115). But *Reid v. Google* (2010) 50 Cal.4th 512, 542, later stated the cat's paw rule in terms of a discriminatory "employee," stating that there were circumstances in which "discriminatory remarks by a non-decisionmaking employee can influence a decision by a decisionmaker," and, " 'If [the formal decision maker] acted as the conduit of [an employee's]	The committee believes that the instruction accurately reflects the state of the law. The committee, however, will continue to monitor the developments in this area and consider the suggested revisions in future release cycles.

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		prejudice—his cat's paw—the innocence of [the decision maker] would not spare the company from liability.' " This language and other discussion in *Reid* and the holding in *McGrory v. Applied Signal Tech.* (2013) 212 Cal.App.4th 1510, 1536, suggest that the discriminatory actor influencing the decisionmaker need not be a supervisor to support liability, even if in many cases the discriminatory actor is a supervisor. We therefore suggest changing "supervisor" in the instruction to encompass persons other than a supervisor: ". . . if [name of decision maker] followed a recommendation from or relied on facts provided by a supervisor [or other person] who had [discriminatory/retaliatory] intent." "1. That [name of plaintiff]'s [specify protected activity or attribute] was a substantial motivating reason for [name of supervisor or other person]'s [specify acts of supervisor or other person on which decision maker relied]; and "2. That [name of supervisor or other person]'s [specify acts on which decision maker relief] was a substantial motivating reason for [name of decision maker]'s decision to [discharge/[other adverse employment action]] [name of plaintiff]."	
	Bruce Greenlee	"Good improvement."	No response necessary.
2521C. *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))*	Civil Justice Association of California by Jaime Huff, Vice President and Counsel, Public Policy, Sacramento	In element #2, "actual" should be added immediately before "sexual favoritism" to make the instruction more clear: 2. That there was actual sexual favoritism in the work environment; Without specifying that the sexual favoritism in question had to have in fact occurred, this instruction is vague and could be prejudicial to the defense.	The committee views the suggested change superfluous. Element 2 requires a plaintiff to establish the existence of sexual favoritism in the work environment.
	Bruce Greenlee	Nothing is cited in the DforU or S&A to explain the removal of "widespread." Since a California Supreme Court case, Miller v. Dept of Corrections (2005) 36 Cal.4th 446, 466 requires that the favoritism be widespread (3rd case excerpt in S&A), one would	Government Code section 12923 was added to the instruction's Sources and Authority in July 2019. The substantive change arising from that

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		expect either a new Supreme Court case or a statute that makes this change.	recent legislation was not incorporated into the instruction in the prior release. (See also response to Orange County Bar Association, below.)
	Orange County Bar Association by Scott B. Garner, President	The removal of the element of "widespread sexual favoritism" is not supported by case law or the EEOC. Miller v. Dep't of Corrections (in annotations) provides that "following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish a claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." Miller v. Dep't of Corrections (2005) 36 Cal.4th 446, 466. Removal of the term widespread from the title and instruction as a whole is not in accord with case law and incorrectly removes from juror consideration the concept that widespread sexual favoritism may constitute hostile environment harassment. See EEOC Policy Guidance, N-915.048 at para. C.	Government Code section 12923 provides that "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment."
2522C. *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))*	Civil Justice Association of California by Jaime Huff, Vice President and Counsel, Public Policy, Sacramento	Here also, in element #2, "actual" should be added immediately before "sexual favoritism" for the same reasons stated for 2521C.	See response to CACI No. 2521C, above.
	Bruce Greenlee	[Same comment as 2521C.]	See response to CACI No. 2521C, above.
	Orange County Bar Association by Scott B. Garner, President	[Same comment as 2521C.]	See response to CACI No. 2521C, above.

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2540. *Disability Discrimination—Disparate Treatment—Essential Factual Elements*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We believe the language "either with or without reasonable accommodation for [his/her/nonbinary pronoun] [e.g. condition]" in element 4 should be made optional (i.e. bracketed) because in cases where reasonable accommodation is not at issue this language may confuse the jury.	The committee has determined that the proposed change is preferable to the existing optional bracket for reasonable accommodation. Adding "either with or without" is consistent with case law. (See *Green v. California* (2007) 42 Cal.4th 254, 262 [64 Cal.Rptr.3d 390, 396, 165 P.3d 118, 123] ["[I]n order to establish that a defendant employer has discriminated on the basis of disability in violation of the FEHA, the plaintiff employee bears the burden of proving he or she was able to do the job, with or without reasonable accommodation."].) The change is also more consistent with how the issue may be considered by a jury. In some cases, the jury will have to decide whether a plaintiff was able to perform essential job duties with the plaintiff's individual capabilities (i.e., without an accommodation) or with a reasonable accommodation.
	Civil Justice Association of California by Jaime Huff, Vice President and Counsel, Public Policy, Sacramento	CJAC recommends deleting history references in four places in this instruction, in the introductory paragraph, in element #3, in element #6, and in the summary paragraph, as shown below: [Name of plaintiff] claims that [name of defendant] wrongfully discriminated against [him/her/nonbinary pronoun] based on [his/her/nonbinary pronoun] ~~[history of [a]]~~ [select term to describe basis of limitations, e.g., physical condition]. To establish this claim, [name of plaintiff] must prove all of the following: ***	This suggestion to delete the optional brackets concerning a claim of discrimination based on an individual's history of disability is beyond the scope of the changes that were circulated for public comment, but the committee notes that both the FEHA and the California Code of Regulations define, respectively, "physical disability" and "disability"

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		3. That [name of defendant] knew that [name of plaintiff] had ~~[a history of having] [a]]~~ [e.g., physical condition] [that limited [insert major life activity]]; *** 6. That [name of plaintiff]'s ~~[history of [a]]~~ [e.g., physical condition] was a substantial motivating reason for [name of defendant]'s [decision to [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff]/conduct]; *** [Name of plaintiff] does not need to prove that [name of defendant] held any ill will or animosity toward [him/her/nonbinary pronoun] personally because [he/she/nonbinary pronoun] was [perceived to be] disabled. [On the other hand, if you find that [name of defendant] did hold ill will or animosity toward [name of plaintiff] because he/she/nonbinary pronoun] was [perceived to be] disabled, you may consider this fact, along with all the other evidence, in determining whether [name of plaintiff]'s ~~[history of [a]]~~ [e.g., physical condition] was a substantial motivating reason for [name of defendant]'s [decision to [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff]/conduct].] It is enough to prove that the condition existed, and the defendant knew of the condition. Whether there was a history of the condition is not an essential fact and should not be part of the instruction. It is distracting and unnecessary.	as having a record or history of any specified condition that is known to the employer. Government Code § 12926(m)(3) ["Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part."]; 2 CCR § 11065(d)(4) [" 'Disability' shall be broadly construed to mean and include any of the following definitions: * * * A 'record or history of disability' includes previously having, or being misclassified as having, a record or history of a mental or physical disability or special education health impairment of which the employer or other covered entity is aware."].
	Bruce Greenlee	"With or without reasonable accommodation" is the way that the cause of action is often expressed, including in *Sandell v. Taylor* (first case excerpt in the S&A). But it is not necessary to include "without" in the instruction. The default position for 2540 is that a reasonable accommodation will not be needed. If there is none, then it is not necessary to say "without" in the instruction. If there is a need for an accommodation, then "with" needs to be included and 2541 given.	The committee's proposed revision is consistent with case law. (See also response to California Lawyers Association, above.)

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2545. *Disability Discrimination—Affirmative Defense—Undue Hardship*	Bruce Greenlee	In the DforU, the cross reference to 2561, delete the statute from the 2561 title. CACI does not include the title statutes in cross references. There are other places where statutes have been added to instruction titles. If this is a conscious change of format, I think that it is a bad one. Simplicity is always better.	For consistency with other instructions, the statutory citation in the Directions for Use's cross-reference, which is part of the title of CACI No. 2561, has been deleted from the Directions for Use.
	Orange County Bar Association by Scott B. Garner, President	Agree with changes generally but propose the following modifications in caps: "[Name of defendant] claims that accommodating [name of plaintiff]'s disability would create an undue hardship to the operation of [his/her/nonbinary pronoun/its] business. To succeed on this defense, [name of defendant] must prove that [an/THE] accommodation[s] REQUESTED would create an undue hardship because it would be significantly difficult or expensive	The committee has concluded that the suggestion is not supported by law. As noted in the Directions for Use to CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*, an employee does not need to specifically request reasonable accommodation. (See *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951 ["The employee bears the burden of giving the employer notice of the disability. This notice then triggers the employer's burden to take 'positive steps' to accommodate the employee's limitations."], citations omitted.)
		Propose revising the phrasing of the hardship factors such that they track the statute, Government Code 12926(u): "…, in light of the following factors: (1) The nature and cost of the accommodation needed. (2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility. (3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to	The comment is beyond the scope of the invitation to comment, but the committee notes that the five factors suggested from Government Code 12926 subdivision (u) are encompassed by factors (a)–(g), which are written in plainer terms for jurors.

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		the number of employees, and the number, type, and location of its facilities. (4) The type of operations, including the composition, structure, and functions of the workforce of the entity. (5) The geographic separateness or administrative or fiscal relationship of the facility or facilities."	
		Disagree with adding the reference to *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 733 in the "Directions for Use" section. The *Atkins* case, as cited, does not include a discussion on whether undue hardship is a true affirmative defense or whether the defendant only has the burden of coming forward with evidence of hardship as a way of negating an element of plaintiff's case concerning the reasonableness of an accommodation.	The court in *Atkins* stated, "[Defendant] failed to convince the jury that any hardship was sufficient to make an otherwise reasonable accommodation unreasonable." While this quote does not directly state the issue identified in the Directions for Use, it is support for the unresolved state of the law.
		CACI 2541, following established law, states that one of the elements of an accommodation claim is that the accommodation be "reasonable." This indicates that the reasonableness of an accommodation is separate and distinct from whether an accommodation would create an undue hardship.	The committee agrees that the two concepts—reasonable accommodation and undue hardship— are distinct, but notes that, in the context of disability discrimination claims, they are also related. To the extent the commenter is advocating for adding *reasonable* to CACI No. 2545, the committee does not see value in adding the modifier to the undue hardship instruction.

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2560. *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements (Gov. Code, § 12940(l))*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	Under Government Code section 12940, subdivision (l)(1), it is the employer's burden to show that it has explored reasonable accommodations, rather than the plaintiff's burden to show the opposite. Accordingly, we would delete element 6.	The committee is unclear about how a plaintiff would establish a failure to accommodate claim without element 6. Subdivision (*l*)(1) includes an undue hardship exception to liability, which is defendant's burden, but the committee does not read that provision to eliminate element 6 as an element of a claim. (Cf. *Scotch v. Art Inst. of California* (2009) 173 Cal.App.4th 986, 1009–1010 [stating elements of a failure to accommodate claim in the disability discrimination context].)
	Civil Justice Association of California by Jaime Huff, Vice President and Counsel, Public Policy, Sacramento	In element #6, CJAC recommends deleting "or by another person": 6. [That [name of defendant] did not [explore available reasonable alternatives of accommodating [name of plaintiff], including excusing [name of plaintiff] from duties that conflict with [name of plaintiff]'s religious [belief/observance] or permitting those duties to be performed at another time ~~or by another person~~, or otherwise reasonably accommodate] [name of plaintiff]'s religious [belief/observance];]	The inclusion of the phrase *or by another person* in the instruction is support by law. Government Code section 12940(*l*)(1) says, ". . . or permitting those duties to be performed at another time *or by another person*, . . ."

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		While there are a variety of reasonable workplace accommodations that may be available for an employee's religious beliefs, it is unnecessary to specify that one of these be the provision of another person. Doing so can create the expectation that the employer should have provided a substitute employee as an accommodation. There is no case law cited in favor of this proposed change that would support the notion that a workplace religious accommodation requires the employer to keep another employee or contractor on standby. The instruction as written is sufficiently broad without the inclusion of "or by another person."	
2561. *Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship (Gov. Code, §§ 12940(l)(1), 12926(u))*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	Government Code section 12940, subdivision (l)(1) specifies two reasonable accommodations that the employer must consider: (1) excusing the person from the duties that conflict with the person's religious belief or observance and (2) permitting those duties to be performed at by another person at another time. We believe the instruction should state that the defendant must prove that the defendant considered both (1) and (2), and should not state that it is sufficient if the defendant considered (1), (2), or (3): "To succeed on this defense, [name of defendant] must prove that [he/she/nonbinary pronoun/it] considered reasonable alternative options for accommodating the [religious belief/religious observance], including (1) excusing [name of plaintiff] from duties that conflict with [his/her/nonbinary pronoun] religious belief/religious observance]~~,~~ or (2) permitting those duties to be performed at another time or by another person~~, or (3) [specify other reasonable accommodation]~~."	Government Code section 12940, subdivision (*l*)(1) provides that a defendant must "demonstrate[] that it has explored *any* available reasonable alternative means of accommodating the religious belief or observance, *including* [two specific alternative reasonable accommodations]." Removing option (3), the possibility other reasonable accommodations, would not give effect to all the words in the statute, namely the words *any* and *including*, which indicates that the statute's list is illustrative, not exclusive.
		We would delete the language, "If there is evidence of another reasonable alternative accommodation, include it as a third means of accommodating the plaintiff." in the Directions for Use for the same reasons.	Same as above.

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	Civil Justice Association of California by Jaime Huff, Vice President and Counsel, Public Policy, Sacramento	CJAC recommends striking the phrase "or by another person" in the second paragraph of the instruction and in Directions for Use: * * * "Again, as noted above with respect to CACI 2560, excusing the employee from duties that conflict with her/his beliefs, allowing the duties to be completed at another time, or specifying another type of reasonable accommodation that is acceptable is sufficient."	See response to Civil Justice Association of California's comment on CACI No. 2560, above.
	Orange County Bar Association by Scott B. Garner, President	Agree with changes generally but propose the following underlined revisions such that the phrasing of the hardship factors track the statute, Government Code 12926 (u): "If you decide that [name of defendant] considered but did not adopt [a] reasonable accommodation[s], you must then decide if the accommodation[s] would have created an undue hardship because it would be significantly difficult or expensive, in light of the following factors: (1) The nature and cost of the accommodation needed. (2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility. (3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities. (4) The type of operations, including the composition, structure, and functions of the workforce of the entity. (5) The geographic separateness or administrative or fiscal relationship of the facility or facilities."	The five factors suggested from Government Code 12926 subdivision (u) are encompassed by factors (a)–(g), which are written in plainer terms for jurors.
VF-2506C. *Work Environment Harassment—Sexual Favoritism-*	Orange County Bar Association	"The removal of the element of 'widespread sexual favoritism' is not supported by case law or the EEOC. Miller v. Dep't of Corrections (in annotations) provides that 'following the guidance of the EEOC, and also employing standards adopted in	See response to CACI No. 2521C, above.

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-Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))	by Scott B. Garner, President	our prior cases, we believe that an employee may establish a claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment.' Miller v. Dep't of Corrections (2005) 36 Cal.4th 446, 466. Removal of the term widespread from the title and instruction as a whole is not in accord with case law and incorrectly removes from juror consideration the concept that widespread sexual favoritism may constitute hostile environment harassment. See EEOC Policy Guidance, N-915.048 at para. C."	
VF-2507B. *Work Environment Harassment—Conduct Directed at Others—Individual Defendant (Gov. Code, §§ 12923, 12940(j))*	Orange County Bar Association by Scott B. Garner, President	"Leave term 'widespread' in Directions for use in accordance with Miller v. Dep't of Corrections (2005) 36 Cal.4th 446, 466."	See response to CACI No. 2521C, above.
VF-2507C. *Work Environment Harassment—Sexual Favoritism—Individual Defendant (Gov. Code, §§ 12923, 12940(j))*	Orange County Bar Association by Scott B. Garner, President	"Leave term 'widespread' in title and directions for use in accordance with Miller v. Dep't of Corrections (2005) 36 Cal.4th 446, 466."	See response to CACI No. 2521C, above.
VF-2508. *Disability Discrimination—Disparate Treatment*	Bruce Greenlee	For the same reason as CACI No. 2540, the proposed changes to VF-2508 are unnecessary.	To clarify VF-2508, the committee favored bifurcating the question concerning a plaintiff's ability to perform essential job functions, instead of *with reasonable accommodation* bracketed for addition

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			in only certain cases. This formulation avoids asking about a reasonable accommodation if one was not even necessary. Even in cases involving an accommodation, a jury could still find that the plaintiff could perform the work *without* an accommodation. The proposed change permits the jury to make that determination, rather than only asking about ability to perform with accommodation when an accommodation is at issue.
2705. *Affirmative Defense to Labor Code, Unemployment Insurance Code, and Wage Order Violations—Plaintiff Was Not Defendant's Employee (Lab. Code, § 2750.3)*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair, Sacramento	"We question whether there is a right to jury trial in actions under the Unemployment Insurance Code. If not, we suggest deleting "Unemployment Insurance Code" from the title, instruction, and Directions for Use."	Labor Code section 2750.3 expressly includes claims under the Unemployment Insurance Code. CACI No. 2705's inclusion of the Unemployment Insurance Code is not meant to decide the issue of whether such claims are for a jury.
		"This instruction pertains only to issues relating to independent contractor status and not to any other 'dispute as to whether the defendant was the plaintiff's employer.' Those disputes can arise in other contexts, such as joint employers. We suggest modifying the Directions for Use to clarify this point and to note the statutory presumption of employment status: 'This instruction may be needed if ~~there is a dispute as to whether~~ the defendant claims that the plaintiff is an independent contractor and not the defendant's employee. Under ~~was the plaintiff's employer for purposes of a claim covered by~~ the Labor Code, the Unemployment Insurance Code, ~~or a~~ and the California wage orders, any person providing services or labor for remuneration is presumptively an employee. . . .' "	The committee believes that the Directions for Use fairly states the context for this instruction. The sentence following the suggested changes advises users that, "The defendant has the burden to prove independent contractor status."
		"Because Labor Code section 2750.3 lists numerous exceptions and potential exceptions to the "ABC" test, we believe the Directions for Use should note that the instruction may not	The committee has added a statement to the Directions for Use in line with the commenter's suggestion and a

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		always be appropriate when the independent contractor issue is raised. We suggest adding the following as a second paragraph: 'This instruction may not be appropriate in cases where the defendant claims independent contractor status based on one of the exceptions listed in Labor Code section 2750.3, subdivisions (b) through (h).' "	cross-reference to the instruction on employment status under the *Borello* test, CACI No. 3704.
		Although not encompassed in the proposed revisions, we would modify the following language in the Directions for Use for greater clarity: "~~The rule on employment status has been that if there are disputed facts, it's for the jury to decide whether one is an employee or an independent contractor.~~ The trial court's determination of employee or independent contractor status is one of fact if it depends upon the resolution of disputed evidence or inferences . . . . *(S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349 [256 Cal.Rptr. 543, 769 P.2d 399] (*Borello*); *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 16-17 [64 Cal.Rptr.3d 327] (*Estrada*).) The question is one of law only if the evidence is undisputed. (*Borello*, at p. 341.)" (*Espejo v. The Copley Press* (2017) 13 Cal.App.5th 329, 342-343 [221 Cal.Rptr.3d 1].) ~~However, on disputed facts, the court may decide that the relationship is employment as a matter of law. (*Dynamex*, *supra*, 4 Cal.5th at p. 963.)~~"	The suggestion relates more to CACI No. 3704, the instruction based on the *Borello* test, which is beyond the scope of the invitation to comment. The committee will continue to monitor developments in this area and consider revisions in future release cycles.
	Orange County Bar Association by Scott B. Garner, President	Generally agree with changes. However, citation in "Sources and Authority" to *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289, 314 should remain as review was denied by the CA Supreme Court on July 11, 2018.	As stated in the User Guide, the purpose of the Sources and Authority is to provide a launching point for further legal research. They are not intended to provide a comprehensive analysis. The committee elected to delete *Curry v. Equilon Enterprises, LLC* from the Sources and Authority, not because it is no longer good law, but because its relevance to the

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			instruction has been diminished by the enactment of Labor Code, § 2750.3.
		Disagree with the proposed deletion of *Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558, 570 as this decision has not been reversed and remains good law.	See response to Orange County Bar Association's similar comment, above.
3020. *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements (42 U.S.C. § 1983)*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	Although not encompassed in the proposed revisions, we believe the language preceding factors (a) through (d) should be written in terms of what the plaintiff has to prove (i.e. excessive force) consistent with the burden of proof stated at the beginning of the instruction and element 2, rather than explain the issue from the perspective of the defendant's position (i.e. when force is not excessive): "Force is not excessive if it is not reasonably necessary under the circumstances."	This comment is beyond the scope of the invitation to comment. The committee will consider these suggestions in a future release cycle.
		In the Sources and Authority, the third and fourth bullet points on page 101 discuss summary judgment, not trial. Those cases provide no authority for this instruction, so we would delete them.	As stated in the User Guide, the purpose of the Sources and Authority is to provide a launching point for further legal research on the subject. The standard for inclusion of case excerpts is that they would be of interest and relevant to CACI users.
	City and County of San Francisco, Office of the City Attorney by Margaret W. Baumgartner, Deputy City Attorney	(1) Instruction 3020 fails to inform the jury that the claim arises under the Fourth Amendment of the Federal Constitution. The instruction never identifies the Fourth Amendment as the source of the plaintiff's claim. If a court gives this instruction and also gives an instruction on, for example, negligence, it will create jury confusion regarding the two different bases of liability. Ensuring clear differentiation on the legal basis of the claim addressed by the instruction will also allow the parties to craft a verdict form that tracks the claims, which may be critical for issues such as attorney fee liability and comparative fault. The instruction should include the federal constitutional basis of liability so as not to create jury confusion when it is given in conjunction with other instructions.	This comment is beyond the scope of the invitation to comment. The committee will consider these suggestions in a future release cycle.
		(2) As with Instruction 440, Instruction 3020 fails to inform the jury of all of the circumstances in which an officer may lawfully	This comment is beyond the scope of the invitation to comment. The

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		use force. Unlike the Ninth Circuit's model jury instruction on use of force liability under 42 U.S.C. §1983, Instruction 3020 does not address all of the reasons an officer may lawfully use force. As set forth above in the comment to Instruction 440, those situations include overcoming resistance, preventing escape, and defense of oneself or others. See 9th Cir. Model Instruction 9.25. Therefore, in addition to the federal constitutional source of liability, the instruction should include all the purposes for which an officer may use force.	committee will consider these suggestions in a future release cycle.
3050. *Retaliation—Essential Factual Elements (42 U.S.C. § 1983)*	City and County of San Francisco, Office of the City Attorney by Margaret W. Baumgartner, Deputy City Attorney	Instruction 3050 applies to a claim of retaliation. A claim of retaliation frequently arises when a plaintiff alleges that an officer arrested the plaintiff in retaliation for the plaintiff's exercise of the plaintiff's First Amendment rights. In 2019, the United States Supreme Court held that a lack of probable cause is an essential element to a retaliatory arrest claim. *Nieves v. Bartlett*, 139 S.Ct. 1715 (2019). We recommend that the Committee include a note to Instruction 3050, stating that if the plaintiff alleges retaliatory arrest, the parties must modify Instruction 3040 to add lack of probable cause as an element of the claim.	This comment is beyond the scope of the invitation to comment. The committee will consider these suggestions in a future release cycle. To alert users to this recent Supreme Court decision, however, the committee has added an excerpt from *Nieves v. Bartlett* to the Sources and Authority.
VF-3511. *Fair Market Value Plus Severance Damages*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	"We support the proposed revisions in concept but believe the verdict form should incorporate the different timing scenarios rather than require modification: '3. What [would have been/will be] the fair market value of the remaining property ~~have been~~ on [*date of valuation*] if the [*name of public entity*]'s proposed project [were/is] completed as planned?' "	The committee considered and rejected several alternative ways of framing Question 3. The committee concluded that the proposed version accurately states the law, and that modification of the model verdict form may be necessary on different facts.
		We would delete the proposed new language in the second paragraph of the Directions for Use for the same reasons.	See response to comment, above.
3704. *Existence of "Employee" Status Disputed*	California Lawyers Association, Litigation	We agree with this proposed new instruction. We would modify the Directions for Use to state that if the plaintiff seeks a penalty the instruction should be modified to require an intentional or reckless violation or willful misconduct.	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle.

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	Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento		
3904A. *Present Cash Value*	American Property Casualty Insurers Association by Denneile Ritter Assistant Vice President, Sacramento	This jury instruction deals with the reduction of future economic damages to their present cash value. Proposed new language in the instruction's second paragraph reads "[defendant] must prove, through expert testimony, the present cash value." The specific reference to proof through expert testimony ignores stipulations agreed to by parties to an action in determining present cash values. Stipulations are mentioned later in the jury instruction but as a mandate on what the jury must consider, not what defendants' may use in meeting their burden. Perhaps unintended, this disjunction in the text brings some confusion to the reading of the jury instruction. Although the instruction's Directions for Use provides some explanation, we believe that the jury instruction itself could be improved by removing the phrase "through expert testimony."	The second and third paragraphs are bracketed. If a stipulation exists, the third paragraph should be given.
		We note that the 2019 Court of Appeal case, *Lewis v. Ukran*, cited as authority for the change in the jury instruction, focused on who bears what burden in reducing future economic damages to present cash values. We respectfully submit that in only a summary fashion does the holding refer to the presentation of expert evidence.	The committee believes that the instruction accurately reflects the state of the law. The committee, however, will continue to monitor the developments in this area and consider revision in future release cycles.
	Association of Southern California Defense Counsel by Steven S. Fleischman, Horvitz &	The proposed changes to the first two paragraphs of CACI No. 3904A appear to be designed to incorporate the holding of *Lewis v. Ukran* (2019) 36 Cal.App.5th 886, 896 (Lewis). *Lewis* appears inconsistent with existing law and is likely to generate further litigation because it fails to take into account controlling authority from the California Supreme Court holding that a plaintiff has the burden of proof to prove damages. (Cassim v. Allstate Ins. Co. (2004) 33 Cal.4th 780, 813 (Cassim) ["as in	The committee is not persuaded that *Lewis* is inconsistent with case law requiring plaintiffs to prove their damages. *Lewis* holds that defendants have the burden to show how to reduce plaintiff's established future damages to present cash value. The committee will continue to monitor the

Instruction(s)	Commenter	Comment	Committee Response
	Levy LLP, Burbank	any tort case, the plaintiff bears the burden of proving by a preponderance of the evidence both the existence and the amount of damages proximately caused by the defendant's tortious acts or omissions" (emphasis added)]; accord, Gorman v. Tassajara Development Corp. (2009) 178 Cal.App.4th 44, 83 (Gorman) [" 'The rule is established that the plaintiff has the burden of proving, with reasonable certainty, the damages actually sustained by him as a result of the defendant's wrongful act, and the extent of such damages must be proved as a fact' "].) Indeed, numerous other CACI instructions squarely place the burden of proving damages on the plaintiff. See, e.g., CACI Nos. 3900, 3901, 3903A, 3903B, 3903C, 3903D, 3903E, 3903F, 3903G, 3903K, 3903L, 3903M, 3903N and 3903O. Cases outside California confirm our belief that Lewis will prove to be controversial. In other jurisdictions that follow the same general rule as California—requiring plaintiffs to prove all aspects of their own damages— numerous cases have placed the burden on plaintiffs to prove the present cash value of future damages. [citations omitted] Under the circumstances, ASCDC suggests that the Committee not make the proposed changes to CACI No. 3904A at this time. In the alternative, the Committee should add citations to Cassim and Gorman to the Sources and Authority to provide a more complete presentation of existing California authority. In addition, we suggest that, if the Committee incorporates the part of *Lewis* that imposes on defendants the burden of presenting evidence on the discount rate for purposes of the jury's present value analysis, the instruction should also reflect plaintiffs' burden of proof under *Lewis* to present evidence on the inflation rate for purposes of present value calculations. (See Lewis, supra, 36 Cal.App.5th at pp. 895-896.)	developments in this area and consider revisions in future release cycles.
3906. *Lost Earnings and Lost Earning Capacity—Jurors*	Bruce Greenlee	In the DforU, change the term "in cases where" to "if."	The committee has made this change.
		The word "lost" should precede "ability to earn money."	For clarity, the committee has added *lost* before "ability to earn money" in both the instruction and the Directions

Instruction(s)	Commenter	Comment	Committee Response
Not to Consider Race, Ethnicity, or Gender (Economic Damage)			for Use, which is consistent with Civil Code section 3361.
4106. *Breach of Fiduciary Duty by Attorney—Essential Factual Elements*	Association of Southern California Defense Counsel by David P. Pruett, Carroll, Kelly, Trotter, Franzen & McBride, Long Beach	The California Supreme Court has recognized just one standard for the determination of causation in tort actions, whether the actions may address claims of negligent, intentional, or fraudulent conduct. The Directions for Use put undue emphasis on outlier language from a Court of Appeal decision, *Knutson v. Foster* (2018) 25 Cal.App.5th 1075, that arises out of unique facts and should not be cited for generally applicable propositions – propositions that are inconsistent with Supreme Court authority. Only one appellate decision, *Knutson v. Foster*, supra, 25 Cal.App.5th 1075, has suggested that a different standard for causation applies to theories of liability asserting intentional or fraudulent conduct as opposed to theories of negligence.	The Supreme Court denied the petition for review on November 27, 2018 (G054247). *Knutson* is, therefore, authority for the proposition that claims for fraud and intentional breach of fiduciary duty, but not professional negligence, against an attorney are governed by the substantial factor test.
		The Directions for Use now propose to add a citation to the Court of Appeal decision in *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, a case that was cited by *Knutson*, but which says nothing about a different standard of causation to be applied in actions alleging intentional misconduct or breach of fiduciary duty in contrast to negligence. The Directions for Use should not cite to *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070 as a case supporting the proposition that a different standard of causation is to be applied in actions alleging intentional misconduct or breach of fiduciary duty in contrast to negligence. *Stanley* does not stand for that proposition. Moreover, that proposition is inconsistent with Supreme Court authority, such that the reference to Knutson v. Foster (2018) 25 CalApp.5th 1075 should be reconsidered, and removed from the Directions for Use.	The committee has deleted the citation to *Stanley v. Richmond*. See comment and response, below, to the California Lawyers Association.

Instruction(s)	Commenter	Comment	Committee Response
	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We would modify the Directions for Use for greater clarity and to make it clear that CACI No. 430 should be given with this instruction: "Give CACI No. 430, *Causation: Substantial Factor*, with this instruction. "The existence of a fiduciary relationship. . . . ~~"Substantial factor causation is the causation standard for an intentional breach of fiduciary duty. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1095 [41 Cal.Rptr.2d 768].) Do not include the optional last sentence of CACI No. 430, *Causation: Substantial Factor*, in a case involving an attorney's intentional or fraudulent breach of duty. If the attorney's breach of duty is negligent, however rather than intentional or fraudulent, the 'but for' ("would have happened anyway") causation standard applicable to legal malpractice (see *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046]) applies. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1093–1094 [236 Cal.Rptr.3d 473].) If so, the optional last sentence of CACI No. 430, *Causation: Substantial Factor*, should be given: "Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct."~~ "The causation standard for an attorney's intentional breach of fiduciary duty differs from that for a negligent breach. If the plaintiff alleges an attorney's intentional breach of duty, do not include the optional last sentence of CACI No. 430, *Causation: Substantial Factor* on 'but for' causation. The 'but for' causation standard does not apply to an intentional breach of fiduciary duty. If the plaintiff alleges an attorney's negligent breach of duty, the 'but for' ('would have happened anyway') causation standard applies. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1093–1094 [236 Cal.Rptr.3d 473]; see *Viner*	To improve clarity, the committee has revised the Directions for Use as suggested.

Instruction(s)	Commenter	Comment	Committee Response
		v. Sweet (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046].) If the plaintiff alleges a negligent breach of duty, give the optional last sentence of CACI No. 430: 'Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.' " "If the plaintiff alleges both negligent breach and intentional or fraudulent breach, the jury must be instructed on both causation standards and it should be made clear which causation standard applies to which claim. "If the harm allegedly caused by the defendant's conduct involves the outcome of a legal claim, the jury should be instructed with CACI No. 601, *Damages for Negligent Handling of Legal Matter*, for the but for standard. (See *Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 928, 933–937 [125 Cal.Rptr.3d 210] [discussing circumstances when a client need not show that they objectively would have obtained a better result in the underlying case in the absence of the attorney's breach (the trial-within-a-trial method)].)" ~~"If both negligent breach and intentional or fraudulent breach are to be presented to the jury in the alternative, the jury must be instructed on both causation standards and it should be made clear which causation standard applies to which claim."~~	
4300. *Introductory Instruction*	Bruce Greenlee	I'm not sure why this one was posted given only change is to add new statute to S&A.	Noted.
	Richard L. Spix, Lake Forest	Add to Paragraph 1: no longer has the right to occupy the property [by subleasing to [*name of subtenant*]] because (*insert claims at issue*). This addition parallels the description of defenses claimed by defendant and without inclusion infers that the plaintiff has nothing to prove.	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle, but notes that this is an introductory instruction in the unlawful detainer series.
4301. *Expiration of Fixed-Term*	Bruce Greenlee	"Revise addition to DforU as follows: For a tenancy of a year or more, the Tenant Protection Act of 2019 requires ;just cause'	Because there are exceptions to and limitations on the applicability of the

Instruction(s)	Commenter	Comment	Committee Response
Tenancy—Essential Factual Elements		before the landlord may terminate the tenancy. (Civ, Code, 1946,2(a); see Civ.Code, 1946.2(b) "just cause" defined.) Therefore, this instruction now may only be used for tenancies of less than a year."	Tenant Protection Act of 2019 and because of its recent enactment, the committee chose to note only the existence of the legislation in the Directions for Use. The committee, however, will continue to monitor the developments in this area and consider revisions in future release cycles.
		And then draft a new instruction for "just cause" termination; maybe two: one for fault and one for no-fault.	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle.
4302. *Termination for Failure to Pay Rent—Essential Factual Elements*	Bruce Greenlee	"Not sure why you didn't note the Act in the DforU here as you did for 4304 and 4308. I would note that 1946.2(b)(1)(A) makes a default in payment of rent just cause."	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle.
4303. *Sufficiency and Service of Notice of Termination for Failure to Pay Rent*	Bruce Greenlee	The citation in the DforU should be to subsections (a), and (b)(1)(A); and maybe then to (c), (d) and (f) for other possible notices.	Because of the breadth of the Tenant Protection Act of 2019 and its recent enactment, the committee decided in favor of citing the new legislation more broadly, rather than directing users to a list of subdivisions. The committee was concerned that specifying subdivisions might suggest an exhaustive list of the applicable subdivisions for a claim.
	Richard L. Spix, Lake Forest	Re: last paragraph: [A notice stating a reasonable estimate of the amount of rent due that is within 20 percent of the amount actually due is reasonable unless [*name of defendant*] proves that it was not reasonable. In determining the reasonableness of the estimate, you may consider whether calculating the amount of rent required information primarily within the knowledge of [*name of defendant*] and whether [*name of defendant*] accurately furnished that information to [*name of plaintiff*].]	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle.

Instruction(s)	Commenter	Comment	Committee Response
		"ARGUMENT: The quoted language is not indented (sic) as applicable only to commercial tenancies. The Judicial Council takes away the factual determination of reasonable estimate by a wholy inappropriate 20% amount. This is a question of fact for the trier of facts. The reasonable estimate available to a commercial landlord only applies where the tenant has the facts needed by an unknowing landlord to calculate the precise amount of rents due. Otherwise, and in a residential setting, the notice to pay rent must state the precise amount of rents due. [citations omitted]."	
4304. *Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements*	Bruce Greenlee	I would note that (b)(1)(B) makes violation of the lease just cause.	The Directions for Use cite to subdivision (b). Because there are exceptions to and limitations on the applicability of the Tenant Protection Act of 2019, the committee chose to note only the existence of the new legislation in the Directions for Use.
4305. *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement*	Bruce Greenlee	The citation in the DforU should be to subsections (a) and (b)(1)(B); and maybe then to (c), (d) and (f) for other possible notices.	Because of the breadth of the Tenant Protection Act of 2019 and its recent enactment, the committee decided in favor of citing the new legislation more broadly, rather than directing users to a list of subdivisions. The committee was concerned that specifying subdivisions might suggest an exhaustive list of the applicable subdivisions for a claim.
4306. *Termination of Month-to-Month Tenancy—Essential Factual Elements*	Bruce Greenlee	"Revise addition to DforU as follows: For a tenancy of a year or more, the Tenant Protection Act of 2019 requires "just cause" before the landlord may termination the tenancy. (Civ, Code, 1946,2(a); see Civ.Code, 1946.2(b) "just cause" defined.) Therefore, this instruction now may only be used for tenancies of less than a year."	Because there are exceptions to and limitations on the applicability of the Tenant Protection Act of 2019 and because of its recent enactment, the committee chose to note only the existence of the new legislation in the Directions for Use.

Instruction(s)	Commenter	Comment	Committee Response
4307. *Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy*	Bruce Greenlee	Revise addition to DforU as follows: For a tenancy of a year or more, the Tenant Protection Act of 2019 requires "just cause" before the landlord may termination the tenancy. (Civ, Code, 1946,2(a); see Civ.Code, 1946.2(b) "just cause" defined.) The grounds for just cause must be stated in the notice of termination. (Civ.Code, 1946,2(a); see also Civ.Code, 1946.2(c), (d), (f).)	Because there are exceptions to and limitations on the applicability of the Tenant Protection Act of 2019, the committee chose to note only the existence of the new legislation in the Directions for Use.
		Then add the just-cause statement as number 4.	See response to comment above.
4308. *Termination for Nuisance or Unlawful Use—Essential Factual Elements*	Bruce Greenlee	I would note that (b)(1)(C) makes nuisance just cause and (b)(1)(I) makes unlawful purpose just cause.	The committee has added references to these subdivisions in the Directions for Use.
4309. *Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use*	Bruce Greenlee	The citation in the DforU should be to subsections (a) and (b)(1)(C), (I); and then maybe to (c), (d) and (f) for other possible notices.	Because of the breadth of the Tenant Protection Act of 2019 and its recent enactment, the committee decided in favor of citing the new legislation more broadly, rather than directing users to a list of subdivisions. The committee was concerned that specifying subdivisions might suggest an exhaustive list of the applicable subdivisions for a claim.
Unlawful Detainer series instructions, 4303–4309.	Richard L. Spix, Lake Forest	The Tenant Protection Act applies to tenancies in California since 1/1/2020. Trial courts are in need of immediate guidance on these important issues for defendants. Rather than an "if applicable" footnote, the proposal should include a full discussion of the landlord's burden of proof in order to prevail. The legislature imposed additional limitations on a landlord's statutory cause of action. They should be implemented forthwith.	Because there are exceptions to and limitations on the applicability of the Tenant Protection Act of 2019, the committee chose to note only the existence of the new legislation in the Directions for Use. The committee will continue to monitor the developments in this area and consider revisions in future release cycles.
4325. *Affirmative Defense—Failure to Comply With*	Bruce Greenlee	A bit more explanation of how a violation of the Tenant Protection Act might be an affirmative defense would be helpful. I would think that lack of just cause is not an	Because there are exceptions to and limitations on the applicability of the Tenant Protection Act of 2019, the

Instruction(s)	Commenter	Comment	Committee Response
Rent Control Ordinance/Tenant Protection Act		affirmative defense; the landlord would have to prove the existence of just cause. (The landlord has to prove rent default, violation of lease, nuisance, or unlawful use.) So what violation of the Act might be an affirmative defense?	committee chose to note only the existence of the new legislation in the Directions for Use. The committee will continue to monitor the developments in this area and consider revisions in future release cycles.
	Richard L. Spix, Lake Forest	The instruction should be expanded to include the state-wide provisions for guidance of the trial courts.	The committee will continue to monitor the developments in this area and consider revisions in future release cycles.
VF-4602. *Whistleblower Protection—Affirmative Defense of Same Decision (Lab. Code, §§1102.5, 1102.6)*	Orange County Bar Association by Scott B. Garner, President	"At 'Directions for Use,' third paragraph, third line, new language indicates that Question 3 is to be omitted if the plaintiff allegedly refused to participate in an activity that would result in violation or noncompliance with a statute, rule, or regulation. This is consistent with the authority cited. It is believed, however, that were it appropriate to omit Question 3, some modification to the directions to the jury following Question 2 would be necessary, as would some guidance to counsel as to how to proceed with the balance of the verdict form."	As noted in the Directions for Use, CACI special verdict forms are intended only as models. They may need to be modified, including renumbering the questions and the then updating the transitional instructions. If a question needs to be omitted, users must make the necessary modifications to the transitional instructions. For additional clarity, however, one modification to Question 5 arising from the omission of Question 3 has been explained in the Directions for Use.
4603. *Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5)*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We agree with the proposed revisions to the instruction. We agree with the proposed revisions to the Directions for Use, but would add a reference to CACI No. 2705 after the first paragraph so as to ensure that the jury is instructed on the presumption of employment status if the defendant claims that the plaintiff was an independent contractor: "If the plaintiff's employment status is at issue because the defendant claims the plaintiff was an independent contractor, give CACI No. 2705, *Affirmative Defense to Labor Code, Unemployment Insurance Code, and Wage Order Violations—Plaintiff Was Not Defendant's Employee (Lab. Code, § 2750.3)*."	This suggested revision to the Directions for Use is beyond the scope of the invitation to comment. The committee will consider this suggestion in a future release cycle.

Instruction(s)	Commenter	Comment	Committee Response
4920. *Wrongful Foreclosure—Essential Factual Elements*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	Element 1 refers to a foreclosure sale of the plaintiff's "home," but the foreclosed property need not be the plaintiff's home. We would change "home" to "real property."	Most wrongful foreclosure claims involve a plaintiff's home, but to reflect the reality that other real property can be foreclosed on, the committee has added a bracketed choice: [home/*specify other real property*].
		Two cases include element 4 as an element of the tort with little discussion, while several other cases listing the essential elements do not include element 4. We believe element 4 should be made optional. We believe the Directions for Use should note the discrepancy in the cases and state that the trial court should decide whether to give element 4.	The committee has revised the instruction and Directions for Use to note the split in authority.
		The final sentence in the instruction reiterates two of the six (or five) elements, stating that the plaintiff must prove those two elements. But the plaintiff must prove all six (or five) elements. We believe that emphasizing two of the six (or five) elements would not be helpful and would be confusing to the jury.	To eliminate the redundancy, the committee has deleted the final sentence of the instruction, which did repeat two of the claim's essential elements.
		We would change "see CACI No. 4921" to "give CACI No. 4921" for clarity and consistency with other instructions stating "give" when the intention is that the instruction be given.	For clarity and consistency, the Directions for Use have been revised to reflect that CACI No. 4921 should be given if the plaintiff claims that tender is excused.
User Guide	Association of Southern California Defense Counsel by Lisa Perrochet, Burbank	"The new language in the User Guide aptly reflects the need to keep up with evolving linguistic conventions."	No response required.
All except as noted above	California Lawyers Association, Litigation	Agree (User Guide, 113, 118, 440, VF-1100, VF-1201, 1812, 2521C, 2522C, 2545, VF-2506A, VF-2506B, VF-2506C, VF-2507A, VF-2507B, VF-2507C, VF-2508, 3050, 3053, VF-3012,	No response required.

Instruction(s)	Commenter	Comment	Committee Response
	Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	3903C, 3903D, 3904A, 3906, 4300, 4301, 4303-4309 & 4325, 4575, VF-4602)	
All except as noted above	Orange County Bar Association by Scott B. Garner, President	Agree (User Guide-Personal Pronouns, 113, 118, 420, 440, 1100, 1102, 1199 VF-1100, 1305, 1812, 2511, 2540, 2560, 2599 VF-2506A, 2599 VF-2506B, 2599 VF-2507A, 2599 VF-2508, 3020, 3050, 3053, 3099 VF-3012, 3599 VF-3501, 3704, 3903C, 3903D, 3904A, 3906, 4106, 4300, 4301, 4303, 4304, 4305, 4306, 4307, 4308, 4309, 4325, 4575, 4603, 4920, 4921)	No response required.

Item number: 10

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Approve**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Jury Instructions: Instructions with Minor or Nonsubstantive Revisions (Release 37)

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

Staff contact (name, phone and e-mail): Eric Long, Attorney, Legal Services, 415-865-7691 eric.long@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Maintenance—Sources and Authority; Technical Corrections

If requesting July 1 or out of cycle, explain:
California Rules of Court, rules 2.1050(d) and 10.58(a), require the advisory committee to update, amend, and add topics to CACI on a regular basis and to submit its recommendations to the council for approval. The Judicial Council has given the Rules Committee final authority to approve instructions with only changes to the Directions for Use or additions to the Sources and Authority under the provisions of the guidelines adopted on December 19, 2006, titled Jury Instructions Corrections and Technical and Minor Substantive Changes. Pursuant to this delegation of authority, the advisory committee requests that the Rules Committee give final approval to 169 revised CACI instructions for Release 37.

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
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

MEMORANDUM

Date
April 1, 2020

To
Members of the Rules Committee

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

Subject
Civil Jury Instructions: Instructions with Minor or Nonsubstantive Revisions (Release 37)

Action Requested
Review and Approve Publication of Instructions

Deadline
April 9, 2020

Contact
Eric Long
415-865-7691 phone
eric.long@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends that the Rules Committee approve revisions to the *Judicial Council of California Civil Jury Instructions (CACI)* to maintain and update those instructions. The 169 instructions in this release, prepared by the advisory committee, contain the types of revisions that the Judicial Council has given the Rules Committee final authority to approve—primarily changes to instructions and Directions for Use text that are nonsubstantive and unlikely to cause controversy and instructions with nonsubstantive additions and changes. Also included within these instructions are grammatical, typographical, and citation corrections for which the Rules Committee has delegated authority to the Advisory Committee on Civil Jury Instructions.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Rules Committee approve for publication revisions to 169 civil jury instructions, prepared by the advisory committee, that contain changes that do not require posting for public comment or Judicial Council approval. These instructions will be published in the 2020 supplement of *CACI* and posted online on the California Courts website, and on Lexis and Westlaw.

The revised instructions are attached at pages 5–532.

Relevant Previous Council Action

In 2003, the Judicial Council approved civil jury instructions—drafted by the Task Force on Jury Instructions—for initial publication in September 2003. The Advisory Committee on Civil Jury Instructions is charged with maintaining and updating those instructions.[1]

In 2006, the Judicial Council approved the Rules Committee's delegation to the Advisory Committee on Civil Jury Instructions the authority to review and approve nonsubstantive grammatical and typographical corrections to the jury instructions, and authority for the Rules Committee 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 the Rules Committee (formerly known as the Rules and Projects Committee or RUPRO) adopted on December 19, 2006, titled *Jury Instructions Corrections and Technical and Minor Substantive Changes*, the Rules Committee 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.

[1] 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 the Rules Committee's final approval. Substantive changes are posted for public comment and presented to the council for approval.

Analysis/Rationale

Overview of revisions

Of the 169 revised instructions in this release (Release 37) that are presented for final approval by the Rules Committee, 162 have revisions under category (d) above (changes to instruction text that are nonsubstantive and unlikely to create controversy). All 162 involve language changes to update binary personal pronoun language in the text of instructions and/or the Directions for Use (e.g., changing "he or she" to "that person"). These language changes do not affect the legal basis of the instructions. Ten have revisions to the Secondary Sources or the Directions for Use (categories (a) and (c) above); 3 of those 10 also have pronoun language changes as noted above.

Standards for adding case excerpts to Sources and Authority

The standards approved by the advisory committee for adding case excerpts to the Sources and Authority are as follows:

1. *CACI* Sources and Authority are in the nature of a digest. Entries should be direct quotes from cases. However, all cases that may be relevant to the subject area of an instruction need not be included, particularly if they do not involve a jury matter.
2. Each legal component of the instruction should be supported by authority—either statutory or case law.
3. Authority addressing the burden of proof should be included.
4. Authority addressing the respective roles of judge and jury (questions of law and questions of fact) should be included.
5. Only one case excerpt should be included for each legal point.
6. California Supreme Court authority should always be included, if available.
7. If no Supreme Court authority is available, the most recent California appellate court authority for a point should be included.
8. A U.S. Supreme Court case should be included on any point for which it is the controlling authority.
9. A Ninth Circuit Court of Appeals case may be included if the case construes California law or federal law that is the subject of the *CACI* instruction.
10. Other cases may be included if deemed particularly useful to the users.
11. The fact that the committee chooses to include a case excerpt in the Sources and Authority does not mean that the committee necessarily believes that the language is binding precedent. The standard is simply whether the language would be useful or of interest to users.

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 being revised or updated, 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. Where found in instructions otherwise being revised or updated, excerpts that were out of order have been moved to the proper location.

Secondary Sources and other cleanup

Under the Rules Committee's delegation of authority, the committee has updated citations to treatises and other secondary sources that were out of date and added a nonbinary personal pronoun option to instructions that contain bracketed personal pronoun choices.

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.

Comments

Because the changes to these instructions do not change the legal effect of the instructions in any way, they were not circulated for public comment.

Alternatives considered

California Rules of Court, rules 2.1050 and 10.58, 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.

Fiscal and Operational Impacts

There are no implementation costs. To the contrary, under its publication agreement with the Judicial Council, the official publisher, LexisNexis Matthew Bender, will pay royalties to the council. With respect to other commercial publishers, the council will register the copyright in this work and will continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the council will provide a broad public license for their noncommercial use and reproduction.

Attachments and Links

1. Jury instructions, at pages 5–532

100. Preliminary Admonitions

You have now been sworn as jurors in this case. I want to impress on you the seriousness and importance of serving on a jury. Trial by jury is a fundamental right in California. The parties have a right to a jury that is selected fairly, that comes to the case without bias, and that will attempt to reach a verdict based on the evidence presented. Before we begin, I need to explain how you must conduct yourselves during the trial.

Do not allow anything that happens outside this courtroom to affect your decision. During the trial do not talk about this case or the people involved in it with anyone, including family and persons living in your household, friends and coworkers, spiritual leaders, advisors, or therapists. You may say you are on a jury and how long the trial may take, but that is all. You must not even talk about the case with the other jurors until after I tell you that it is time for you to decide the case.

This prohibition is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic device or media, such as a cell phone or smart phone, PDA, computer, the Internet, any Internet service, any text or instant-messaging service, any Internet chat room, blog, or website, including social networking websites or online diaries, to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty.

During the trial you must not listen to anyone else talk about the case or the people involved in the case. You must avoid any contact with the parties, the lawyers, the witnesses, and anyone else who may have a connection to the case. If anyone tries to talk to you about this case, tell that person that you cannot discuss it because you are a juror. If ~~he or she~~that person keeps talking to you, simply walk away and report the incident to the court [attendant/bailiff] as soon as you can.

After the trial is over and I have released you from jury duty, you may discuss the case with anyone, but you are not required to do so.

During the trial, do not read, listen to, or watch any news reports about this case. [I have no information that there will be news reports concerning this case.] This prohibition extends to the use of the Internet in any way, including reading any blog about the case or about anyone involved with it. If you receive any information about this case from any source outside of the courtroom, promptly report it to the court [attendant/bailiff]. It is important that all jurors see and hear the same evidence at the same time.

Do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case or use any Internet maps or mapping programs or any other program or device to search for or to view any place discussed in the testimony. If you happen to pass by the scene, do not stop or investigate. If you do need to view the scene during the trial, you will be taken there as a group under proper supervision.

[If you violate any of these prohibitions on communications and research, including prohibitions on electronic communications and research, you may be held in contempt of court or face other sanctions. That means that you may have to serve time in jail, pay a fine, or face other punishment for that violation.]

It is important that you keep an open mind throughout this trial. Evidence can only be presented a piece at a time. Do not form or express an opinion about this case while the trial is going on. You must not decide on a verdict until after you have heard all the evidence and have discussed it thoroughly with your fellow jurors in your deliberations.

Do not concern yourselves with the reasons for the rulings I will make during the course of the trial. Do not guess what I may think your verdict should be from anything I might say or do.

When you begin your deliberations, you may discuss the case only in the jury room and only when all the jurors are present.

You must decide what the facts are in this case. Do not let bias, sympathy, prejudice, or public opinion influence your verdict.

At the end of the trial, I will explain the law that you must follow to reach your verdict. You must follow the law as I explain it to you, even if you do not agree with the law.

New September 2003; Revised April 2004, October 2004, February 2005, June 2005, December 2007, December 2009, December 2011, December 2012, May 2020

Directions for Use

This instruction should be given at the outset of every case, even as early as when the jury panel enters the courtroom (without the first sentence).

If the jury is allowed to separate, Code of Civil Procedure section 611 requires the judge to admonish the jury that "it is their duty not to converse with, or suffer themselves to be addressed by any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them."

Sources and Authority

- Constitutional Right to Jury Trial. Article I, section 16 of the California Constitution.
- Instructing the Jury. Code of Civil Procedure section 608.
- Jury as Trier of Fact. Evidence Code section 312.
- Admonishments to Jurors. Code of Civil Procedure section 611.

- Contempt of Court for Juror Misconduct. Code of Civil Procedure section 1209(a)(6).

- Under Code of Civil Procedure section 611, jurors may not "form or express an opinion" prior to deliberations. (See also *City of Pleasant Hill v. First Baptist Church of Pleasant Hill* (1969) 1 Cal.App.3d 384, 429 [82 Cal.Rptr. 1]. It is misconduct for a juror to prejudge the case. (*Deward v. Clough* (1966) 245 Cal.App.2d 439, 443–444 [54 Cal.Rptr. 68].)

- Jurors must not undertake independent investigations of the facts in a case. (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 36 [224 P.2d 808]; *Walter v. Ayvazian* (1933) 134 Cal.App. 360, 365 [25 P.2d 526].)

- Jurors are required to avoid discussions with parties, counsel, or witnesses. (*Wright v. Eastlick* (1899) 125 Cal. 517, 520–521 [58 P. 87]; *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 144 [45 Cal.Rptr. 313, 403 P.2d 721].)

- It is misconduct for jurors to engage in experiments that produce new evidence. (*Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1746 [286 Cal.Rptr. 435].)

- Unauthorized visits to the scene of matters involved in the case are improper. (*Anderson v. Pacific Gas & Electric Co.* (1963) 218 Cal.App.2d 276, 280 [32 Cal.Rptr. 328].)

- It is improper for jurors to receive information from the news media about the case. (*Province v. Center for Women's Health & Family Birth* (1993) 20 Cal.App.4th 1673, 1679 [25 Cal.Rptr.2d 667], disapproved on other grounds in *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 41 [32 Cal.Rptr.2d 200, 876 P.2d 999]; *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 408 [196 Cal.Rptr. 117].)

- Jurors must avoid bias: " 'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.' " (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132], internal citations omitted.) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (*Ibid*.)

- An instruction to disregard any appearance of bias on the part of the judge is proper and may cure any error in a judge's comments. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257–259 [288 P.2d 1003], disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 [328 P.2d 449] and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478 [6 Cal.Rptr. 289, 353 P.2d 929].) "It is well understood by most trial judges that it is of the utmost importance that the trial judge not communicate in any manner to the jury the judge's opinions on the case submitted to the jury, because juries tend to attach inflated importance to any such communication, even when the judge has no intention whatever of influencing a jury's determination." (*Dorshkind v. Harry N. Koff Agency, Inc.* (1976) 64 Cal.App.3d 302, 307 [134 Cal.Rptr. 344].)

Secondary Sources

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, § 322.50 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.05

California Judges Benchbook: Civil Proceedings—Trial ~~(2d ed.)~~ §§ ~~13~~12.6, ~~14~~13.50, ~~14~~13.51, ~~14~~13.58 (Cal CJER ~~2010~~2019)

103. Multiple Parties

[There are [*number*] plaintiffs in this trial. You should decide the case of each plaintiff separately as if it were a separate lawsuit. Each plaintiff is entitled to separate consideration of ~~his or her~~that plaintiff's own claim(s).]

[There are [*number*] defendants in this trial. You should decide the case against each defendant separately as if it were a separate lawsuit. Each defendant is entitled to separate consideration of ~~his or her~~ that defendant's own defenses.]

[Different aspects of this case involve different parties (plaintiffs and defendants). Each instruction will identify the parties to whom it applies. Pay particular attention to the parties named in each instruction.]

[*or*]

[Unless I tell you otherwise, all instructions apply to each plaintiff and defendant.]

New September 2003; Revised April 2009, May 2020

Directions for Use

The CACI instructions require the use of party names rather than party-status words like "plaintiff" and "defendant." In multiparty cases, it is important to name only the parties in each instruction to whom the instruction applies. For example, an instruction on loss of consortium (see CACI No. 3920) will not apply to all plaintiffs. Instructions on vicarious liability (see CACI No. 3700 et seq.) will not apply to all defendants. Unless all or nearly all of the instructions will apply to all of the parties, give the first option for the last paragraph.

Sources and Authority

- "We realize, of course, that multiple defendants are involved and that each defendant is entitled to instructions on, and separate consideration of, every defense available and applicable to it. The purpose of this rule is to insure that the jury will distinguish and evaluate the separate facts relevant to each defendant." (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 58 [148 Cal.Rptr. 596, 583 P.2d 121], internal citations omitted.)"

Secondary Sources

4 Witkin, California Procedure (45th ed. ~~1997~~2008) Pleading, § ~~67~~ 78 et seq.

27 California Forms of Pleading and Practice, Ch. 318, *Judgments*, § 318.15 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 5, *Parties*, 5.30 et seq.

106. Evidence

You must decide what the facts are in this case only from the evidence you see or hear during the trial. Sworn testimony, documents, or anything else may be admitted into evidence. You may not consider as evidence anything that you see or hear when court is not in session, even something done or said by one of the parties, attorneys, or witnesses.

What the attorneys say during the trial is not evidence. In their opening statements and closing arguments, the attorneys will talk to you about the law and the evidence. What the lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence.

The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because an attorney's question suggests that it is true. However, the attorneys for both sides can agree that certain facts are true. This agreement is called a "stipulation." No other proof is needed and you must accept those facts as true in this trial.

Each side has the right to object to evidence offered by the other side. If I do not agree with the objection, I will say it is overruled. If I overrule an objection, the witness will answer and you may consider the evidence. If I agree with the objection, I will say it is sustained. If I sustain an objection, you must ignore the question. If the witness did not answer, you must not guess what ~~he or she~~ that witness might have said or why I sustained the objection. If the witness has already answered, you must ignore the answer.

An attorney may make a motion to strike testimony that you have heard. If I grant the motion, you must totally disregard that testimony. You must treat it as though it did not exist.

New September 2003; Revised February 2005, December 2010, December 2012, May 2020

Directions for Use

This instruction should be given as an introductory instruction.

Sources and Authority

- "Evidence" Defined. Evidence Code section 140.
- Jury to Decide Questions of Fact. Evidence Code section 312.
- Miscarriage of Justice. Evidence Code section 353.
- A stipulation in proper form is binding on the parties if it is within the authority of the attorney. Properly stipulated facts may not be contradicted. (*Palmer v. City of Long Beach* (1948) 33 Cal.2d

134, 141–142 [199 P.2d 952].)

- Courts have held that "attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960 [161 Cal.Rptr. 377].)

- Courts have stated that "[t]he right to object on appeal to misconduct or improper argument, even when prejudicial, is generally waived in the absence of a proper objection and request the jury be admonished." (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 427 [94 Cal.Rptr. 49]; *Horn v. Atchison, Topeka & Santa Fe Ry. Co*. (1964) 61 Cal.2d 602, 610 [39 Cal.Rptr. 721, 394 P.2d 561].)

Secondary Sources

3 Witkin, California Evidence (~~4th~~ 5th ed. ~~2000~~2012) Presentation at Trial, § 1

7 Witkin, California Procedure (5th ed. 2008) Trial, §§ 281, 282

1A California Trial Guide, Unit 21, *Procedures for Determining Admissibility of Evidence*, §§ 21.01, 21.03 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, §§ 322.56–322.57 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.61, 551.77 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial ~~(2d ed.)~~ §§ ~~3.52~~2.37, 2.38, 34.99, ~~5.40~~5.21, 5.29, 5.39, ~~5.49, 5.69, 12~~11.9, ~~12~~11.35 (Cal CJER ~~2010~~2019)

107. Witnesses

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

(a) How well did the witness see, hear, or otherwise sense what ~~he or she~~the witness described in court?

(b) How well did the witness remember and describe what happened?

(c) How did the witness look, act, and speak while testifying?

(d) Did the witness have any reason to say something that was not true? For example, did the witness show any bias or prejudice or have a personal relationship with any of the parties involved in the case or have a personal stake in how this case is decided?

(e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else ~~he or she~~ the witness said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness did not tell the truth about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness did not tell the truth about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

New September 2003; Revised April 2004, June 2005, April 2007, December 2012, June 2015, December 2016, May 2020

Directions for Use

This instruction may be given as an introductory instruction or as a concluding instruction after trial. (See CACI No. 5003, *Witnesses.*)

Sources and Authority

- Role of Jury. Evidence Code section 312.
- Considerations for Evaluating the Credibility of Witnesses. Evidence Code section 780.
- Direct Evidence of Single Witness Sufficient. Evidence Code section 411.
- "It should certainly not be of importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar." (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671 [288 P. 834].)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 281

1A California Trial Guide, Unit 22, *Rules Affecting Admissibility of Evidence*, § 22.30 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.122 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial § 8.72 (Cal CJER 2019)

108. Duty to Abide by Translation Provided in Court

Some testimony will be given in [*insert language other than English*]. An interpreter will provide a translation for you at the time that the testimony is given. You must rely solely on the translation provided by the interpreter, even if you understand the language spoken by the witness. Do not retranslate any testimony for other jurors. If you believe the court interpreter translated testimony incorrectly, let me know immediately by writing a note and giving it to the [clerk/bailiff/court attendant].

New September 2003; Revised April 2004, June 2011

Sources and Authority

- ~~It is misconduct for a juror to retranslate for other jurors testimony that has been translated by the court-appointed interpreter.~~"Juror [] committed misconduct by failing to rely on the court interpreter's translation, as she promised she would during voir dire. She committed further misconduct by sharing her personal translation with her fellow jurors thus introducing outside evidence into their deliberations." (*People v. Cabrera* (1991) 230 Cal.App.3d 300, 303–304 [281 Cal.Rptr. 238].)

- "It is well-settled a juror may not conduct an independent investigation into the facts of the case or gather evidence from outside sources and bring it into the jury room. It is also misconduct for a juror to inject his or her own expertise into the jury's deliberation." (*People v. Cabrera, supra,* 230 Cal.App.3d at p. 303.)

- "If [the juror] believed the court interpreter was translating incorrectly, the proper action would have been to call the matter to the trial court's attention, not take it upon herself to provide her fellow jurors with the 'correct' translation." (*People v. Cabrera, supra,* 230 Cal.App.3d at p. 304.)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 281

1 California Trial Guide, Unit 3, *Other Non-Evidentiary Motions*, § 3.32 (Matthew Bender)

1A California Trial Guide, Unit 20, *Procedural Rules for Presentation of Evidence*, § 20.13 (Matthew Bender)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, §§ 91.10, 91.12 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial ~~(2d ed.)~~ § 8.~~118~~ 119 (Cal CJER ~~2010~~2019)

200. Obligation to Prove—More Likely True Than Not True

~~A party~~The parties must persuade you, by the evidence presented in court, that what ~~he or she is~~ they are required to prove is more likely to be true than not true. This is referred to as "the burden of proof."

After weighing all of the evidence, if you cannot decide that something is more likely to be true than not true, you must conclude that the party did not prove it. You should consider all the evidence, no matter which party produced the evidence.

In criminal trials, the prosecution must prove that the defendant is guilty beyond a reasonable doubt. But in civil trials, such as this one, the party who is required to prove something need prove only that it is more likely to be true than not true.

New September 2003; Revised February 2005, May 2020

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.

For an instruction on clear and convincing evidence, see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

Sources and Authority

- Burden of Proof – Preponderance of Evidence. Evidence Code section 115.
- Party With Burden of Proof. Evidence Code section 500.
- Each party is entitled to the benefit of all the evidence, including the evidence produced by an adversary. (*Williams v. Barnett* (1955) 135 Cal.App.2d 607, 612 [287 P.2d 789]; 7 Witkin, California Procedure (4th ed. 1997) Trial, § 305, p. 352.)
- The general rule in California is that " '[i]ssues of fact in civil cases are determined by a preponderance of testimony.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 483 [286 Cal.Rptr. 40, 816 P.2d 892], citation omitted.)
- The preponderance-of-the-evidence standard "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.' " (*In re Angelia P.* (1981) 28 Cal.3d 908, 918 [171 Cal.Rptr. 637, 623 P.2d 198], citation omitted.)
- "Preponderance of the evidence" " 'means what it says, viz., that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of

witnesses or quantity, but in its effect on those to whom it is addressed.' " (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325 [276 Cal.Rptr. 430] (quoting *People v. Miller* (1916) 171 Cal. 649, 652 [154 P. 468] and holding that it was prejudicial misconduct for jurors to refer to the dictionary for definition of the word "preponderance").)

Secondary Sources

1 Witkin, California Evidence (~~4th~~ 5th ed. ~~2000~~2012) Burden of Proof and Presumptions, § ~~35~~36

Jefferson, California Evidence Benchbook (3d ed. 1997) Ch. 45, Burdens of Proof and of Producing Evidence; Presumptions

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)

218. Statements Made to Physician (Previously Existing Condition)

[*Insert name of health-care provider***] has testified that [***insert name of patient***] made statements to [him/her/*nonbinary pronoun*] about [***name of patient***]'s medical history. These statements helped [***name of health-care provider***] diagnose the patient's condition. You can use these statements to help you examine the basis of [***name of health-care provider***]'s opinion. You cannot use them for any other purpose.**

[However, a statement by [*name of patient***] to [***name of health-care provider***] about [his/her/*nonbinary pronoun*] current medical condition may be considered as evidence of that medical condition.]**

New September 2003; Revised June 2006, May 2020

Directions for Use

This instruction does not apply to, and should not be used for, a statement of the patient's then-existing physical sensation, mental feeling, pain, or bodily health. Such statements are admissible as an exception to the hearsay rule under Evidence Code section 1250. This instruction also does not apply to statements of a patient regarding a prior mental or physical state if ~~he or she~~ the patient is unavailable as a witness. (Evid. Code, § 1251.)

This instruction also does not apply to, and should not be used for, statements of a party that are offered into evidence by an opposing party. Such statements are admissible as an exception to the hearsay rule under Evidence Code section 1220. See CACI No. 212, *Statements of a Party Opponent*.

Sources and Authority

- Statements of Party. Evidence Code section 1220.
- Statements pointing to the cause of a physical condition may be admissible if they are made by a patient to a physician. The statement must be required for proper diagnosis and treatment and is admissible only to show the basis of the physician's medical opinion. (*People v. Wilson* (1944) 25 Cal.2d 341, 348 [153 P.2d 720]; *Johnson v. Aetna Life Insurance Co.* (1963) 221 Cal.App.2d 247, 252 [34 Cal.Rptr. 484]; *Willoughby v. Zylstra* (1935) 5 Cal.App.2d 297, 300–301 [42 P.2d 685].)

Secondary Sources

1 Witkin, California Evidence (~~4th~~ 5th ed. ~~2000~~2012) Hearsay, § ~~196~~197

2 California Trial Guide, Unit 40, *Hearsay*, § 40.42 (Matthew Bender)

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~~the expert's field of expertise even if ~~he or she~~the expert 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; Revised May 2020

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)

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/*nonbinary pronoun*/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/*nonbinary pronoun*/it] to do;]**

[*or***]**

[4. That [*name of defendant***] did something that the contract prohibited [him/her/*nonbinary pronoun*/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, May 2020

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~~ the plaintiff 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 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 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.)

- " ' "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~~ 11th ed. ~~2005~~2017) Contracts, § ~~847~~872

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

306. Unformalized Agreement

[*Name of defendant*] contends that the parties did not enter into a contract because they had not signed a final written agreement. To prove that a contract was created, [*name of plaintiff*] must prove both of the following:

1. **That the parties understood and agreed to the terms of the agreement; and**

2. **That the parties agreed to be bound before a written agreement was completed and signed.**

New September 2003; Revised December 2012, May 2020

Directions for Use

Give this instruction if the parties agreed to contract terms with the intention of reducing their agreement to a written and signed contract, but an alleged breach occurred before the written contract was completed and signed. For other situations involving the lack of a final written contract, see CACI No. 304, *Oral or Written Contract Terms*, and CACI No. 305, *Implied-in-Fact Contract*.

Do not give this instruction unless the defendant has testified or offered other evidence in support of ~~his or her~~ the contention.

Sources and Authority

- "Where the writing at issue shows 'no more than an intent to further reduce the informal writing to a more formal one' the failure to follow it with a more formal writing does not negate the existence of the prior contract. However, where the writing shows it was not intended to be binding until a formal written contract is executed, there is no contract." (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307 [87 Cal.Rptr.2d 822], internal citations omitted.)

- The execution of a formalized written agreement is not necessarily essential to the formation of a contract that is made orally: "[I]f the respective parties orally agreed upon all of the terms and conditions of a proposed written agreement with the mutual intention that the oral agreement should thereupon become binding, the mere fact that a formal written agreement to the same effect has not yet been signed does not alter the binding validity of the oral agreement. [Citation.]" (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358 [72 Cal.Rptr.2d 598].)

- If the parties have agreed not to be bound until the agreement is reduced to writing and signed by the parties, then the contract will not be effective until the formal agreement is signed. (*Beck v. American Health Group International, Inc.* (1989) 211 Cal.App.3d 1555, 1562 [260 Cal.Rptr. 237].)

- "Whether it was the parties' mutual intention that their oral agreement to the terms contained in a proposed written agreement should be binding immediately is to be determined from the surrounding

facts and circumstances of a particular case and is a question of fact for the trial court." (*Banner Entertainment, Inc., supra,* 62 Cal.App.4th at p. 358.)

Secondary Sources

1 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Contracts, §§ 133, 134

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.22 (Matthew Bender)

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

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.07[3]

307. Contract Formation—Offer

Both an offer and an acceptance are required to create a contract. [*Name of defendant***] contends that a contract was not created because there was never any offer. To overcome this contention, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] communicated to [***name of defendant***] that [he/she/*nonbinary pronoun*/it] was willing to enter into a contract with [***name of defendant***];**

2. **That the communication contained specific terms; and**

3. **That, based on the communication, [***name of defendant***] could have reasonably concluded that a contract with these terms would result if [he/she/*nonbinary pronoun*/it] accepted the offer.**

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

New September 2003; Revised May 2020

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of ~~his or her~~ the contention there was never any offer.

This instruction assumes that the defendant is claiming the plaintiff never made an offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror). If the existence of an offer is not contested, then this instruction is unnecessary.

Sources and Authority

- Courts have adopted the definition of "offer" found at Restatement Second of Contracts, section 24: "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." (*City of Moorpark v. Moorpark Unified School Dist.* (1991) 54 Cal.3d 921, 930 [1 Cal.Rptr.2d 896, 819 P.2d 854].)

- Under basic contract law "'[a]n offer must be sufficiently definite, or must call for such definite terms in the acceptance that the performance promised is reasonably certain.'" (*Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761, 770 [23 Cal.Rptr.2d 810].)

- "The trier of fact must determine 'whether a reasonable person would necessarily assume ... a willingness to enter into contract.' [Citation.]" (*In re First Capital Life Insurance Co.* (1995) 34 Cal.App.4th 1283, 1287 [40 Cal.Rptr.2d 816].)

- Offers should be contrasted with preliminary negotiations: "Preliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid, subsisting agreement." (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 59 [248 Cal.Rptr. 217].)

Secondary Sources

1 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Contracts, §§ 116, 117, 125–137

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.22 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.210 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.18–13.24

308. Contract Formation—Revocation of Offer

Both an offer and an acceptance are required to create a contract. [*Name of defendant***] contends that the offer was withdrawn before it was accepted. To overcome this contention, [***name of plaintiff***] must prove one of the following:**

1. **That [***name of defendant***] did not withdraw the offer; or**

2. **That [***name of plaintiff***] accepted the offer before [***name of defendant***] withdrew it; or**

3. **That [***name of defendant***]'s withdrawal of the offer was never communicated to [***name of plaintiff***].**

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

New September 2003; Revised May 2020

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of ~~his or her~~ the contention.

This instruction assumes that the defendant is claiming to have revoked ~~his or her~~ the defendant's offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeree).

Sources and Authority

- Revocation Before Acceptance. Civil Code section 1586.
- Methods for Revocation. Civil Code section 1587.
- "It is a well-established principle of contract law that an offer may be revoked by the offeror any time prior to acceptance." (*T. M. Cobb Co., Inc. v. Superior Court* (1984) 36 Cal.3d 273, 278 [204 Cal.Rptr. 143, 682 P.2d 338].)
- " 'Under familiar contract law, a revocation of an offer must be directed to the offeree.' [Citation.]" (*Moffett v. Barclay* (1995) 32 Cal.App.4th 980, 983 [38 Cal.Rptr.2d 546].)

Secondary Sources

1 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Contracts, §§ 159–165

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.22, 140.61 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.351 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.211 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.23–13.24

309. Contract Formation—Acceptance

Both an offer and an acceptance are required to create a contract. [*Name of defendant***] contends that a contract was not created because the offer was never accepted. To overcome this contention, [***name of plaintiff***] must prove both of the following:**

1. **That [***name of defendant***] agreed to be bound by the terms of the offer. [If [***name of defendant***] agreed to be bound only on certain conditions, or if [he/she/*nonbinary pronoun*/it] introduced a new term into the bargain, then there was no acceptance]; and**

2. **That [***name of defendant***] communicated [his/her/*nonbinary pronoun*/its] agreement to [***name of plaintiff***].**

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

New September 2003; Revised May 2020

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of ~~his or her~~ the contention.

This instruction assumes that the defendant is claiming to have not accepted plaintiff's offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror).

Sources and Authority

- Acceptance. Civil Code section 1585.

- "[T]erms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract; and a qualified acceptance amounts to a new proposal or counteroffer putting an end to the original offer." (*Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855–856 [70 Cal.Rptr.2d 595].)

- "[I]t is not necessarily true that any communication other than an unequivocal acceptance is a rejection. Thus, an acceptance is not invalidated by the fact that it is 'grumbling,' or that the offeree makes some simultaneous 'request.' Nevertheless, it must appear that the 'grumble' does not go so far as to make it doubtful that the expression is really one of assent. Similarly, the 'request' must not add additional or different terms from those offered. Otherwise, the 'acceptance' becomes a counteroffer." (*Guzman v. Visalia Community Bank* (1999) 71 Cal.App.4th 1370, 1376 [84 Cal.Rptr.2d 581].)

- "The interpretation of the purported acceptance or rejection of an offer is a question of fact. Further,

based on the general rule that manifested mutual assent rather than actual mental assent is the essential element in the formation of contracts, the test of the true meaning of an acceptance or rejection is not what the party making it thought it meant or intended it to mean. Rather, the test is what a reasonable person in the position of the parties would have thought it meant." (*Guzman, supra,* 71 Cal.App.4th at pp. 1376–1377.)

- "Acceptance of an offer, which may be manifested by conduct as well as by words, must be expressed or communicated by the offeree to the offeror." (*Russell v. Union Oil Co.* (1970) 7 Cal.App.3d 110, 114 [86 Cal.Rptr. 424].)

- "The Restatement Second of Contracts, section 60 provides, 'If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded.' Comment a to Restatement 2d, section 60 provides, 'a. *Interpretation of offer*. If the offeror prescribes the only way in which his offer may be accepted, an acceptance in any other way is a counter-offer. But frequently in regard to the details of methods of acceptance, the offeror's language, if fairly interpreted, amounts merely to a statement of a satisfactory method of acceptance, without positive requirement that this method shall be followed.' [¶] Similarly, Restatement 2d, section 30 provides in relevant part, 'Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.' Comment b to Restatement 2d section 30 states: '*Invited form*. Insistence on a particular form of acceptance is unusual. Offers often make no express reference to the form of acceptance; sometimes ambiguous language is used. Language referring to a particular mode of acceptance is often intended and understood as suggestion rather than limitation; the suggested mode is then authorized, but other modes are not precluded. In other cases language which in terms refers to the mode of acceptance is intended and understood as referring to some more important aspect of the transaction, such as the time limit for acceptance.' " (*Pacific Corporate Group Holdings, LLC v. Keck* (2014) 232 Cal.App.4th 294, 311−312 [181 Cal.Rptr.3d 399], original italics, footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Contracts, §§ 180–192

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.22 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.352 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.214 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.25–13.31

310. Contract Formation—Acceptance by Silence

Ordinarily, if a ~~party~~ person does not say or do anything in response to another party's offer, then ~~he or she~~ the person has not accepted the offer. However, if [*name of plaintiff*] proves that both [he/she/*nonbinary pronoun*/it] and [*name of defendant*] understood silence or inaction to mean that [*name of defendant*] had accepted [*name of plaintiff*]'s offer, then there was an acceptance.

New September 2003; Revised May 2020

Directions for Use

This instruction assumes that the defendant is claiming to have not accepted plaintiff's offer. Change the identities of the parties in the last two sets of brackets if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror).

This instruction should be read in conjunction with and immediately after CACI No. 309, *Contract Formation—Acceptance*, if acceptance by silence is an issue.

Sources and Authority

- Consent by Acceptance of Benefits. Civil Code section 1589.
- Because acceptance must be communicated, "[s]ilence in the face of an offer is not an acceptance, unless there is a relationship between the parties or a previous course of dealing pursuant to which silence would be understood as acceptance." (*Southern California Acoustics Co., Inc. v. C. V. Holder, Inc.* (1969) 71 Cal.2d 719, 722 [79 Cal.Rptr. 319, 456 P.2d 975].)
- Acceptance may also be inferred from inaction where one has a duty to act, and from retention of the offered benefit. (*Golden Eagle Insurance Co. v. Foremost Insurance Co.* (1993) 20 Cal.App.4th 1372, 1386 [25 Cal.Rptr.2d 242].)

Secondary Sources

1 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Contracts, §§ 193–197

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.22 (Matthew Bender)

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

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.31

311. Contract Formation—Rejection of Offer

[*Name of defendant***] contends that the offer to enter into a contract terminated because [***name of plaintiff***] rejected it. To overcome this contention, [***name of plaintiff***] must prove both of the following:**

1. **That [***name of plaintiff***] did not reject [***name of defendant***]'s offer; and**

2. **That [***name of plaintiff***] did not make any additions or changes to the terms of [***name of defendant***]'s offer.**

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

New September 2003; Revised May 2020

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of ~~his or her~~ the contention that the plaintiff rejected the offer.

Note that rejections of a contract offer, or proposed alterations to an offer, are effective only if they are communicated to the other party. (See *Beverly Way Associates v. Barham* (1990) 226 Cal.App.3d 49, 55 [276 Cal.Rptr. 240].) If it is necessary for the jury to make a finding regarding the issue of communication then this instruction may need to be modified.

This instruction assumes that the defendant is claiming plaintiff rejected defendant's offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeree).

Conceptually, this instruction dovetails with CACI No. 309, *Contract Formation—Acceptance*. This instruction is designed for the situation where a party has rejected an offer by not accepting it on its terms.

Sources and Authority

- Acceptance. Civil Code section 1585.

- Cases provide that "a qualified acceptance amounts to a new proposal or counter-offer putting an end to the original offer. ... A counter-offer containing a condition different from that in the original offer is a new proposal and, if not accepted by the original offeror, amounts to nothing." (*Apablasa v. Merritt and Co.* (1959) 176 Cal.App.2d 719, 726 [1 Cal.Rptr. 500], internal citations omitted.) More succinctly: "The rejection of an offer kills the offer." (*Stanley v. Robert S. Odell and Co.* (1950) 97 Cal.App.2d 521, 534 [218 P.2d 162].)

- "[T]erms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to

result in the formation of a binding contract; and a qualified acceptance amounts to a new proposal or counteroffer putting an end to the original offer." (*Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855–856 [70 Cal.Rptr.2d 595].)

- The original offer terminates as soon as the rejection is communicated to the offeror: "It is hornbook law that an unequivocal rejection by an offeree, communicated to the offeror, terminates the offer; even if the offeror does no further act, the offeree cannot later purport to accept the offer and thereby create enforceable contractual rights against the offeror." (*Beverly Way Associates, supra,* 226 Cal.App.3d at p. 55.)

Secondary Sources

1 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Contracts, § 163

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.22 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.352 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, §§ 75.212–75.214 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract–Absence of Essential Element*, 13.23–13.24

312. Substantial Performance

[*Name of defendant*] contends that [*name of plaintiff*] did not perform all of the things that [*name of plaintiff*~~he/she/it~~] was required to do under the contract, and therefore [*name of defendant*] did not have to perform [his/her/*nonbinary pronoun*/its] obligations under the contract. To overcome this contention, [*name of plaintiff*] must prove both of the following:

1. **That [*name of plaintiff*] made a good faith effort to comply with the contract; and**

2. **That [*name of defendant*] received essentially what the contract called for because [*name of plaintiff*]'s failures, if any, were so trivial or unimportant that they could have been easily fixed or paid for.**

New September 2003; Revised May 2020

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of ~~his or her~~ the contention that the plaintiff did not perform all of the things required under the contract.

Sources and Authority

- " 'Substantial performance means that there has been no willful departure from the terms of the contract, and no omission of any of its essential parts, and that the contractor has in good faith performed all of its substantive terms. If so, he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed.' " (*Connell v. Higgins* (1915) 170 Cal. 541, 556 [150 P. 769], citation omitted.)

- The Supreme Court has cited the following passage from Witkin with approval: "At common law, recovery under a contract for work done was dependent upon a complete performance, although hardship might be avoided by permitting recovery in quantum meruit. The prevailing doctrine today, which finds its application chiefly in building contracts, is that substantial performance is sufficient, and justifies an action on the contract, although the other party is entitled to a reduction in the amount called for by the contract, to compensate for the defects. What constitutes substantial performance is a question of fact, but it is essential that there be no wilful departure from the terms of the contract, and that the defects be such as may be easily remedied or compensated, so that the promisee may get practically what the contract calls for." (*Posner v. Grunwald-Marx, Inc*. (1961) 56 Cal.2d 169, 186–187 [14 Cal.Rptr. 297, 363 P.2d 313]; see also *Kossler v. Palm Springs Developments, Ltd.* (1980) 101 Cal.App.3d 88, 101 [161 Cal.Rptr. 423].)

- " 'Whether, in any case, such defects or omissions are substantial, or merely unimportant mistakes that have been or may be corrected, is generally a question of fact.' " (*Connell, supra,* 170 Cal. at pp. 556–557, internal citation omitted.)

- "The doctrine of substantial performance has been recognized in California since at least 1921, when the California Supreme Court decided the landmark case of *Thomas Haverty Co. v. Jones* [citation], in which the court stated: 'The general rule on the subject of [contractual] performance is that "Where a person agrees to do a thing for another for a specified sum of money to be paid on full performance, he is not entitled to any part of the sum until he has himself done the thing he agreed to do, unless full performance has been excused, prevented, or delayed by the act of the other party, or by operation of law, or by the act of God or the public enemy." [Citation.] [¶] … [I]t is settled, especially in the case of building contracts, where the owner has taken possession of the building and is enjoying the fruits of the contractor's work in the performance of the contract, that if there has been a substantial performance thereof by the contractor in good faith, where the failure to make full performance can be compensated in damages, to be deducted from the price or allowed as a counterclaim, and the omissions and deviations were not willful or fraudulent, and do not substantially affect the usefulness of the building for the purposes for which it was intended, the contractor may, in an action upon the contract, recover the amount unpaid of his contract price less the amount allowed as damages for the failure in strict performance. [Citations.]' " (*Murray's Iron Works, Inc. v. Boyce* (2008) 158 Cal.App.4th 1279, 1291–1292 [71 Cal.Rptr.3d 317].)

- "We hold that a provision in the parties' contract making time of the essence does not automatically make [the defendant's] untimely performance a breach of contract because there are triable issues regarding the scope of that provision and whether its enforcement would result in a forfeiture to [the defendant] and a windfall to [the plaintiff]." (*Magic Carpet Ride LLC v. Rugger Investment Group, LLC* (2019) 41 Cal.App.5th 357, 360 [254 Cal.Rptr.3d 213].)

Secondary Sources

1 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Contracts, §§ ~~818~~843–~~819~~884

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.23 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.30, 50.31 (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*, 22.08[2], 22.16[2], 22.37, 22.69

322. Occurrence of Agreed Condition Precedent

The parties agreed in their contract that [*name of defendant***] would not have to [***insert duty***] unless [***insert condition precedent***]. [***Name of defendant***] contends that this condition did not occur and that [he/she/*nonbinary pronoun*/it] did not have to [***insert duty***]. To overcome this contention, [***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; Revised May 2020

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of ~~his or her~~ the contention a condition precedent did not occur.

If both the existence and the occurrence of a condition precedent are contested, use CACI No. 321, *Existence of Condition Precedent Disputed*.

Sources and Authority

- Conditional Obligation. Civil Code section 1434.
- Condition Precedent. Civil Code section 1436.
- "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." (*JMR Construction Corp. v. Environmental Assessment & Remediation Management, Inc.* (2015) 243 Cal.App.4th 571, 593 [198 Cal.Rptr.3d 47].)
- "[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].)
- "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].)
- "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].)

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- " '[G]enerally, a party's failure to perform a condition precedent will preclude an action for breach of contract.' " (*Stephens & Stephens XII, LLC, supra,* 231 Cal.App.4th at p. 1147.)

- "[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~~ 11th ed. ~~2005~~2017) Contracts, §§ ~~776~~799–~~791~~814

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

324. Anticipatory Breach

A party can breach, or break, a contract before performance is required by clearly and positively indicating, by words or conduct, that ~~he or she~~ the party will not or can not meet the requirements of the contract.

If [*name of plaintiff*] proves that [he/she/*nonbinary pronoun*/it] would have been able to fulfill the terms of the contract and that [*name of defendant*] clearly and positively indicated, by words or conduct, that [he/she/*nonbinary pronoun*/it] would not or could not meet the contract requirements, then [*name of defendant*] breached the contract.

New September 2003; Revised May 2020

Sources and Authority

- Anticipatory Breach. Civil Code section 1440.

- "Repudiation of a contract, also known as "anticipatory breach," occurs when a party announces an intention not to perform prior to the time due for performance." (*Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co.* (2014) 231 Cal.App.4th 1131, 1150 [180 Cal.Rptr.3d 683].)

- Courts have defined anticipatory breach as follows: "An anticipatory breach of contract occurs on the part of one of the parties to the instrument when he positively repudiates the contract by acts or statements indicating that he will not or cannot substantially perform essential terms thereof, or by voluntarily transferring to a third person the property rights which are essential to a substantial performance of the previous agreement, or by a voluntary act which renders substantial performance of the contract impossible or apparently impossible." (*C. A. Crane v. East Side Canal & Irrigation Co.* (1935) 6 Cal.App.2d 361, 367 [44 P.2d 455].)

- Anticipatory breach can be express or implied: "An express repudiation is a clear, positive, unequivocal refusal to perform; an implied repudiation results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible." (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137 [123 Cal.Rptr. 641, 539 P.2d 425].)

- "In the event the promisor repudiates the contract before the time for his or her performance has arrived, the plaintiff has an election of remedies--he or she may 'treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relation between the parties, or he [or she] can treat the repudiation as an empty threat, wait until the time for performance arrives and exercise his [or her] remedies for actual breach if a breach does in fact occur at such time.' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 489 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)

- Anticipatory breach can be used as an excuse for plaintiff's failure to substantially perform. (*Gold Mining & Water Co. v. Swinerton* (1943) 23 Cal.2d 19, 29 [142 P.2d 22].)

- "Although it is true that an anticipatory breach or repudiation of a contract by one party permits the other party to sue for damages without performing or offering to perform its own obligations, this does not mean damages can be recovered without evidence that, but for the defendant's breach, the plaintiff would have had the ability to perform." (*Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 625 [2 Cal.Rptr.2d 288], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Contracts, §§ ~~861~~886 ~~868~~893

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.54, 140.105 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.23 (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations*, §§ 77.15, 77.361 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.23

325. Breach of Implied Covenant of Good Faith and Fair Dealing—Essential Factual Elements

In every contract or agreement there is an implied promise of good faith and fair dealing. This implied promise means that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract. Good faith means honesty of purpose without any intention to mislead or to take unfair advantage of another. Generally speaking, it means being faithful to one's duty or obligation. However, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the terms of the contract.

[*Name of plaintiff***] claims that [***name of defendant***] violated the duty to act fairly and in good faith. To establish this claim, [***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/*nonbinary pronoun*/it] to do [or that [he/she/*nonbinary pronoun*/it] was excused from having to do those things];]**

[3. That all conditions required for [*name of defendant***]'s performance [had occurred/ [or] were excused];]**

4. That [*name of defendant***] [***specify conduct that plaintiff claims prevented ~~him/her/it~~ plaintiff from receiving the benefits ~~that he/she/it was entitled to have received~~ under the contract***];**

5. That by doing so, [*name of defendant***] did not act fairly and in good faith; and**

6. That [*name of plaintiff***] was harmed by [***name of defendant***]'s conduct.**

New April 2004; Revised June 2011, December 2012, June 2014, November 2019, May 2020

Directions for Use

This instruction should be given if the plaintiff has brought a separate count for breach of the covenant of good faith and fair dealing. It may be given in addition to CACI No. 303, *Breach of Contract—Essential Factual Elements,* if breach of contract on other grounds is also alleged.

Include element 2 if the plaintiff's substantial performance of contract requirements is at issue. Include element 3 if the contract contains conditions precedent that must occur before the defendant is required to perform. For discussion of element 3, see the Directions for Use to CACI No. 303.

In element 4, insert an explanation of the defendant's conduct that violated the duty to act in good faith.

If a claim for breach of the implied covenant does nothing more than allege a mere contract breach and,

relying on the same alleged acts, simply seeks the same damages or other relief already claimed in a contract cause of action, it may be disregarded as superfluous because no additional claim is actually stated. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 [272 Cal.Rptr. 387].) The harm alleged in element 6 may produce contract damages that are different from those claimed for breach of the express contract provisions. (See *Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885 [123 Cal.Rptr.3d 736] [noting that gravamen of the two claims rests on different facts and different harm].)

It has been noted that one may bring a claim for breach of the implied covenant without also bringing a claim for breach of other contract terms. (See *Careau & Co., supra,* 222 Cal.App.3d at p. 1395.) Thus it would seem that a jury should be able to find a breach of the implied covenant even if it finds for the defendant on all other breach of contract claims.

Sources and Authority

- "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [328 P.2d 198], internal citation omitted.)

- " ' "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." ' [] The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith." (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371–372 [6 Cal.Rptr.2d 467, 826 P.2d 710], internal citations omitted.)

- "When one party to a contract retains the unilateral right to amend the agreement governing the parties' relationship, its exercise of that right is constrained by the covenant of good faith and fair dealing which precludes amendments that operate retroactively to impair accrued rights." (*Cobb v. Ironwood Country Club* (2015) 233 Cal.App.4th 960, 963 [183 Cal.Rptr.3d 282].)

- "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*. The covenant thus cannot ' " 'be endowed with an existence independent of its contractual underpinnings.' " ' It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349–350 [100 Cal.Rptr.2d 352, 8 P.3d 1089], original italics, internal citations omitted.)

- "The implied covenant of good faith and fair dealing cannot be read to require defendants to take a particular action that is discretionary under the contract when the contract also expressly grants them the discretion to take a different action. To apply the covenant to *require* a party to take one of two alternative actions expressly allowed by the contract and forgo the other would contravene the rule that the implied covenant of good faith and fair dealing may not be 'read to prohibit a party from doing that which is expressly permitted by an agreement.' " (*Bevis v. Terrace View Partners, LP* (2019) 33 Cal.App.5th 230, 256 [244 Cal.Rptr.3d 797], original italics.)

- "The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. 'The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.' ... 'In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.' " (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031–1032 [14 Cal.Rptr.2d 335], internal citations omitted.)

- "There is no obligation to deal fairly or in good faith absent an existing contract. If there exists a contractual relationship between the parties ... the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract." (*Racine & Laramie, Ltd., supra,* 11 Cal.App.4th at p. 1032, internal citations omitted.)

- "Although breach of the implied covenant often is pleaded as a separate count, a breach of the implied covenant is necessarily a breach of contract." (*Digerati Holdings, LLC, supra,* 194 Cal.App.4th at p. 885.)

- " '[B]reach of a specific provision of the contract is not … necessary' to a claim for breach of the implied covenant of good faith and fair dealing." (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244 [160 Cal.Rptr.3d 718].)

- "The issue of whether the implied covenant of good faith and fair dealing has been breached is ordinarily 'a question of fact unless only one inference [can] be drawn from the evidence.' " (*Hicks v. E.T. Legg & Associates* (2001) 89 Cal.App.4th 496, 509 [108 Cal.Rptr.2d 10], internal citation omitted.)

- "If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated. Thus, absent those limited cases where a breach of a consensual contract term is not claimed or alleged, the only justification for asserting a separate cause of action for breach of the implied covenant is to obtain a tort recovery." (*Careau & Co., supra,* 222 Cal.App.3d at p. 1395.)

- "[W]e believe that the gravamen of the two counts differs. The gravamen of the breach of contract count is [cross defendants'] alleged failure to comply with their express contractual obligations specified in paragraph 37 of the cross-complaint, while the gravamen of the count for breach of the implied covenant of good faith and fair dealing is their alleged efforts to undermine or prevent the potential sale and distribution of the film, both by informing distributors that the film was unauthorized and could be subject to future litigation and by seeking an injunction. (*Digerati Holdings, LLC, supra,* 194 Cal. App. 4th at p. 885.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 822, 824–826

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.12, 140.50 et seq. (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 23, *Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing*, 23.05

333. Affirmative Defense—Economic Duress

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

1. **That [***name of plaintiff***] used a wrongful act or wrongful threat to pressure [***name of defendant***] into consenting to the contract;**

2. **That a reasonable person in [***name of defendant***]'s position would have believed that ~~he or she had~~ there was no reasonable alternative except to consent to the contract; and**

3. **That [***name of defendant***] would not have consented to the contract without the wrongful act or wrongful threat.**

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

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

New September 2003; Revised December 2005, June 2011, December 2011, May 2020

Directions for Use

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

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

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

Sources and Authority

- When Consent Not Freely Given. Civil Code sections 1567, 1568.

- "The doctrine of 'economic duress' can apply when one party has done a wrongful act which is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract. The party subjected to the coercive act, and having no reasonable alternative, can then plead 'economic duress' to avoid the contract." (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 644 [76 Cal.Rptr.2d 615], internal citation omitted.)

- The nonexistence of a "reasonable alternative" is a question of fact. (*CrossTalk Productions, Inc., supra,* 65 Cal.App.4th at p. 644.)

- " 'At the outset it is helpful to acknowledge the various policy considerations which are involved in cases involving economic duress. Typically, those claiming such coercion are attempting to avoid the consequences of a modification of an original contract or of a settlement and release agreement. On the one hand, courts are reluctant to set aside agreements because of the notion of freedom of contract and because of the desirability of having private dispute resolutions be final. On the other hand, there is an increasing recognition of the law's role in correcting inequitable or unequal exchanges between parties of disproportionate bargaining power and a greater willingness to not enforce agreements which were entered into under coercive circumstances.' " (*Rich & Whillock, Inc., supra,* 157 Cal.App.3d at p. 1158.)

- " 'As it has evolved to the present day, the economic duress doctrine is not limited by early statutory and judicial expressions requiring an unlawful act in the nature of a tort or a crime. … Instead, the doctrine now may come into play upon the doing of a wrongful act which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure. … The assertion of a claim known to be false or a bad faith threat to breach a contract or to withhold a payment may constitute a wrongful act for purposes of the economic duress doctrine. … Further, a reasonably prudent person subject to such an act may have no reasonable alternative but to succumb when the only other alternative is bankruptcy or financial ruin. …' " (*Chan, supra,* 188 Cal.App.4th at pp. 1173–1174.)

- " 'It is not duress . . . to take a different view of contract rights, even though mistaken, from that of the other contracting party, and it is not duress to refuse, in good faith, to proceed with a contract, even though such refusal might later be found to be wrong. [¶] . . . "A mere threat to withhold a legal right for the enforcement of which a person has an adequate [legal] remedy is not duress." ' " (*River Bank America, supra,* 38 Cal.App.4th at p. 1425.)

- "[W]rongful acts will support a claim of economic duress when 'a reasonably prudent person subject to such an act may have no reasonable alternative but to succumb when the only other alternative is bankruptcy or financial ruin.' " (*Uniwill, supra,* 124 Cal.App.4th at p. 545.)

- "Economic duress has been recognized as a basis for rescinding a settlement. However, the courts, in desiring to protect the freedom of contracts and to accord finality to a privately negotiated dispute resolution, are reluctant to set aside settlements and will apply 'economic duress' only in limited circumstances and as a 'last resort.' " (*San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048, 1058 [37 Cal.Rptr.2d 501].)

- "Required criteria that must be proven to invalidate a settlement agreement are: '(1) the debtor knew

there was no legitimate dispute and that it was liable for the full amount; (2) the debtor nevertheless refused in bad faith to pay and thereby created the economic duress of imminent bankruptcy; (3) the debtor, knowing the vulnerability its own bad faith had created, used the situation to escape an acknowledged debt; and (4) the creditor was forced to accept an inequitably low amount. …' " (*Perez, supra,* 157 Cal.App.4th at pp. 959–960.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ ~~314~~315–~~316~~317

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

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

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

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

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] and [*name of defendant*] enter into a contract?
____ Yes ____ No

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

[2. Did [*name of plaintiff*] do all, or substantially all, of the significant things that the contract required [him/her/*nonbinary pronoun*/it] to do?
____ Yes ____ No

If your answer to question 2 is yes, [skip question 3 and] answer question 4. If you answered no, [answer question 3 *if excuse is at issue*/stop here, answer no further questions, and have the presiding juror sign and date this form].]

[3.
Was [*name of plaintiff*] excused from having to do all, or substantially all, of the significant things that the contract required [him/her/*nonbinary pronoun*/it] to do?
____ Yes ____ No

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

[4. Did all the conditions that were required for [*name of defendant*]'s performance occur?
____ Yes ____ No

If your answer to question 4 is yes, [skip question 5 and] answer question 6. If you answered no, [answer question 5 *if waiver or excuse is at issue*/stop here, answer no further questions, and have the presiding juror sign and date this form].]

[5. Were the required conditions that did not occur [excused/waived]?
____ Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

6. [Did [*name of defendant*] fail to do something that the contract required [him/her/*nonbinary pronoun*/it] to do?

____ Yes ____ No]

[or]

[Did [*name of defendant*] do something that the contract prohibited [him/her/*nonbinary pronoun*/it] from doing?
____ Yes ____ No]

If your answer to [either option for] question 6 is yes, then answer question 7. If you answered no [to both options], stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of plaintiff*] harmed by [*name of defendant*]'s breach of contract?
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

[a. Past [economic] loss [including [*insert descriptions of claimed damages***]]:**

$ _____]

[b. Future [economic] loss [including [*insert descriptions of claimed damages***]]:**

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New April 2004; Revised December 2010, June 2011, June 2013, June 2015, May 2020

Directions for Use

This verdict form is based on CACI No. 303, *Breach of Contract—Essential Factual Elements*. This form is intended for use in most contract disputes. If more specificity is desired, see verdict forms that follow.

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.

Optional questions 2 and 3 address acts that the plaintiff must have performed before the defendant's duty to perform is triggered. Include question 2 if the court has determined that the contract included dependent covenants, such that the failure of the plaintiff to perform some obligation would relieve the defendant of the obligation to perform. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.Rptr.3d 893].) Include question 3 if the plaintiff claims that ~~he or she~~the plaintiff was excused from having to perform an otherwise required obligation.

Optional questions 4 and 5 address conditions precedent to the defendant's performance. Include question 4 if the occurrence of conditions for performance is at issue. (See CACI No. 322, *Occurrence of Agreed Condition Precedent*.) Include question 5 if the plaintiff alleges that conditions that did not occur were excused. The most common form of excuse is the defendant's waiver. (See CACI No. 323, *Waiver of Condition Precedent*; see also Restatement Second of Contracts, section 225, Comment b.) Waiver must be proved by clear and convincing evidence. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [35 Cal.Rptr.2d 515].)

Note that questions 4 and 5 address conditions precedent, not the defendant's nonperformance after the conditions have all occurred or been excused. The defendant's nonperformance is the first option for question 6. If the defendant alleges that its nonperformance was excused or waived by the plaintiff, an additional question on excuse or waiver should be included after question 6.

If the verdict form used combines other causes of action involving both economic and noneconomic damages, use "economic" in question 8.

If specificity is not required, users do not have to itemize the damages listed in question 8. The breakdown is optional depending on the circumstances.

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

We answer the questions submitted to us as follows:

1. Were the contract terms clear enough so that the parties could understand what each was required to do?
____ Yes ____ No

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

2. Did the parties agree to give each other something of value?
____ Yes ____ No

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

3. Did the parties agree to the terms of the contract?
____ Yes ____ No

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

[4. Did [*name of plaintiff*] do all, or substantially all, of the significant things that the contract required [him/her/*nonbinary pronoun*/it] to do?
____ Yes ____ No

If your answer to question 4 is yes, [skip question 5 and] answer question 6. If you answered no, [answer question 5 *if excuse is at issue*/stop here, answer no further questions, and have the presiding juror sign and date the form].]

[5. Was [*name of plaintiff*] excused from having to do all, or substantially all, of the significant things that the contract required [him/her/*nonbinary pronoun*/it] to do?
____ Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

[6. Did all the conditions that were required for [*name of defendant*]'s performance occur?
____ Yes ____ No

If your answer to question 6 is yes, [skip question 7 and] answer question 8. If you answered no, [answer question 7 *if excuse_or waiver is at issue*/**stop here, answer no further questions, and have the presiding juror sign and date this form].**

[7. Were the required conditions that did not occur [excused/waived]?
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

8. [Did [*name of defendant***] fail to do something that the contract required [him/her/***nonbinary pronoun***/it] to do?**
____ Yes ____ No]

[or]

[Did [*name of defendant***] do something that the contract prohibited [him/her/***nonbinary pronoun***/it] from doing?**
____ Yes ____ No]

If your answer to [either option for] question 8 is yes, then answer question 9. If you answered no [to both options], stop here, answer no further questions, and have the presiding juror sign and date this form.

9. Was [*name of plaintiff***] harmed by [***name of defendant***]'s breach of contract?**
____ Yes ____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

[a. Past [economic] loss [including] [*insert descriptions of claimed damages***]:**
$ _____]

[b. Future [economic] loss [including] [*insert descriptions of claimed damages***]:**
$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New October 2004; Revised December 2010, June 2015. May 2020

Directions for Use

This verdict form is based on CACI No. 302, *Contract Formation—Essential Factual Elements*, and CACI No. 303, *Breach of Contract—Essential Factual Elements*. The elements concerning the parties' legal capacity and legal purpose will likely not be issues for the jury. If the jury is needed to make a factual determination regarding these issues, appropriate questions may be added to this verdict form.

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.

Optional questions 4 and 5 address acts that the plaintiff must have performed before the defendant's duty to perform is triggered. Include question 4 if the court has determined that the contract included dependent covenants, such that the failure of the plaintiff to perform some obligation would relieve the defendant of the obligation to perform. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.Rptr.3d 893].) Include question 5 if the plaintiff claims that ~~he or she~~the plaintiff was excused from having to perform an otherwise required obligation.

Optional questions 6 and 7 address conditions precedent to the defendant's performance. Include question 6 if the occurrence of conditions for performance is at issue. (See CACI No. 322, *Occurrence of Agreed Condition Precedent*.) Include question 7 if the plaintiff alleges that conditions that did not occur were excused. The most common form of excuse is the defendant's waiver. (See CACI No. 323, *Waiver of Condition Precedent*; see also Restatement Second of Contracts, section 225, Comment b.) Waiver must be proved by clear and convincing evidence. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [35 Cal.Rptr.2d 515].)

Note that questions 6 and 7 address conditions precedent, not the defendant's nonperformance after the conditions have all occurred or been excused. The defendant's nonperformance is the first option for question 8. If the defendant alleges that its nonperformance was excused or waived by the plaintiff, an additional question on excuse or waiver should be included after question 8.

If the verdict form used combines other causes of action involving both economic and noneconomic damages, use "economic" in question 10.

If specificity is not required, users do not have to itemize all the damages listed in question 10. The breakdown is optional depending on the circumstances.

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

401. Basic Standard of Care

Negligence is the failure to use reasonable care to prevent harm to oneself or to others.

A person can be negligent by acting or by failing to act. A person is negligent if ~~he or she~~that person does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.

You must decide how a reasonably careful person would have acted in [*name of plaintiff/defendant***]'s situation.**

New September 2003; Revised May 2020

Sources and Authority

- "The formulation of the standard of care is a question of law for the court. Once the court has formulated the standard, its application to the facts of the case is a task for the trier of fact if reasonable minds might differ as to whether a party's conduct has conformed to the standard." (*Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 546 [25 Cal.Rptr.2d 97, 863 P.2d 167], internal citations omitted.)

- Restatement Second of Torts, section 282, defines negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."

- Restatement Second of Torts, section 283, provides: "Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances."

- The California Supreme Court has stated: "Because application of [due care] is inherently situational, the amount of care deemed reasonable in any particular case will vary, while at the same time the standard of conduct itself remains constant, i.e., due care commensurate with the risk posed by the conduct taking into consideration all relevant circumstances. [Citations]." (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997 [35 Cal.Rptr.2d 685, 884 P.2d 142]; see also *Tucker v. Lombardo* (1956) 47 Cal.2d 457, 464 [303 P.2d 1041].)

- The proper conduct of a reasonable person in a particular situation may become settled by judicial decision or may be established by statute or administrative regulation. (*Ramirez, supra,* 6 Cal.4th at p. 547.) (See CACI Nos. 418 to 421 on negligence per se.)

- Negligence can be found in the doing of an act, as well as in the failure to do an act. (Rest.2d Torts, § 284.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~867~~998, ~~868~~999

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.3

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, §§ 1.01, 1.02, 1.30 (Matthew Bender)

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

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.31 (Matthew Bender)

404. Intoxication

A person is not necessarily negligent just because ~~he or she~~ that person used alcohol [or drugs]. However, people who drink alcohol [or take drugs] must act just as carefully as those who do not.

New September 2003; Revised May 2020

Directions for Use

This instruction should be given only if there is evidence of alcohol or drug consumption. This instruction is not intended for situations in which intoxication is grounds for a negligence per se instruction (e.g., driving under the influence).

Sources and Authority

- Mere consumption of alcohol is not negligence in and of itself: "The fact that a person when injured was intoxicated is not in itself evidence of contributory negligence, but it is a circumstance to be considered in determining whether his intoxication contributed to his injury." (*Coakley v. Ajuria* (1930) 209 Cal. 745, 752 [290 P. 33].)

- Intoxication is not generally an excuse for failure to comply with the reasonable-person standard. (*Cloud v. Market Street Railway Co.* (1946) 74 Cal.App.2d 92, 97 [168 P.2d 191].)

- Intoxication is not negligence as a matter of law, but it is a circumstance for the jury to consider in determining whether such intoxication was a contributing cause of an injury and is also a question of fact for the jury. (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 217 [57 Cal.Rptr. 319]; *Barr v. Scott* (1955) 134 Cal.App.2d 823, 827–828 [286 P.2d 552]; see also *Emery v. Los Angeles Ry. Corp.* (1943) 61 Cal.App.2d 455, 461 [143 P.2d 112].)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § ~~1320~~1477

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, §§ 20.02, 20.04 (Matthew Bender)

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

411. Reliance on Good Conduct of Others

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

New September 2003; Revised May 2020

Directions for Use

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

Sources and Authority

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

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

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

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

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

- "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." (*Bigbee v.*

Pacific Telephone and Telegraph Co. (1983) 34 Cal.3d 49, 58 [192 Cal.Rptr. 857, 665 P.2d 947]; see also Rest.2d Torts, § 449.)

- "Foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 678 [25 Cal.Rptr.2d 137, 863 P.2d 207], disapproved on other grounds in *Reid v. Google Inc.* (2010) 50 Cal.4th 512, 527 fn. 5 [113 Cal.App.3d 327, 235 P.3d 988].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1468–1470

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

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

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

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.51 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.120 et seq. (Matthew Bender)

414. Amount of Caution Required in Dangerous Situations

People must be extremely careful when they deal with dangerous items or participate in dangerous activities. [*Insert type of dangerous item or activity***] is dangerous in and of itself. The risk of harm is so great that the failure to use extreme caution is negligence.**

New September 2003; Revised May 2020

Directions for Use

An instruction on the standard of care for extremely dangerous activities is proper only "in situations where the nature of the activity or substance is so inherently dangerous or complex, as such, that the hazard persists despite the exercise of ordinary care." (*Benwell v. Dean* (1964) 227 Cal.App.2d 226, 233 [38 Cal.Rptr. 542]; see also *Menchaca v. Helms Bakeries, Inc.* (1968) 68 Cal.2d 535, 544 [67 Cal.Rptr. 775, 439 P.2d 903].)

This instruction should not be given at the same time as an instruction pertaining to standard of care for employees who have to work in dangerous situations. In appropriate cases, juries may be instructed that a person of ordinary prudence is required to exercise extreme caution when engaged in a dangerous activity. (*Borenkraut v. Whitten* (1961) 56 Cal.2d 538, 544–546 [15 Cal.Rptr. 635, 364 P.2d 467].) However, this rule does not apply when a person's lawful employment requires that ~~he or she must~~ person to work in a dangerous situation. (*McDonald v. City of Oakland* (1967) 255 Cal.App.2d 816, 827 [63 Cal.Rptr. 593].) This is because "reasonable ~~men~~ [employees] who are paid to give at least part of their attention to their job" may not be as able to maintain the same standards for personal safety as nonemployees. (*Young v. Aro Corp.* (1974) 36 Cal.App.3d 240, 245 [111 Cal.Rptr. 535].) (See CACI No. 415, *Employee Required to Work in Dangerous Situations*.)

Sources and Authority

- Even a slight deviation from the standards of care will constitute negligence in cases involving dangerous instrumentalities. (*Borenkraut, supra,* 56 Cal.2d at p. 545.)

- Dangerous instrumentalities include fire, firearms, explosive or highly inflammable materials, and corrosive or otherwise dangerous or noxious fluids. (*Warner v. Santa Catalina Island Co.* (1955) 44 Cal.2d 310, 317 [282 P.2d 12].)

- In *Menchaca*, the Court held that "[d]riving a motor vehicle may be sufficiently dangerous to warrant special instructions, but it is not so hazardous that it always requires 'extreme caution.' " (*Menchaca, supra,* 68 Cal.2d at p. 544.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~918~~1050–~~922~~ 1054

1 Levy et al., California Torts, Ch. 1, *Negligence*, §§ 1.02, 1.30 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.14 (Matthew Bender)

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

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

417. Special Doctrines: Res ipsa loquitur

[*Name of plaintiff*] may prove that [*name of defendant*]'s negligence caused [his/her/*nonbinary pronoun*] harm if [he/she/*nonbinary pronoun*] proves all of the following:

1. **That [*name of plaintiff*]'s harm ordinarily would not have happened unless someone was negligent;**

2. **That the harm was caused by something that only [*name of defendant*] controlled; and**

3. **That [*name of plaintiff*]'s voluntary actions did not cause or contribute to the event[s] that harmed [him/her/*nonbinary pronoun*].**

If you decide that [*name of plaintiff*] did not prove one or more of these three things, you must decide whether [*name of defendant*] was negligent in light of the other instructions I have read.

If you decide that [*name of plaintiff*] proved all of these three things, you may, but are not required to, find that [*name of defendant*] was negligent or that [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm, or both.

[*Name of defendant*] contends that [he/she/*nonbinary pronoun*/it] was not negligent or that [his/her/*nonbinary pronoun*/its] negligence, if any, did not cause [*name of plaintiff*] harm. If after weighing all of the evidence, you believe that it is more probable than not that [*name of defendant*] was negligent and that [his/her/*nonbinary pronoun*] negligence was a substantial factor in causing [*name of plaintiff*]'s harm, you must decide in favor of [*name of plaintiff*]. Otherwise, you must decide in favor of [*name of defendant*].

New September 2003; Revised June 2011, December 2011

Directions for Use

The first paragraph of this instruction sets forth the three elements of res ipsa loquitur. The second paragraph explains that if the plaintiff fails to establish res ipsa loquitur as a presumption, the jury may still find for the plaintiff if it finds based on its consideration of all of the evidence that the defendant was negligent. (See *Howe v. Seven Forty Two Co., Inc.* (2010) 189 Cal.App.4th 1155, 1163–1164 [117 Cal.Rptr.3d 126].)

If the plaintiff has established the three conditions that give rise to the doctrine, the jury is required to find that the accident resulted from the defendant's negligence unless the defendant comes forward with evidence that would support a contrary finding. (See Cal. Law Revision Com. com. ~~Comment~~ to Evid. Code, § 646.) The last two paragraphs of the instruction assume that the defendant has presented evidence that would support a finding that the defendant was not negligent or that any negligence on the defendant's part was not a proximate cause of the accident. In this case, the presumption drops out, and the plaintiff must then prove the elements of negligence without the benefit of the presumption of res ipsa

loquitur. (See *Howe, supra,* 189 Cal.App.4th at pp. 1163–1164; see also Evid. Code, § 646(c).)

Sources and Authority

- Res Ipsa Loquitur. Evidence Code section 646(c).

- Presumption Affecting Burden of Producing Evidence. Evidence Code section 604.

- "In California, the doctrine of res ipsa loquitur is defined by statute as 'a presumption affecting the burden of producing evidence.' The presumption arises when the evidence satisfies three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.' A presumption affecting the burden of producing evidence 'require[s] the trier of fact to assume the existence of the presumed fact' unless the defendant introduces evidence to the contrary. The presumed fact, in this context, is that 'a proximate cause of the occurrence was some negligent conduct on the part of the defendant ... .' If the defendant introduces 'evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence,' the trier of fact determines whether defendant was negligent without regard to the presumption, simply by weighing the evidence." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825–826 [15 Cal.Rptr.2d 679, 843 P.2d 624], internal citations omitted.)
- " 'The doctrine of res ipsa loquitur is applicable where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the one responsible.' " (*Howe, supra,* 189 Cal.App.4th at p. 1161.)

- "Res ipsa loquitur is an evidentiary rule for 'determining whether circumstantial evidence of negligence is sufficient.' " (*Howe, supra,* 189 Cal.App.4th at p. 1161, internal citation omitted.)

- The doctrine "is based on a theory of 'probability' where there is no direct evidence of defendant's conduct, permitting a common sense inference of negligence from the happening of the accident." (*Gicking v. Kimberlin* (1985) 170 Cal.App.3d 73, 75 [215 Cal.Rptr. 834].)

- "All of the cases hold, in effect, that it must appear, either as a matter of common experience or from evidence in the case, *that the accide*nt is of a type which probably would not happen unless someone was negligent." (*Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 Cal.2d 436, 442–443 [247 P.2d 344].)

- The purpose of the second "control" requirement is to "link the defendant with the probability, already established, that the accident was negligently caused." (*Newing v. Cheatham* (1975) 15 Cal.3d 351, 362 [124 Cal.Rptr. 193, 540 P.2d 33].)

- "The purpose of [the third] requirement, like that of control by the defendant is to establish that the defendant is the one probably responsible for the accident. The plaintiff need not show that he was entirely inactive at the time of the accident in order to satisfy this requirement, so long as the evidence is such as to eliminate his conduct as a factor contributing to the occurrence." (*Newing, supra,* 15 Cal.3d at p. 363, internal citations omitted.)

- The third condition "should not be confused with the problem of contributory negligence, as to which defendant has the burden of proof. ... [I]ts purpose, like that of control by the defendant, is merely to assist the court in determining whether it is more probable than not that the defendant was responsible for the accident." (*Zentz, supra,* 39 Cal.2d at p. 444.)

- "[Evidence Code section 646] … classified the doctrine as a presumption affecting the burden of producing evidence. Under that classification, when the predicate facts are established to give rise to the presumption, the burden of producing evidence to rebut it shifts to the defendant to prove lack of negligence or lack of proximate cause that the injury claimed was the result of that negligence. As a presumption affecting the burden of producing evidence (as distinguished from a presumption affecting the burden of proof), if evidence is presented to rebut the presumed fact, the presumption is out of the case—it 'disappears.' But if no such evidence is submitted, the trier of fact must find the presumed fact to be established." (*Howe, supra,* 189 Cal.App.4th at p. 1162.)

- " 'If evidence is produced that would support a finding that the defendant was not negligent or that any negligence on his part was not a proximate cause of the accident, the presumptive effect of the doctrine vanishes.' '[T]he mere introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact causes the presumption, as a matter of law, to disappear.' When the presumptive effect vanishes, it is the plaintiff's burden to introduce actual evidence that would show that the defendant is negligent and that such negligence was the proximate cause of the accident." (*Howe, supra,* 189 Cal.App.4th at p. 1163, internal citations omitted.)

- "As the [Law Revision Commission] Comment [to Evidence Code section 646] explains, even though the presumptive effect of the doctrine vanishes, 'the jury may still be able to draw an inference that the accident was caused by the defendant's lack of due care from the facts that gave rise to the presumption. … [¶] … [¶] … An inference of negligence may well be warranted from all of the evidence in the case even though the plaintiff fails to establish all the elements of res ipsa loquitur. In appropriate cases, therefore, the jury may be instructed that, even though it does not find that the facts giving rise to the presumption have been proved by a preponderance of the evidence, it may nevertheless find the defendant negligent if it concludes from a consideration of all the evidence that it is more probable than not that the defendant was negligent.' " (*Howe, supra,* 189 Cal.App.4th at p. 1163, internal citation omitted.)

- "It follows that where part of the facts basic to the application of the doctrine of res ipsa loquitur is established as a matter of law but that others are not, the court should instruct that application of the doctrine by the jury depends only upon the existence of the basic facts not conclusively established." (*Rimmele v. Northridge Hospital Foundation* (1975) 46 Cal.App.3d 123, 130 [120 Cal.Rptr. 39].)

Secondary Sources

1 Witkin, California Evidence (~~4th~~ 5th ed. ~~2000~~2012) Burden of Proof and Presumptions, §§ ~~114~~116–~~118~~120

7 Witkin, California Procedure (5th ed. 2008) Trial, § 300

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-G, *Inability To Prove Negligence Or Causation—Res Ipsa Loquitur, "Alternative Liability" And "Market Share Liability~~,~~".* ¶¶ 2:1751–2:1753 (The Rutter Group)

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, § 3.20 et seq. (Matthew Bender)

1A California Trial Guide, Unit 11, *Opening Statement*, § 11.42, Unit 90, *Closing Argument*, § 90.90 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.11 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.340 et seq. (Matthew Bender)

422. Providing Alcoholic Beverages to Obviously Intoxicated Minors (Bus. & Prof. Code, § 25602.1)

[*Name of plaintiff***] claims [***name of defendant***] is responsible for [his/her/*nonbinary pronoun*] harm because [***name of defendant***] [sold/gave] alcoholic beverages to [***name of alleged minor***], a minor who was already obviously intoxicated.**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **[That [***name of defendant***] was [required to be] licensed to sell alcoholic beverages;]**

   [*or***]**

   [That [*name of defendant***] was authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave;]**
2. **[That [***name of defendant***] [sold/ gave] alcoholic beverages to [***name of alleged minor***];]**

   [or]

   [That [*name of defendant***] caused alcoholic beverages to be [sold/given away] to [***name of alleged minor***];]**
3. **That [***name of alleged minor***] was less than 21 years old at the time;**
4. **That when [***name of defendant***] provided the alcoholic beverages, [***name of alleged minor***] displayed symptoms that would lead a reasonable person to conclude that [he/she/*nonbinary pronoun*] was obviously intoxicated;**
5. **That [***name of alleged minor***] harmed [***name of plaintiff***]; and**
6. **That [***name of defendant***]'s [selling/ giving] alcoholic beverages to [***name of alleged minor***] was a substantial factor in causing [***name of plaintiff***]'s harm.**

In deciding whether [*name of alleged minor***] was obviously intoxicated, you may consider whether [he/she/*nonbinary pronoun*] displayed one or more of the following symptoms to [***name of defendant***] before the alcoholic beverages were provided: impaired judgment; alcoholic breath; incoherent or slurred speech; poor muscular coordination; staggering or unsteady walk or loss of balance; loud, boisterous, or argumentative conduct; flushed face; or other symptoms of intoxication. The mere fact that [***name of alleged minor***] had been drinking is not enough.**

New September 2003; Revised December 2009, June 2014, December 2014, May 2020

Directions for Use

Business and Professions Code section 25602.1 imposes potential liability on those who have or are required to have a liquor license for the selling, furnishing, or giving away of alcoholic beverages to an obviously intoxicated minor. It also imposes potential liability on a person who is not required to be licensed who sells alcohol to an obviously intoxicated minor. (See *Ennabe v. Manosa* (2014) 58 Cal.4th 697, 711 [168 Cal.Rptr.3d 440, 319 P.3d 201].) In this latter case, omit element 1, select "sold" in the opening paragraph and in element 2, and select "selling" in element 6.

If the plaintiff is the minor who is suing for ~~his or her~~ the plaintiff's own injuries (see *Chalup v. Aspen Mine Co.* (1985) 175 Cal.App.3d 973, 974 [221 Cal.Rptr. 97]), modify the instruction by substituting the appropriate pronoun for "[*name of alleged minor*]" throughout.

For purposes of this instruction, a "minor" is someone under the age of 21. (*Rogers v. Alvas* (1984) 160 Cal.App.3d 997, 1004 [207 Cal.Rptr. 60].)

Sources and Authority

- Liability for Providing Alcohol to Minors. Business and Professions Code section 25602.1.

- Sales Under the Alcoholic Beverage Control Act. Business and Professions Code section 23025.

- "In sum, if a plaintiff can establish the defendant provided alcohol to an obviously intoxicated minor, and that such action was the proximate cause of the plaintiff's injuries or death, section 25602.1--the applicable statute in this case--permits liability in two circumstances: (1) the defendant was either licensed to sell alcohol, required to be licensed, or federally authorized to sell alcoholic beverages in certain places, and the defendant sold, furnished, or gave the minor alcohol or caused alcohol to be sold, furnished, or given to the minor; or (2) the defendant was 'any other person' (i.e., neither licensed nor required to be licensed), and he or she sold alcohol to the minor or caused it to be sold. Whereas licensees (and those required to be licensed) may be liable if they merely furnish or give an alcoholic beverage away, a nonlicensee may be liable only if a *sale* occurs; that is, a nonlicensee, such as a social host, who merely furnishes or gives drinks away--even to an obviously intoxicated minor--retains his or her statutory immunity." (*Ennabe, supra,* 58 Cal.4th at pp. 709−710, original italics.)

- "[W]e conclude that the placement of section 25602.1 in the Business and Professions Code does not limit the scope of that provision to commercial enterprises. First, the structure of section 25602.1 suggests it applies to noncommercial providers of alcohol. The statute addresses four categories of persons and we assume those falling in the first three categories--those licensed by the Department of ABC, those without licenses but who are nevertheless required to be licensed, and those authorized to sell alcohol by the federal government--are for the most part engaged in some commercial enterprise. The final category of persons addressed by section 25602.1 is more of a catchall: 'any other person' who sells alcohol. Consistent with the plain meaning of the statutory language and the views of the Department of ABC, we find this final category includes private persons and ostensible social hosts who, for whatever reason, charge money for alcoholic drinks." (*Ennabe, supra,* 58 Cal.4th at p. 711.)

- "[Business and Professions Code] Section 23025's broad definition of a sale shows the Legislature intended the law to cover a wide range of transactions involving alcoholic beverages: a qualifying

sale includes '*any* transaction' in which title to an alcoholic beverage is passed for '*any* consideration.' (Italics added.) Use of the term 'any' to modify the words 'transaction' and 'consideration' demonstrates the Legislature intended the law to have a broad sweep and thus include both indirect as well as direct transactions." (*Ennabe, supra,* 58 Cal.4th at p. 714, orginal italics.)

- In " 'The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known *outward* manifestations which are "plain" and "easily seen or discovered." If such outward manifestations exist and the seller still serves the customer so affected, he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent.' " (*Schaffield v. Abboud* (1993) 15 Cal.App.4th 1133, 1140 [19 Cal.Rptr.2d 205], original italics.)

- "[T]he standard for determining 'obvious intoxication' is measured by that of a reasonable person." (*Schaffield, supra,* 15 Cal.App.4th at p. 1140.)

- "We shall make no effort to state definitively the meaning of the word 'furnishes' … . As used in a similar context the word 'furnish' has been said to mean: ' "To supply; to offer for use, to give, to hand." ' It has also been said the word 'furnish' is synonymous with the words 'supply' or 'provide.' In relation to a physical object or substance, the word 'furnish' connotes possession or control over the thing furnished by the one who furnishes it. The word 'furnish' implies some type of affirmative action on the part of the furnisher; failure to protest or attempt to stop another from imbibing an alcoholic beverage does not constitute 'furnishing.' " (*Bennett v. Letterly* (1977) 74 Cal.App.3d 901, 904–905 [141 Cal.Rptr. 682], internal citations omitted.)

- "As used in liquor laws, 'furnish' means to provide in any way, and includes giving as well as selling. … [¶] California courts have interpreted the terms 'furnish' and 'furnished' as requiring an affirmative act by the purported furnisher to supply the alcoholic beverage to the drinker." (*Fiorini v. City Brewing Co., LLC* (2014) 231 Cal.App.4th 306, 320−321 [179 Cal.Rptr.3d 827] [beverage manufacturer does not "furnish" beverage to the consumer], footnote and internal citation omitted.)

- "As instructed by the court, the jury was told to consider several outward manifestations of obvious intoxication, which included incontinence, unkempt appearance, alcoholic breath, loud or boisterous conduct, bloodshot or glassy eyes, incoherent or slurred speech, flushed face, poor muscular coordination or unsteady walking, loss of balance, impaired judgment, or argumentative behavior. This instruction was correct." (*Jones v. Toyota Motor Co.* (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611], internal citation omitted.)

- "[S]ection 25602.1's phrase 'causes to be sold' requires an affirmative act directly related to the sale of alcohol which necessarily brings about the resultant action to which the statute is directed, i.e., the furnishing of alcohol to an obviously intoxicated minor." (*Hernandez v. Modesto Portuguese Pentecost Assn.* (1995) 40 Cal.App.4th 1274, 1276 [48 Cal.Rptr.2d 229].)

- "The undisputed evidence shows [defendant]'s checker sold beer to Spitzer and that Spitzer later gave some of that beer to Morse. As in *Salem* [*Salem v. Superior Court* (1989) 211 Cal.App.3d 595, 600 [259 Cal.Rptr. 447]] , we conclude defendant cannot be held liable because the person to whom it sold alcohol was not the person whose negligence allegedly caused the injury at issue." (

Safeway, Inc. (2013) 209 Cal.App.4th 1455, 1462 [147 Cal.Rptr.3d 809].)

- "[O]bviously intoxicated minors who are served alcohol by a licensed purveyor of liquor, may bring a cause of action for negligence against the purveyor for [their own] subsequent injuries." (*Chalup, supra,* 175 Cal.App.3d at p. 979.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § ~~1072~~1218

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.63

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-L, *Liability For Providing Alcoholic Beverages*, ¶ 2:2101 (The Rutter Group)

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.21 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 19, *Alcoholic Beverages: Civil Liability*, §§ 19.12, 19.52, 19.75 (Matthew Bender)

1 California Points and Authorities, Ch. 15A, *Alcoholic Beverages: Civil Liability for Furnishing*, § 15A.21 et seq. (Matthew Bender)

427. Furnishing Alcoholic Beverages to Minors (Civ. Code, § 1714(d))

[*Name of plaintiff***] claims [***name of defendant***] is responsible for [his/her/*nonbinary pronoun*] harm because [***name of defendant***] furnished alcoholic beverages to [him/her/*nonbinary pronoun*/[***name of minor***]], a minor, at [***name of defendant***]'s home.**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was an adult;**

2. **That [***name of defendant***] knowingly furnished alcoholic beverages to [him/her/*nonbinary pronoun*/[***name of minor***]] at [***name of defendant***]'s home;**

3. **That [***name of defendant***] knew or should have known that [he/she/*nonbinary pronoun*/[***name of minor***]] was less than 21 years old at the time;**

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

5. **That [***name of defendant***]'s furnishing alcoholic beverages to [[***name of plaintiff***]/[***name of minor***]] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2011; Revised May 2020

Directions for Use

This instruction is for use for a claim of social host (noncommercial) liability for furnishing alcohol to a minor. (See Civ. Code, § 1714(d).) For an instruction for commercial liability, see CACI No. 422, *Sale of Alcoholic Beverages to Obviously Intoxicated Minors*.

Under the statute, the minor may sue for ~~his or her~~ the minor's own injuries, or a third person may sue for injuries caused by the minor. (Civ. Code, § 1714(d)(2).) If the minor is the plaintiff, use the appropriate pronoun throughout. If the plaintiff is a third person, select "[*name of minor*]" throughout and include "by [*name of minor*]" in element 4.

Sources and Authority

- No Social Host Liability for Furnishing Alcohol. Civil Code section 1714(c).
- Exception to Nonliability. Civil Code section 1714(d).
- "Although the claim against [host] appears to fall within the section 1714, subdivision (d) exception, plaintiffs cannot bootstrap respondents into that exception by alleging that respondents conspired with or aided and abetted [host] by providing alcoholic beverages that were furnished to [minor]. Subdivision (b) of section 1714 unequivocally states that 'the furnishing of alcoholic beverages is not

the proximate cause of injuries resulting from intoxication … .' This provision necessarily precludes liability against anyone who furnished alcohol to someone who caused injuries due to intoxication. The exception set forth in subdivision (d) vitiates subdivision (b) for a very narrow class of claims: claims against an adult who knowingly furnishes alcohol at his or her residence to a person he or she knows is under the age of 21. Because respondents are not alleged to have furnished alcohol to [minor] at their residences, plaintiffs' claims against them are barred because, as a matter of statutory law, plaintiffs cannot establish that respondents' actions proximately caused plaintiffs' injuries." (*Rybicki v. Carlson* (2013) 216 Cal.App.4th 758, 764 [157 Cal.Rptr.3d 660].)

- "We shall make no effort to state definitively the meaning of the word 'furnishes' … . As used in a similar context the word 'furnish' has been said to mean: ' "To supply; to offer for use, to give, to hand." ' It has also been said the word 'furnish' is synonymous with the words 'supply' or 'provide.' In relation to a physical object or substance, the word 'furnish' connotes possession or control over the thing furnished by the one who furnishes it. The word 'furnish' implies some type of affirmative action on the part of the furnisher; failure to protest or attempt to stop another from imbibing an alcoholic beverage does not constitute 'furnishing.' " (*Bennett v. Letterly* (1977) 74 Cal.App.3d 901, 904–905 [141 Cal.Rptr. 682], internal citations omitted.)

- "As used in liquor laws, 'furnish' means to provide in any way, and includes giving as well as selling. … [¶] California courts have interpreted the terms 'furnish' and 'furnished' as requiring an affirmative act by the purported furnisher to supply the alcoholic beverage to the drinker." (*Fiorini v. City Brewing Co., LLC* (2014) 231 Cal.App.4th 306, 320−321 [179 Cal.Rptr.3d 827] [beverage manufacturer does not "furnish" beverage to the consumer], footnote and internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § ~~1070~~1215 et seq.

1 Levy et al., California Torts, Ch. 1, *Duty and Breach*, § 1.21 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 19, *Alcoholic Beverages: Civil Liability*, §§ 19.11, 19.13 (Matthew Bender)

1 California Points and Authorities, Ch. 15A, *Alcoholic Beverages: Civil Liability for Furnishing*, § 15A.21 et seq. (Matthew Bender)

429. Negligent Sexual Transmission of Disease

[*Name of plaintiff***] claims that [***name of defendant***] sexually transmitted [***specify sexually transmitted disease, e.g., HIV***] to [him/her/*nonbinary pronoun*]. [***Name of defendant***] may be negligent for this transmission if [***name of plaintiff***] proves that [***name of defendant***] knew, or had reason to know, that [he/she/*nonbinary pronoun*] was infected with [***e.g., HIV***].**

New May 2017; Revised May 2020

Directions for Use

This instruction should be given with CACI No. 400, *Negligence—Essential Factual Elements*. In a claim for negligent transmission of a sexually communicable disease, the elements of negligence, duty, breach, and causation of harm must be proved. (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1188 [45 Cal.Rptr.3d 316, 137 P.3d 153].)

One has a duty to avoid ~~transmission~~ transmitting an infectious disease if ~~he or she~~ that person should have known of ~~that he or she was infected with~~ the ~~disease~~ infection (constructive knowledge). (*John B., supra,* 38 Cal.4th at pp. 1190−1191.) While the existence of a duty is a question of law for the court, what a person should have known is a question of fact.

It must be noted that in *John B.*, the court limited its holding on constructive knowledge to the facts of the case before it, which involved a couple who were engaged and subsequently married; a defendant who was alleged to have falsely represented himself as monogamous and disease-free, and who insisted the couple stop using condoms; and a plaintiff who agreed to stop using condoms in reliance on those allegedly false representations. The court did not consider the existence or scope of a duty for persons whose relationship did not extend beyond the sexual encounter itself, whose relationship did not contemplate sexual exclusivity, who had not represented themselves as disease-free, or who had not insisted on having sex without condoms. (*John B., supra,* 38 Cal.4th at p. 1193.) Therefore, this instruction may not be appropriate on facts that were expressly reserved in *John B.*

Sources and Authority

- "[A] person who unknowingly contracts a sexually transmitted disease such as herpes may maintain an action for damages against one who either negligently or through deceit infects her with the disease." (*Doe v. Roe* (1990) 218 Cal.App.3d 1538, 1543 [267 Cal.Rptr. 564].)

- "[T]o be *stricken with disease* through another's negligence is in legal contemplation as it often is in the seriousness of consequences, no different from *being struck with an automobile* through another's negligence." (*John B., supra,* 38 Cal.4th at p. 1188, original italics.)

- "Because ' "[a]ll persons are required to use ordinary care to prevent others being injured as a result of their conduct" ', this court has repeatedly recognized a cause of action for negligence not only against those who have actual knowledge of unreasonable danger, but also against those who have constructive knowledge of it." (*John B., supra,* 38 Cal.4th at p. 1190, internal citation

omitted.)

- " '[C]onstructive knowledge,' which means knowledge 'that one using reasonable care or diligence should have, and therefore is attributed by law to a given person', encompasses a variety of mental states, ranging from one who is deliberately indifferent in the face of an unjustifiably high risk of harm to one who merely should know of a dangerous condition. (*John B., supra,* 38 Cal.4th at pp. 1190−1191, internal citations omitted.)

- "[T]he tort of negligent transmission of HIV does not depend solely on actual knowledge of HIV infection and would extend at least to those situations where the actor, under the totality of the circumstances, has reason to know of the infection. Under the reason-to-know standard, 'the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists.' In other words, 'the actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist.' " (*John B., supra,* 38 Cal.4th at p. 1191, internal citations omitted.)

- "[W]e are mindful that our precedents direct us to consider whether a duty of care exists ' "on a case-by-case basis." ' Accordingly, our conclusion that a claim of negligent transmission of HIV lies against those who know or at least have reason to know of the disease must be understood in the context of the allegations in this case, which involves a couple who were engaged and subsequently married; a defendant who falsely represented himself as monogamous and disease-free and insisted the couple stop using condoms; and a plaintiff who agreed to stop using condoms in reliance on those false representations. We need not consider the existence or scope of a duty for persons whose relationship does not extend beyond the sexual encounter itself, whose relationship does not contemplate sexual exclusivity, who have not represented themselves as disease-free, or who have not insisted on having sex without condoms." (*John B., supra,* 38 Cal.4th at p. 1193.)

Secondary Sources

~~9~~ 6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § ~~912~~1044

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.13 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.32[2] (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.170 (Matthew Bender)

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, May 2020

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~~the plaintiff 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~~the plaintiff 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.)

- "The second aspect of proximate cause 'focuses on public policy considerations. Because the purported [factual] causes of an event may be traced back to the dawn of humanity, the law has imposed additional "limitations on liability other than simple causality." [Citation.] "These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy." [Citation.] Thus, "proximate 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.' " [Citation.]' " (*State Dept. of State Hospitals, supra,* 61 Cal.4th at p. 353, internal citation 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 [236 Cal.Rptr.3d 128].)

- " '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.)

- "Ordinarily, proximate cause is a question of fact which cannot be decided as a matter of law from the allegations of a complaint. … Nevertheless, where the facts are such that the only reasonable conclusion is an absence of causation, the question is one of law, not of fact." (*Modisette v. Apple Inc.*

(2018) 30 Cal.App.5th 136, 152 [241 Cal.Rptr.3d 209].)

- "[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)

435. Causation for Asbestos-Related Cancer Claims

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

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

New September 2003; Revised December 2007, May 2018, November 2018, May 2020

Directions for Use

This instruction is to be given in a case in which the plaintiff's claim is that ~~he or she~~the plaintiff contracted an asbestos-related disease from exposure to the defendant's asbestos-containing product. This instruction is based on *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982–983 [67 Cal.Rptr.2d 16, 941 P.2d 1203], which addresses only exposure to asbestos from "defendant's defective asbestos-containing products." Whether the same causation standards from *Rutherford* would apply to defendants who are alleged to have created exposure to asbestos but are not manufacturers or suppliers of asbestos-containing products is not settled. However, at least one court has given CACI No. 435 with regard to a defendant other than an asbestos manufacturer or supplier, but there was no analysis of the issue on appeal. (See *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 290 [220 Cal.Rptr.3d 185] [court gave CACI No. 435 with regard to premises liability defendant]; see also *Casey v. Perini Corp.* (2012) 206 Cal.App.4th 1222, 1236–1239 [142 Cal.Rptr.3d 678] [*Rutherford* causation standards cited in case against contractor alleged to have created exposure to asbestos at job site].) See the discussion in the Directions for Use to CACI No. 430, *Causation: Substantial Factor*, with regard to whether CACI No. 430 may also be given.

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

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

Sources and Authority

- "In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold *exposure* to the defendant's defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a *substantial factor* in bringing about the injury. In an asbestos-related cancer case, the plaintiff need *not* prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer. The jury should be so instructed. The standard

instructions on substantial factor and concurrent causation remain correct in this context and should also be given." (*Rutherford, supra,* 16 Cal.4th at pp. 982–983, original italics, internal citation and footnotes omitted.)

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

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

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

- " 'A threshold issue in asbestos litigation is exposure to the defendant's product. … If there has been no exposure, there is no causation.' Plaintiffs bear the burden of 'demonstrating that exposure to [defendant's] asbestos products was, in reasonable medical probability, a substantial factor in causing or contributing to [plaintiff's] risk of developing cancer.' 'Factors relevant to assessing whether such a medical probability exists include frequency of exposure, regularity of exposure and proximity of the asbestos product to [plaintiff].' Therefore, '[plaintiffs] cannot prevail against [defendant] without evidence that [plaintiff] was exposed to asbestos-containing materials manufactured or furnished by [defendant] with enough frequency and regularity as to show a reasonable medical probability that

this exposure was a factor in causing the plaintiff's injuries.' " (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1084 [109 Cal.Rptr.3d 371], internal citations omitted.)

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

- "[T]here is no requirement that plaintiffs show that [defendant] was the exclusive, or even the primary, supplier of asbestos-containing gaskets to PG&E." (*Turley v. Familian Corp.* (2017) 18 Cal.App.5th 969, 981 [227 Cal.Rptr.3d 321].)

- "[T]o establish exposure in an asbestos case a plaintiff has no obligation to prove a specific exposure to a specific product on a specific date or time. Rather, it is sufficient to establish 'that defendant's product was definitely at his work site and that it was sufficiently prevalent to warrant an inference that plaintiff was exposed to it' during his work there." (*Turley, supra,* 18 Cal.App.5th at p. 985.)

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

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

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

- "In this case, [defendant] argues the trial court's refusal to give its proposed instruction was error because the instruction set forth 'the requirement in *Rutherford* that causation be decided by taking into account "the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, [and] any other potential causes to which the disease could be attributed." ' But *Rutherford* does not require the jury to take these factors into account when deciding whether a

plaintiff's exposure to an asbestos-containing product was a substantial factor in causing mesothelioma. Instead, those factors are ones that a medical expert may rely upon in forming his or her expert medical opinion." (*Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 495 [199 Cal.Rptr.3d 583], internal citation omitted.)

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

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

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

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

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

- "We hold that the duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission. This duty also applies to premises owners who use asbestos on their property, subject to any exceptions and affirmative defenses generally applicable to premises owners, such as the rules of contractor liability. Importantly, we hold that this duty extends only to members of a worker's household. Because the duty is premised on the foreseeability of both the regularity and intensity of contact that occurs in a worker's home, it does not extend

beyond this circumscribed category of potential plaintiffs." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1140 [210 Cal.Rptr.3d 283, 384 P.3d 283].)

Secondary Sources

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

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

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

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

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

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

450B. Good Samaritan—Scene of Emergency

[*Name of defendant*] claims that [he/she/*nonbinary pronoun*] is not responsible for [*name of plaintiff*]'s harm because [he/she/*nonbinary pronoun*] was trying to protect [*name of plaintiff*] from harm at the scene of an emergency.

To succeed on this defense, [*name of defendant*] must prove all of the following:

1. **That [*name of defendant*] rendered medical or nonmedical care or assistance to [*name of plaintiff*] at the scene of an emergency;**

2. **That [*name of defendant*] was acting in good faith; and**

3. **That [*name of defendant*] was not acting for compensation.**

If you decide that [*name of defendant*] has proved all of the above, but you decide that [*name of defendant*] was negligent, [he/she/*nonbinary pronoun*] is not responsible unless [*name of plaintiff*] proves that [*name of defendant*]'s conduct constituted gross negligence or willful or wanton misconduct.

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

"Willful or wanton misconduct" means 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~~ the person knows or should know it is highly probable that harm will result.

If you find that [*name of defendant*] was grossly negligent or acted willfully or wantonly, [*name of plaintiff*] must then also prove:

1. **[(a) That [*name of defendant*]'s conduct added to the risk of harm;]**

   [or]

   [(b) That [*name of defendant*]'s conduct caused [*name of plaintiff*] to reasonably rely on [his/her/*nonbinary pronoun*] protection;]

   AND

2. **That the [additional risk/ [or] reliance] was a substantial factor in causing harm to [*name of plaintiff*].**

Derived from former CACI No. 450 December 2010; Revised December 2011, May 2020

Directions for Use

Use this instruction for situations at the scene of an emergency not involving medical, law enforcement, or emergency personnel. (See Health & Saf. Code, § 1799.102.) In a nonemergency situation, give CACI No. 450A, *Good Samaritan—Nonemergency*.

Under Health and Safety Code section 1799.102(b), the defendant must have acted at the scene of an emergency, in good faith, and not for compensation. These terms are not defined, and neither the statute nor case law indicates who has the burden of proof. However, the advisory committee believes that it is more likely that the defendant has the burden of proving those things necessary to invoke the protections of the statute. (See Evid. Code, § 500 [party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense asserted].)

If the jury finds that the statutory standards have been met, then presumably it must also find that the common-law standards for Good-Samaritan liability have also been met. (See Health & Saf. Code, § 1799.102(c) ["Nothing in this section shall be construed to change any existing legal duties or obligations"].) In the common-law part of the instruction, select either or both options for element 1 depending on the facts.

See also CACI No. 425, "*Gross Negligence" Explained.*

Sources and Authority

- Immunity for Persons Rendering Care at Scene of Emergency. Health and Safety Code section 1799.102.

- " '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 v. Superior Court* (2007) 41 Cal.4th 747, 754 [62 Cal.Rptr.3d 527, 161 P.3d 1095], 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.)

- "Under well-established common law principles, a person has no duty to come to the aid of another. If, however, a person elects to come to someone's aid, he or she has a duty to exercise due care. Thus, a 'good Samaritan' who attempts to help someone might be liable if he or she does not exercise due care and ends up causing harm." (*Van Horn v. Watson* (2008) 45 Cal.4th 322, 324 [86 Cal.Rptr.3d 350, 197 P.3d 164], internal citations omitted.)

- "A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act. Also pertinent to our discussion is the role of the volunteer who, having no initial duty to do so,

undertakes to come to the aid of another—the 'good Samaritan.' ... He is under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." (*Williams v. State of California* (1983) 34 Cal.3d 18, 23 [192 Cal.Rptr. 233, 664 P.2d 137], internal citations omitted.)

- "A police officer, paramedic or other public safety worker is as much entitled to the benefit of this general rule as anyone else." (*Camp v. State of California* (2010) 184 Cal.App.4th 967, 975 [109 Cal.Rptr.3d 676].)

- "Under the good Samaritan doctrine, CHP may have a duty to members of the public to exercise due care when CHP voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member thereby inducing reliance, when an express promise to warn of a danger has induced reliance, or when the actions of CHP place a person in peril or increase the risk of harm. In other words, to create a special relationship and a duty of care, there must be evidence that CHP ' "made misrepresentations that induced a citizen's detrimental reliance [citation], placed a citizen in harm's way [citations], or lulled a citizen into a false sense of security and then withdrew essential safety precautions." ' Nonfeasance that leaves the citizen in exactly the same position that he or she already occupied cannot support a finding of duty of care. Affirmative conduct or misfeasance on the part of CHP that induces reliance or changes the risk of harm is required." (*Greyhound Lines, Inc. v. Department of the California Highway Patrol* (2013) 213 Cal.App.4th 1129, 1136 [152 Cal.Rptr.3d 492], internal citations omitted.)

- Statutory exceptions to Good Samaritan liability include immunities under certain circumstances for medical licensees (Bus. & Prof. Code, §§ 2395–2398), nurses (Bus. & Prof. Code, §§ 2727.5, 2861.5), dentists (Bus. & Prof. Code, § 1627.5), rescue teams (Health & Saf. Code, § 1317(f)), persons rendering emergency medical services (Health & Saf. Code, § 1799.102), paramedics (Health & Saf. Code, § 1799.104), and first-aid volunteers (Gov. Code, § 50086).

Secondary Sources

4 Witkin, California Procedure (5th ed. 2008) Pleadings, § 594

6 Witkin, Summary of California Law (11th~~10th~~ ed. ~~2005~~2017) Torts, §§ ~~1060~~1205–~~1065~~1210

Haning~~,~~ et al., California Practice Guide: Personal Injury, Ch. 2(IV~~H~~)-H~~I~~, *Emergency Medical Services Immunity*, ¶¶ 2:3495–2:3516 ~~*Negligence Liability Based On Omission To Act—Legal Duty Arising From "Special Relationship,"* ¶¶ 2:1985, 2:2005~~ (The Rutter Group)

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

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

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.32[5][c] (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.150 (Matthew Bender)

454. Affirmative Defense—Statute of Limitations

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

New April 2007; Revised December 2007

Directions for Use

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

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

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

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

Sources and Authority

- Two-Year Statute of Limitations. Code of Civil Procedure section 335.1.
- Three-Year Statute of Limitations. Code of Civil Procedure section 338(c).
- One-Year Statute of Limitations. Code of Civil Procedure section 340.2(c).
- "A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable." (*Glue-Fold, Inc., supra,* 82 Cal.App.4th at p. 1029, internal citations omitted.)
- " ' " ' "Ordinarily this is when the wrongful act is done and the obligation or the liability arises, but it does not 'accrue until the party owning it is entitled to begin and prosecute an action thereon.' " … In other words, "[a] cause of action accrues 'upon the occurrence of the

last element essential to the cause of action.' " ' " ' " (*Choi v. Sagemark Consulting* (2017) 18 Cal.App.5th 308, 323 [226 Cal.Rptr.3d 267], original italics.)

- "It is undisputed that plaintiffs discovered shortly after the accident in 2010 that [defendant] had failed to secure the insurance coverage plaintiffs requested. Thus, this case does not involve the delayed discovery doctrine, which makes 'accrual of a cause of action contingent on when a party discovered or should have discovered that his or her injury had a wrongful cause.' In delayed discovery cases, 'plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation.' Here, the question is when plaintiffs incurred 'actual injury'—not when they discovered [defendant]'s negligence. The trial court erred to the extent that it relied on the delayed discovery doctrine to determine when plaintiffs incurred actual injury." *(Lederer v. Gursey Schneider LLP* (2018) 22 Cal.App.5th 508, 521 [231 Cal.Rptr.3d 518], internal citations omitted.)

- "Where, as here, 'damages are an element of a cause of action, the cause of action does not accrue until the damages have been sustained. … "Mere threat of future harm, not yet realized, is not enough." … "Basic public policy is best served by recognizing that damage is necessary to mature such a cause of action." … Therefore, when the wrongful act does not result in immediate damage, "the cause of action does not accrue prior to the maturation of perceptible harm." ' " (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 604 [129 Cal.Rptr.3d 525].)

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

- "Violations of a continuing or recurring obligation may give rise to 'continuous accrual' of causes of action, meaning that ' "a cause of action accrues each time a wrongful act occurs, triggering a new limitations period." [Citation.]' " (*Esparza v. Safeway, Inc*. (2019) 36 Cal.App.5th 42, 59 [247 Cal.Rptr.3d 875].)

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

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

- "Commencement of the statute of limitations is usually a factual question, but can be resolved as a matter of law when, as here, the material facts are not disputed." *Moss v. Duncan* (2019) 36 Cal.App.5th 569, 574 [248 Cal.Rptr.3d 689].)

- "Because the relevant facts are not in dispute, the application of the statute of limitations may be decided as a question of law." (*Lederer, supra,* 22 Cal.App.5th at p. 521.)

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

Secondary Sources

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

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

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

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

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

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

455. Statute of Limitations—Delayed Discovery

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

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

[*or***]**

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

New April 2007; Revised December 2007, April 2009, December 2009, May 2020

Directions for Use

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

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

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

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

Malpractice—One-Year Limit, and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*). Also, do not use this instruction if the case was timely but a fictitiously named defendant was identified and substituted in after the limitation period expired. (See *McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 942 [63 Cal.Rptr.3d 615] [if lawsuit is initiated within the applicable period of limitations against one party and the plaintiff has complied with Code of Civil Procedure section 474 by alleging the existence of unknown additional defendants, the relevant inquiry when the plaintiff seeks to substitute a real defendant for one sued fictitiously is what facts the plaintiff actually knew at the time the original complaint was filed].)

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

Sources and Authority

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

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

- "*Jolly* 'sets forth two alternate tests for triggering the limitations period: (1) a subjective test requiring actual suspicion by the plaintiff that the injury was caused by wrongdoing; and (2) an objective test requiring a showing that a reasonable person would have suspected the injury was caused by wrongdoing. [Citation.] The first to occur under these two tests begins the limitations period.' " (*Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522, 1552 [178 Cal.Rptr.3d 897].)

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

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

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

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

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

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

- "The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action. The discovery rule does not encourage dilatory tactics because plaintiffs are charged with presumptive knowledge of an injury if they have ' " 'information

of circumstances to put [them] on inquiry' " ' or if they have ' " 'the opportunity to obtain knowledge from sources open to [their] investigation.' " ' In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." (*Fox, supra,* 35 Cal.4th at pp. 807–808, internal citations omitted.)

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

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

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

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

- "The statute of limitations does not begin to run when some members of the public have a suspicion of wrongdoing, but only '[o]nce the plaintiff *has* a suspicion of wrongdoing.' " (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364 [76 Cal.Rptr.3d 146], original italics.)

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

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

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

Secondary Sources

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

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

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

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

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

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

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

456. Defendant Estopped From Asserting Statute of Limitations Defense

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

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

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

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

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

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

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

New October 2008; Revised December 2014, June 2015, May 2020

Directions for Use

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

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

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

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

Sources and Authority

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

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

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

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

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

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

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

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

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

- " "'[W]hether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law." [Citations.]' " (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 925–926 [73 Cal.Rptr.3d 216], internal citations omitted.)

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

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

- "It is well settled that the doctrine of estoppel *in pais* is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations." (*Estate of Pieper* (1964) 224 Cal.App.2d 670, 690–691 [37 Cal.Rptr. 46], internal citations omitted.)

- "Although 'ignorance of the identity of the defendant … will not *toll* the statute', 'a defendant may be *equitably estopped* from asserting the statute of limitations when, as the result of intentional concealment, the plaintiff is unable to discover the defendant's actual identity'." (*Vaca*

v. Wachovia Mortgage Corp. (2011) 198 Cal.App.4th 737, 745 [129 Cal.Rptr.3d 354], original italics, internal citation omitted.)

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

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

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

- " 'It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act.' Estoppel as a bar to a public entity's assertion of the defense of noncompliance arises when a plaintiff establishes by a preponderance of the evidence (1) the public entity was apprised of the facts, (2) it intended its conduct to be acted upon, (3) the plaintiff was ignorant of the true state of facts, and (4) relied upon the conduct to his detriment." (*K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1239–1240 [92 Cal.Rptr.3d 1], internal citation omitted.)

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

Secondary Sources

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

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

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

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

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

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

462. Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensities—Essential Factual Elements

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[*Name of plaintiff*] claims that [*name of defendant*]'s [*insert type of animal*] harmed [him/her/*nonbinary pronoun*] and that [*name of defendant*] is responsible for that harm.

People who own, keep, or control animals with unusually dangerous natures or tendencies can be held responsible for the harm that their animals cause to others, no matter how carefully they guard or restrain their animals.

To establish [his/her/*nonbinary pronoun*] claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] owned, kept, or controlled a [*insert type of animal*];**
2. **That the [*insert type of animal*] had an unusually dangerous nature or tendency;**
3. **That before [*name of plaintiff*] was injured, [*name of defendant*] knew or should have known that the [*insert type of animal*] had this nature or tendency;**
4. **That [*name of plaintiff*] was harmed; and**
5. **That the [*insert type of animal*]'s unusually dangerous nature or tendency was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised April 2007, June 2013

Directions for Use

Give this instruction to impose strict liability on an animal owner if the owner knew or should have known that the animal had a dangerous propensity. (See *Thomas v. Stenberg* (2012) 206 Cal.App.4th 654, 665 [142 Cal.Rptr.3d 24].) There is also strict liability for injuries caused by animals of a type that are inherently dangerous without the need to show the owner's knowledge of dangerousness. (*Baugh v. Beatty* (1949) 91 Cal.App.2d 786, 791–792 [205 P.2d 671]; see CACI No. 461, *Strict Liability for Injury Caused by Wild Animal—Essential Factual Elements*.)

For an instruction on statutory strict liability under the dog-bite statute, see CACI No. 463, *Dog Bite Statute (Civ. Code, § 3342)—Essential Factual Elements*.

Sources and Authority

- "A common law strict liability cause of action may also be maintained if the owner of a domestic animal that bites or injures another person knew or had reason to know of the animal's vicious propensities. If [defendant] knew or should have known of his dog's vicious propensities and failed to inform [plaintiff] of such facts, he could be found to have exposed [plaintiff] to an *unknown risk* and

thereby be held strictly liable at common law for her injuries. Under such circumstances, the defense of primary assumption of risk would not bar [plaintiff]'s claim since she could not be found to have assumed a risk of which she was unaware." (*Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1115–1116 [47 Cal.Rptr.3d 553, 140 P.3d 848], original italics, internal citations omitted.)

- "The doctrine of strict liability for harm done by animals has developed along two separate and independent lines: (1) Strict liability for damages by trespassing livestock, and (2) strict liability apart from trespass (a) for damages by animals of a species regarded as inherently dangerous, and (b) for damages by animals of a species not so regarded but which, in the particular case, possess dangerous propensities which were or should have been known to the possessor." (*Thomas, supra,* 206 Cal.App.4th at p. 665.)

- "California has long followed the common law rule of strict liability for harm done by a domestic animal with known vicious or dangerous propensities abnormal to its class." (*Drake v. Dean* (1993) 15 Cal.App.4th 915, 921 [19 Cal.Rptr.2d 325].)

- Any propensity that is likely to cause injury under the circumstances is a dangerous or vicious propensity within the meaning of the law. (*Talizin v. Oak Creek Riding Club* (1959) 176 Cal.App.2d 429, 437 [1 Cal.Rptr. 514].)

- The question of whether a domestic animal is vicious or dangerous is ordinarily a factual one for the jury. (*Heath v. Fruzia* (1942) 50 Cal.App.2d 598, 601 [123 P.2d 560].)

- " 'The gist of the action is not the manner of keeping the vicious animal, but the keeping him at all with knowledge of the vicious propensities. In such instances the owner is an insurer against the acts of the animal, to one who is injured without fault, and the question of the owner's negligence is not in the case.' " (*Hillman v. Garcia-Ruby* (1955) 44 Cal.2d 625, 626 [283 P.2d 1033], internal citations omitted.)

- "The absolute duty to restrain the dog could not be invoked unless the jury found, not only that the dog had the alleged dangerous propensity, but that defendants knew or should have known that it had." (*Hillman, supra,* 44 Cal.2d at p. 628.)

- "[N]egligence may be predicated on the characteristics of the animal which, although not abnormal to its class, create a foreseeable risk of harm. As to those characteristics, the owner has a duty to anticipate the harm and to exercise ordinary care to prevent the harm." (*Drake, supra,* 15 Cal.App.4th at p. 929.)

- "'It is well settled in cases such as this (the case involved a bull) that the owner of an animal, not naturally vicious, is not liable for an injury done by it, unless two propositions are established: 1. That the animal in fact was vicious, and 2. That the owner knew it." (*Mann v. Stanley* (1956) 141 Cal.App.2d 438, 441 [296 P.2d 921].)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~1414~~1575–~~1427~~1588 et seq.

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 3.3–3.6

1 Levy et al., California Torts, Ch. 6, *Strict Liability for Injuries Caused by Animals*, §§ 6.01–6.10 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 23, *Animals: Civil Liability*, § 23.33 (Matthew Bender)

1 California Civil Practice: Torts, §§ 2:20–2:21 (Thomson Reuters ~~West~~)

463. Dog Bite Statute (Civ. Code, § 3342)—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*]'s dog bit [him/her/*nonbinary pronoun*] and that [*name of defendant*] is responsible for that harm.

People who own dogs can be held responsible for the harm from a dog bite, no matter how carefully they guard or restrain their dogs.

To establish [his/her/*nonbinary pronoun*] claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] owned a dog;**
2. **That the dog bit [*name of plaintiff*] while [he/she/*nonbinary pronoun*] was in a public place or lawfully on private property;**
3. **That [*name of plaintiff*] was harmed; and**
4. **That [*name of defendant*]'s dog was a substantial factor in causing [*name of plaintiff*]'s harm.**

[[*Name of plaintiff*] was lawfully on private property of the owner if [he/she/*nonbinary pronoun*] was performing any duty required by law or was on the property at the invitation, express or implied, of the owner.]

New September 2003; Revised April 2007, May 2020

Directions for Use

Read the last optional paragraph if there is an issue regarding whether the plaintiff was lawfully on private property when ~~he or she~~the plaintiff was bitten.

For an instruction on common-law liability based on the defendant's knowledge of his or her pet's dangerous propensities, see CACI No. 462, *Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensities—Essential Factual Elements*.

Sources and Authority

- Liability for Dog Bites. Civil Code section 3342(a).
- This statute creates an exception to the general rule that an owner is not strictly liable for harm caused by a domestic animal absent knowledge of the animal's vicious propensity. (*Hicks v. Sullivan* (1932) 122 Cal.App. 635, 639 [10 P.2d 516].)
- It is not necessary that the skin be broken in order for the statute to apply. (*Johnson v. McMahan*

(1998) 68 Cal.App.4th 173, 176 [80 Cal.Rptr.2d 173].)

- "The defenses of assumption of the risk and contributory negligence may still be asserted" in an action brought under section 3342. (*Johnson, supra,* 68 Cal.App.4th at p. 176.)

- "A veterinarian or a veterinary assistant who accepts employment for the medical treatment of a dog, aware of the risk that *any* dog, regardless of its previous nature, might bite while being treated, has assumed this risk as part of his or her occupation." (*Nelson v. Hall* (1985) 165 Cal.App.3d 709, 715 [211 Cal.Rptr. 668], original italics.)

- "[Plaintiff], by virtue of the nature of her occupation as a kennel worker, assumed the risk of being bitten or otherwise injured by the dogs under her care and control while in the custody of the commercial kennel where she worked pursuant to a contractual boarding agreement. The Court of Appeal correctly concluded a strict liability cause of action under the dog bite statute (§ 3342) was therefore unavailable to [plaintiff]." (*Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1132 [47 Cal.Rptr.3d 553, 140 P.3d 848].)

- The definition of "lawfully upon the private property of such owner" effectively prevents trespassers from obtaining recovery under the Dog Bite Statute. (*Fullerton v. Conan* (1948) 87 Cal.App.2d 354, 358 [197 P.2d 59].)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~1408~~1569 ~~1412~~1573

California Tort Guide (Cont.Ed.Bar 3d ed.) § 3.2

1 Levy et al., California Torts, Ch. 6, *Strict Liability for Injuries Caused by Animals*, § 6.12 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 23, *Animals: Civil Liability* (Matthew Bender)

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

1 California Civil Practice: Torts ~~(Thomson West)~~ § 2:16 (Thomson Reuters)

471. Primary Assumption of Risk—Exception to Nonliability—Instructors, Trainers, or Coaches

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

1. **That [***name of defendant***] was [***name of plaintiff***]'s [coach/trainer/instructor];**

2. **[That [***name of defendant***] intended to cause [***name of plaintiff***] injury or acted recklessly in that [his/her/*nonbinary pronoun*] conduct was entirely outside the range of ordinary activity involved in teaching or coaching [***sport or other recreational activity, e.g., horseback riding***] in which [***name of plaintiff***] was participating;]**

   [or]

   [That [*name of defendant***] unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., horseback riding***];]**

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

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

New September 2003; Revised April 2004, June 2012, December 2013; Revised and Renumbered From CACI No. 409 May 2017; Revised May 2020

Directions for Use

This instruction sets forth a plaintiff's response to a defendant's assertion of the affirmative defense of primary assumption of risk. Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].)

There are exceptions, however, in which there is a duty of care. Use the first option for element 2 if it is alleged that the coach or trainer intended to cause the student's injury or engaged in conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport or activity. Use the second option if it is alleged that the coach's or trainer's failure to use ordinary care increased the risk of injury to the plaintiff, for example, by encouraging or allowing ~~him or her~~ the plaintiff to participate in the sport or activity when ~~he or she~~ the plaintiff was physically unfit to participate or by allowing the plaintiff to use unsafe equipment or instruments. (See *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 845 [120 Cal.Rptr.3d 90].) If the second option is selected, also give CACI No. 400, *Negligence—Essential Factual Elements*.

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

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. 470, *Primary Assumption of Risk—Exception to Nonliability─Coparticipant in Sport or Other Recreational Activity*. For an instruction on primary assumption of risk applicable to facilities owners and operators and to event sponsors, see CACI No. 472, *Primary Assumption of Risk—Exception to Nonliability─Facilities Owners and Operators and Event Sponsors*. For an instruction applicable to occupations with inherent risk, see CACI No. 473, *Primary Assumption of Risk─Exception to Nonliability─Occupation with Inherent Risk*.

Sources and Authority

- "In order to support a cause of action in cases in which it is alleged that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction, it must be alleged and proved that the instructor acted with intent to cause a student's injury or that the instructor acted recklessly in the sense that the instructor's conduct was 'totally outside the range of the ordinary activity' involved in teaching or coaching the sport." (*Kahn v. East Side Union High School District* (2003) 31 Cal.4th 990, 1011 [4 Cal.Rptr.3d 103, 75 P.3d 30], internal citation omitted.)

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

- "Although the doctrine is often applied as between sports coparticipants, it defines the duty owed as between persons engaged in any activity involving inherent risks. The doctrine applies to activity 'done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury' … ." (*Jimenez v. Roseville City School Dist.* (2016) 247 Cal.App.4th 594, 601 [202 Cal.Rptr.3d 536], internal citations omitted; see also *Bertsch v. Mammoth Community Water Dist.* (2016) 247 Cal.App.4th 1201, 1208 [202 Cal.Rptr.3d 757] ["These factors certainly apply to skateboarding"], internal citations omitted.)

- "Here, we do not deal with the relationship between coparticipants in a sport, or with the duty that an operator may or may not owe to a spectator. Instead, we deal with the duty of a coach or trainer to a student who has entrusted himself to the former's tutelage. There are precedents reaching back for most of this century that find an absence of duty to coparticipants and, often, to spectators, but the law is otherwise as applied to coaches and instructors. For them, the general rule is that coaches and instructors owe a duty of due care to persons in their charge. The coach or instructor is not, of course, an insurer, and a student may be held to notice that which is obvious and to ask appropriate questions. But all of the authorities that comment on the issue have recognized the existence of a duty of care." (*Tan v. Goddard* (1993) 13 Cal.App.4th 1528, 1535–1536 [17 Cal.Rptr.2d 89], internal citations

omitted.)

- "[D]ecisions have clarified that the risks associated with learning a sport may themselves be inherent risks of the sport, and that an instructor or coach generally does not increase the risk of harm inherent in learning the sport simply by urging the student to strive to excel or to reach a new level of competence." (*Kahn, supra,* 31 Cal.4th at p. 1006.)

- "To the extent a duty is alleged against a coach for 'pushing' and/or 'challenging' a student to improve and advance, the plaintiff must show that the coach intended to cause the student's injury or engaged in reckless conduct—that is, conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport. Furthermore, a coach has a duty of ordinary care not to increase the risk of injury to a student by encouraging or allowing the student to participate in the sport when he or she is physically unfit to participate or by allowing the student to use unsafe equipment or instruments." (*Eriksson, supra,* 191 Cal.App.4th at p. 845, internal citation omitted.)

- "That an instructor might ask a student to do more than the student can manage is an inherent risk of the activity. Absent evidence of recklessness, or other risk-increasing conduct, liability should not be imposed simply because an instructor asked the student to take action beyond what, with hindsight, is found to have been the student's abilities. To hold otherwise would discourage instructors from requiring students to stretch, and thus to learn, and would have a generally deleterious effect on the sport as a whole." (*Honeycutt v. Meridian Sports Club, LLC* (2014) 231 Cal.App.4th 251, 258 [179 Cal.Rptr.3d 473].)

- Coaches and sports instructors "owe students a duty 'not to increase the risks inherent in the learning process undertaken by the student.' But this does not require them to 'fundamentally alter the nature of the sport and, in some instances, effectively preclude participation altogether ... .' Instead, '[b]y choosing to participate in a sport that poses the obvious possibility of injury, the student athlete must learn to accept an adverse result of the risks inherent in the sport.' " (*Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428, 1436−1437 [89 Cal.Rptr.2d 920], internal citations omitted.)

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

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

- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra,* 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra,* 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball 'is issue of fact to be resolved at trial']; but see *Huff v. Wilkins, supra,* 138 Cal.App.4th at p. 745 ['it is the trial court's province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury']; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t is for the court to decide … whether the defendant has increased the risks of the activity beyond the risks inherent in the sport']; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d 325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn, supra,* 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna, supra,* 169 Cal.App.4th at pp. 112–113.)

- "The existence of a duty of care is a separate issue from the question whether (on the basis of forseeability among other factors) a particular defendant breached that duty of care, which is an essentially factual matter." (*Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 498 [71 Cal.Rptr.2d 552].)

- "[A duty not to increase the risk] arises only if there is an ' "organized relationship" ' between the defendants and the participant in relation to the sporting activity, such as exists between … a coach or instructor and his or her students. [I]mposing such a duty in the context of these types of relationships is justified because the defendants are 'responsible for, or in control of, the conditions under which the [participant] engaged in the sport.' " (*Bertsch, supra,* 247 Cal.App.4th at pp. 1208−1209, internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~1339~~1496, ~~1340~~1497, ~~1343~~1501–~~1350~~1508

Haning et al., California Practice Guide: Personal Injury, Ch. 3-D, *Mitigating Factors In Reduction Of Damages*, ¶¶ 3:~~234~~1067–3:~~254.30~~ 1078 (The Rutter Group)

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

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics*, § 273.31 (Matthew Bender)

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

473. Primary Assumption of Risk—Exception to Nonliability—Occupation Involving Inherent Risk

[*Name of plaintiff***] claims that [he/she/*nonbinary pronoun*] was harmed by [***name of defendant***] while [***name of plaintiff***] was performing [his/her/*nonbinary pronoun*] job duties as [***specify, e.g., a firefighter***]. [***Name of defendant***] is not liable if [***name of plaintiff***]'s injury arose from a risk inherent in the occupation of [***e.g., firefighter***]. However, [***name of plaintiff***] may recover if [he/she/*nonbinary pronoun*] proves all of the following:**

[1. That [*name of defendant*] unreasonably increased the risks to [*name of plaintiff*] over and above those inherent in [*e.g., firefighting*];]

[*or*]

[1. That [*name of defendant*] [misrepresented to/failed to warn] [*name of plaintiff*] [of] a dangerous condition that [*name of plaintiff*] could not have known about as part of [his/her/*nonbinary pronoun*] job duties;]

[*or*]

[1. That the cause of [*name of plaintiff*]'s injury was not related to the inherent risk;]

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

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

New May 2017; Revised May 2020

Directions for Use

Give this instruction if the plaintiff asserts an exception to assumption of risk of the injury that ~~he or she~~the plaintiff suffered because the risk is an inherent part of ~~his or her job~~the plaintiff's duties. This has traditionally been referred to as the "firefighter's rule." (See *Gregory v. Cott* (2014) 59 Cal. 4th 996, 1001 [176 Cal. Rptr. 3d 1, 331 P.3d 179].)

There are, however, exceptions to nonliability under the firefighter's rule. The plaintiff may recover if (1) the defendant's actions have unreasonably increased the risks of injury beyond those inherent in the occupation; (2) the defendant misrepresented or failed to disclose a hazardous condition that the plaintiff had no reason to know about; or (3) the cause of the injury was not related to the inherent risk. This instruction asks the jury to determine whether an exception applies. (*Gregory, supra,* 59 Cal.4th at p. 1010.) These exceptions are presented in the options to element 1.

While duty is a question of law, courts have held that whether the defendant has increased the risk is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d

588] [and cases cited therein].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. 470, *Primary Assumption of Risk—Exception to Nonliability─Coparticipant in Sport or Other Recreational Activity.* For an instruction applicable to coaches, instructors, or trainers, see CACI No. 471, *Primary Assumption of Risk─Exception to Nonliability─Instructors, Trainers, or Coaches*. For an instruction applicable to facilities owners and operators and to event sponsors, see CACI No. 472, *Primary Assumption of Risk─Exception to Nonliability─Facilities Owners and Operators and Event Sponsors*.

Sources and Authority

- "Primary assumption of risk cases often involve recreational activity, but the doctrine also governs claims arising from inherent occupational hazards. The bar against recovery in that context first developed as the 'firefighter's rule,' which precludes firefighters and police officers from suing members of the public for the conduct that makes their employment necessary. After *Knight,* we have viewed the firefighter's rule 'not … as a separate concept,' but as a variant of primary assumption of risk, 'an illustration of when it is appropriate to find that the defendant owes no duty of care.' Whether a duty of care is owed in a particular context depends on considerations of public policy, viewed in light of the nature of the activity and the relationship of the parties to the activity." (*Gregory, supra,* 59 Cal. 4th at pp. 1001−1002, internal citations omitted.)

- "The firefighter's rule, upon which the [defendant] relies, and the analogous veterinarian's rule, are examples of the primary assumption of risk doctrine applied in the employment context." (*Moore v. William Jessup University* (2015) 243 Cal.App.4th 427, 435 [197 Cal.Rptr.3d 51].)

- "Our holding does not preclude liability in situations where caregivers are not warned of a known risk, where defendants otherwise increase the level of risk beyond that inherent in providing care, or where the cause of injury is unrelated to the symptoms of [Alzheimers] disease." (*Gregory, supra,* 59 Cal.4th at p. 1000.)

- "[T]he principle of assumption of risk, which forms the theoretical basis for the fireman's rule, is not applicable where a fireman's injuries are proximately caused by his being misled as to the nature of the danger to be confronted." (*Lipson v. Superior Court* (1982) 31 Cal.3d 362, 371 [182 Cal. Rptr. 629, 644 P.2d 822].)

- "The firefighter's rule, however, is hedged about with exceptions. The firefighter does not assume every risk of his or her occupation. The rule does not apply to conduct other than that which necessitated the summoning of the firefighter or police officer, and it does not apply to independent acts of misconduct that are committed after the firefighter or police officer has arrived on the scene." (*Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 538 [34 Cal. Rptr. 2d 630, 882 P.2d 347], internal citation omitted.)

- "We have noted that the duty to avoid injuring others 'normally extends to those engaged in hazardous work.' 'We have never held that the doctrine of assumption of risk relieves all persons of a duty of care to workers engaged in a hazardous occupation.' However, the doctrine does

apply in favor of those who hire workers to handle a dangerous situation, in both the public and the private sectors. Such a worker, 'as a matter of fairness, should not be heard to complain of the negligence that is the cause of his or her employment. [Citations.] In effect, we have said it is unfair to charge the defendant with a duty of care to prevent injury to the plaintiff arising from the very condition or hazard the defendant has contracted with the plaintiff to remedy or confront.' This rule encourages the remediation of dangerous conditions, an important public policy. Those who hire workers to manage a hazardous situation are sheltered from liability for injuries that result from the risks that necessitated the employment." (*Gregory, supra,* 59 Cal.4th at p. 1002, internal citations omitted.)

- "[A] person whose conduct precipitates the intervention of a police officer owes no duty of care to the officer 'with respect to the original negligence that caused the officer's intervention.' " (*Harry v. Ring the Alarm, LLC* (2019) 34 Cal.App.5th 749, 759 [246 Cal.Rptr.3d 471].)

- "Because of the nature of the activity, caring for the mentally infirm, and the relationship between the parties, patient and caregiver, mentally incompetent patients should not owe a legal duty to protect caregivers from injuries suffered in attending to them. Here, the very basis of the relationship between plaintiff and [defendant] was to protect [defendant] from harming either herself or others." (*Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761, 1770 [53 Cal.Rptr.2d 713].)

Secondary Sources

69 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § ~~1355~~1515

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.23 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.173 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.412 (Matthew Bender)

VF-402. Negligence—Fault of Plaintiff and Others at Issue

We answer the questions submitted to us as follows:

1. Was [*name of first defendant***] negligent?**
____ Yes ____ No

Was [*name of second defendant***] negligent?**
____ Yes ____ No

[*Repeat as necessary for other defendants.***]**

If you answered yes for any defendant in question 1, then answer question 2 for that defendant. If you answered no for any defendant in question 1, insert the number zero next to that defendant's name in question 8. If you answered no for all defendants in question 1, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. For each defendant that received a "yes" answer in question 1, answer the following:

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

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

[*Repeat as necessary for other defendants.***]**

If you answered yes for any defendant in question 2, then answer question 3. If you answered no for any defendant in question 2, insert the number zero next to that defendant's name in question 8. If you did not answer yes for any defendant in question 2, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. What are [*name of plaintiff***]'s total damages? Do not reduce the damages based on the fault, if any, of [***name of plaintiff***] or others.**

[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 $ _____

If [*name of plaintiff*] has proved any damages, then answer question 4. If [*name of plaintiff*] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of plaintiff*] negligent?

____ Yes ____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, insert the number zero next to [*name of plaintiff*]'s name in question 8, skip question 5, and answer question 6.

5. Was [*name of plaintiff*]'s negligence a substantial factor in causing [his/her/*nonbinary pronoun*] harm?

____ Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, insert the number zero next to [*name of plaintiff*]'s name in question 8 and answer question 6.

6. Was [*name/description of first nonparty*] negligent?

____ Yes ____ No

Was [*name/description of second nonparty*] negligent?

____ Yes ____ No

[*Repeat as necessary for other nonparties.***]**

If you answered yes for any person in question 6, then answer question 7 for that person. If you answered no for any person in question 6, insert the number zero next to that person's name in question 8. If you answered no for all persons in question 6, skip question 7 and answer question 8.

7. For each person who received a "yes" answer in question 6, answer the following:

Was [*name/description of first nonparty***]'s negligence a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

Was [*name/description of second nonparty***]'s negligence a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

[*Repeat as necessary for other nonparties.***]**

If you answered yes for any person in question 7, then answer question 8. If you answered no for any person in question 7, then insert the number zero next to that person's name in question 8 and answer question 8.

8. What percentage of responsibility for [*name of plaintiff***]'s harm do you assign to the following? Insert a percentage for only those who received "yes" answers in questions 2, 5, or 7:**

[*Name of first defendant***]:**	**____%**
[*Name of second defendant***]:**	**____%**
[*Name of plaintiff***]:**	**____%**
[*Name/description of first nonparty***]:**	**____%**
[*Name/description of second nonparty***]:**	**____%**
TOTAL	**100%**

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2009, December 2010, June 2014, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 400, *Negligence—Essential Factual Elements*, CACI No. 405, *Comparative Fault of Plaintiff*, and CACI No. 406, *Apportionment of Responsibility*.

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

If specificity is not required, users do not have to itemize all the damages listed in question 3. The breakdown is optional depending on the circumstances.

This verdict form is designed for a single plaintiff, multiple defendants, and multiple nonparties who are alleged to have been negligent. If there are multiple plaintiffs, consider preparing a separate verdict form for each. If a coplaintiff is alleged to have been negligent and that coplaintiff's negligence is alleged to have harmed the plaintiff, treat the allegedly negligent coplaintiff as a nonparty in questions 6 and 7 and add ~~his or her~~the coplaintiff's name to the list of contributing persons in question 8 of the plaintiff's verdict form.

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.

503A. Psychotherapist's Duty to Protect Intended Victim From Patient's Threat

[*Name of plaintiff***] claims that [***name of defendant***]'s failure to protect [***name of plaintiff/decedent***] was a substantial factor in causing [injury to [***name of plaintiff***]/the death of [***name of decedent***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was a psychotherapist;**
2. **That [***name of patient***] was [***name of defendant***]'s patient;**
3. **That [***name of patient***] communicated to [***name of defendant***] a serious threat of physical violence;**
4. **That [***name of plaintiff/decedent***] was a reasonably identifiable victim of [***name of patient***]'s threat;**
5. **That [***name of patient***] [injured [***name of plaintiff***]/killed [***name of decedent***]];**
6. **That [***name of defendant***] failed to make reasonable efforts to protect [***name of plaintiff/decedent***]; and**
7. **That [***name of defendant***]'s failure was a substantial factor in causing [[***name of plaintiff***]'s injury/the death of [***name of decedent***]].**

Derived from former CACI No. 503 April 2007; Revised June 2013, May 2020

Directions for Use

Read this instruction for a *Tarasoff* cause of action for professional negligence against a psychotherapist for failure to protect a victim from a patient's act of violence after the patient communicated to the therapist a threat against the victim. (See *Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334].) The liability imposed by *Tarasoff* is modified by the provisions of Civil Code section 43.92(a). First read CACI No. 503B, *Affirmative Defense—Psychotherapist's Communication of Threat to Victim and Law Enforcement*, if the therapist asserts that ~~he or she~~the therapist is immune from liability under Civil Code section 43.92(b) because ~~he or she~~the therapist made reasonable efforts to communicate the threat to the victim and to a law enforcement agency.

In a wrongful death case, insert the name of the decedent victim where applicable.

Sources and Authority

- Limited Psychotherapist Immunity. Civil Code section 43.92(a).
- "[T]herapists cannot escape liability merely because [the victim] was not their patient. When a therapist determines, or pursuant to the standards of his profession should determine, that his patient

presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances." (*Tarasoff, supra,* 17 Cal.3d at p. 431.)

- Civil Code section 43.92 was enacted to limit the liability of psychotherapists under *Tarasoff* regarding a therapist's duty to warn an intended victim. (*Barry v. Turek* (1990) 218 Cal.App.3d 1241, 1244–1245 [267 Cal.Rptr. 553].) Under this provision, "[p]sychotherapists thus have immunity from *Tarasoff* claims except where the plaintiff proves that the patient has communicated to his or her psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." (*Barry, supra,* 218 Cal.App.3d at p. 1245.)

- "When the communication of the serious threat of physical violence is received by the therapist from a member of the patient's immediate family and is shared for the purpose of facilitating and furthering the patient's treatment, the fact that the family member is not technically a 'patient' is not crucial to the statute's purpose." (*Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 817 [15 Cal.Rptr.3d 864].)

- "Section 43.92 strikes a reasonable balance in that it does not compel the therapist to predict the dangerousness of a patient. Instead, it requires the therapist to attempt to protect a victim under limited circumstances, even though the therapist's disclosure of a patient confidence will potentially disrupt or destroy the patient's trust in the therapist. However, the requirement is imposed upon the therapist only after he or she determines that the patient has made a credible threat of serious physical violence against a person." (*Calderon v. Glick* (2005) 131 Cal.App.4th 224, 231 [31 Cal.Rptr.3d 707].)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~1050~~1189, ~~1051~~1190

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services and Civil Rights*, § 361A.93 (Matthew Bender)

11 California Points and Authorities, Ch. 154, *Mental Health and Mental Disabilities*, § 154.30 (Matthew Bender)

503B. Affirmative Defense—Psychotherapist's Communication of Threat to Victim and Law Enforcement

[*Name of defendant***] is not responsible for [[***name of plaintiff***]'s injury/the death of [***name of decedent***]] if [***name of defendant***] proves that [he/she/*nonbinary pronoun*] made reasonable efforts to communicate the threat to [***name of plaintiff/decedent***] and to a law enforcement agency.**

Derived from former CACI No. 503 April 2007; Revised June 2013, May 2020

Directions for Use

Read this instruction for a *Tarasoff* cause of action for professional negligence against a psychotherapist (*Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334]) if there is a dispute of fact regarding whether the defendant made reasonable efforts to communicate to the victim and to a law enforcement agency a threat made by the defendant's patient. The therapist is immune from liability under *Tarasoff* if ~~he or she~~the therapist makes reasonable efforts to communicate the threat to the victim and to a law enforcement agency. (Civ. Code, § 43.92(b).) CACI No. 503A, *Psychotherapist's Duty to Protect Intended Victim From Patient's Threat*, sets forth the elements of a *Tarasoff* cause of action if the defendant is not immune.

In a wrongful death case, insert the name of the decedent victim where applicable.

Sources and Authority

- Limited Psychotherapist Immunity. Civil Code section 43.92(b).

- Failure to inform a law enforcement agency concerning a homicidal threat made by a patient against his work supervisor did not abrogate the "firefighter's rule" and, therefore, did not render the psychiatrist liable to a police officer who was subsequently shot by the patient. (*Tilley v. Schulte* (1999) 70 Cal.App.4th 79, 85–86 [82 Cal.Rptr.2d 497].)

- "When the communication of the serious threat of physical violence is received by the therapist from a member of the patient's immediate family and is shared for the purpose of facilitating and furthering the patient's treatment, the fact that the family member is not technically a 'patient' is not crucial to the statute's purpose." (*Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 817 [15 Cal.Rptr.3d 864].)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~1050~~1189, ~~1051~~1190

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services and Civil Rights*, § 361A.93 (Matthew Bender)

11 California Points and Authorities, Ch. 154, *Mental Health and Mental Disabilities,* § 154.30 (Matthew Bender)

510. Derivative Liability of Surgeon

A surgeon is responsible for the negligence of other medical practitioners or nurses who are under ~~his or her~~the surgeon's supervision and control and actively participating during an operation.

New September 2003; Revised April 2007, May 2020

Directions for Use

Give this instruction in a case in which the plaintiff seeks to hold a surgeon vicariously responsible under the "captain-of-the-ship" doctrine for the negligence of nurses or other hospital employees that occurs during the course of an operation. There is some disagreement in the courts regarding whether the captain-of-the-ship doctrine remains a viable rule of law. (Compare *Truhitte v. French Hospital* (1982) 128 Cal.App.3d 332, 348 [180 Cal.Rptr. 152] (doctrine has been eroded) with *Baumgardner v. Yusuf* (2006) 144 Cal.App.4th 1381, 1397–1398 [51 Cal.Rptr.3d 277] (doctrine remains viable).)

Sources and Authority

- The "captain of the ship" doctrine imposes liability on a surgeon under the doctrine of respondeat superior for the acts of those under the surgeon's special supervision and control during the operation. (*Thomas v. Intermedics Orthopedics, Inc.* (1996) 47 Cal.App.4th 957, 967 [55 Cal.Rptr.2d 197].)

- "The doctrine has been explained as follows: 'A physician generally is not liable for the negligence of hospital or other nurses, attendants, or internes, who are not his employees, particularly where he has no knowledge thereof or no connection therewith. On the other hand, a physician is liable for the negligence of hospital or other nurses, attendants, or internes, who are not his employees, where such negligence is discoverable by him in the exercise of ordinary care, he is negligent in permitting them to attend the patient, or the negligent acts were performed under conditions where, in the exercise of ordinary care, he could have or should have been able to prevent their injurious effects and did not. [¶] The mere fact that a physician or surgeon gives instructions to a hospital employee does not render the physician or surgeon liable for negligence of the hospital employee in carrying out the instructions. Similarly, the mere right of a physician to supervise a hospital employee is not sufficient to render the physician liable for the negligence of such employee. On the other hand, if the physician has the right to exercise control over the work to be done by the hospital employee and the manner of its performance, or an employee of a hospital is temporarily detached in whole or in part from the hospital's general control so as to become the temporary servant of the physician he assists, the physician will be subject to liability for the employee's negligence. [¶] Thus, where a hospital employee, although not in the regular employ of an operating surgeon, *is under his special supervision and control during the operation*, the relationship of master and servant exists, and the surgeon is liable, under the doctrine of respondeat superior, for the employee's negligence.' '' (*Thomas, supra,* 47 Cal.App.4th at pp. 966–967, original italics.)

- This doctrine applies only to medical personnel who are actively participating in the surgical procedure. (*Thomas, supra,* 47 Cal.App.4th at pp. 966–967.)

- While the "captain of the ship" doctrine has never been expressly rejected, it has been eroded by modern courts. "A theory that the surgeon directly controls *all* activities of whatever nature in the operating room certainly is not realistic in present day medical care." (*Truhitte, supra,* 128 Cal.App.3d at p. 348, original italics.)

- "[T]he *Truhitte* court ignores what we have already recognized as the special relationship between a vulnerable hospital patient and the surgeon operating on the patient. A helpless patient on the operating table who cannot understand or control what is happening reasonably expects a surgeon to oversee her care and to look out for her interests. We find this special relationship sufficient justification for the continued application of captain of the ship doctrine. Moreover, in light of the Supreme Court's expressions of approval of the doctrine … , we feel compelled to adhere to the doctrine." (*Baumgardner, supra,* 144 Cal.App.4th at pp. 1397–1398, internal citations omitted.)

- Absent evidence of right to control, an operating surgeon is generally not responsible for the conduct of anesthesiologists or others who independently carry out their duties. (*Seneris v. Haas* (1955) 45 Cal.2d 811, 828 [291 P.2d 915]; *Marvulli v. Elshire* (1972) 27 Cal.App.3d 180, 187 [103 Cal.Rptr. 461].)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § ~~976~~1109

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.4

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.45 (Matthew Bender)

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

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, § 175.25 (Matthew Bender)

517. Affirmative Defense—Patient's Duty to Provide for ~~His or Her~~the Patient's Own Well-Being

A patient must use reasonable care to provide for ~~his or her~~the patient's own well-being. This includes a responsibility to [follow [a/an] [*insert type of medical practitioner*]'s instructions/seek medical assistance] when a reasonable person in the same situation would do so.

[*Name of defendant*] claims that [*name of plaintiff*]'s harm was caused, in whole or in part, by [*name of plaintiff*]'s negligence in failing to [follow [*name of defendant*]'s instructions/seek medical assistance]. To succeed, [*name of defendant*] must prove both of the following:

1. **That [*name of plaintiff*] did not use reasonable care in [following [*name of defendant*]'s instructions/seeking medical assistance]; and**

2. **That [*name of plaintiff*]'s failure to [follow [*name of defendant*]'s instructions/seek medical assistance] was a substantial factor in causing [his/her/*nonbinary pronoun*] harm.**

New September 2003; Revised December 2015, May 2020

Directions for Use

Read this instruction in conjunction with basic comparative fault and damages instructions (CACI Nos. 405, 406, 407).

The defendant has the burden of proving that the plaintiff was comparatively negligent and that this negligence was a cause of the harm. (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1285 [164 Cal.Rptr.3d 112].)

Sources and Authority

- "It is error for a trial court to charge the jury with regard to contributory negligence [for failure to follow doctor's advice] when there is no expert testimony the plaintiff was negligent." (*Bolen v. Woo* (1979) 96 Cal.App.3d 944, 952 [158 Cal.Rptr. 454].)

- "[I]t is error in medical malpractice cases to [instruct on contributory negligence] in the absence of some evidence that the injured patient's acts or omissions were a proximate cause of the harm sustained." (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 875 [148 Cal.Rptr. 355, 582 P.2d 946].)

- "Unquestionably the jury must have considered whether the attitude of respondent was one of refusal to follow the advice of his physicians or was, because of his extended experience, one of justifiable fear of want of their skill. Whether such delays under the circumstances were those of a reasonably prudent person determines the right of respondent to recover all of the special damages, and the

implied finding was that respondent was not arbitrary in not promptly acceding to each suggestion of an operation." (*Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 422 [175 P.2d 607].)

- "Negligence, in fact, may often explain why the patient, to begin with, needed and sought out the physician's assistance. The health care professional, in this instance, takes the patient as he finds him. Other than in very rare cases, the only legitimate application of the doctrine of contributory fault is when it takes place concurrently with or after the delivery of the practitioner's care and treatment." (*Harb v. City of Bakersfield* (2015) 233 Cal.App.4th 606, 632 [183 Cal.Rptr.3d 89].)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § ~~1624~~1798

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.66

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.61 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, § 295.14 (Matthew Bender)

533. Failure to Obtain Informed Consent—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] was negligent because [he/she/*nonbinary pronoun*] performed [a/an] [*insert medical procedure*] on [*name of plaintiff*] without first obtaining [his/her/*nonbinary pronoun*] informed consent. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] performed [a/an] [*insert medical procedure*] on [*name of plaintiff*];**

2. **That [*name of defendant*] did not disclose to [*name of plaintiff*] the important potential results and risks of[, and alternatives to] the [*insert medical procedure*];**

3. **That a reasonable person in [*name of plaintiff*]'s position would not have agreed to the [*insert medical procedure*] if ~~he or she~~that person had been adequately informed; and**

4. **That [*name of plaintiff*] was harmed by a result or risk that [*name of defendant*] should have explained.**

New September 2003; Revised June 2014, May 2020

Directions for Use

This instruction should be read in conjunction with CACI No. 532, *Informed Consent—Definition*. See also the Directions for Use and Sources and Authority to that instruction.

If the patient is a minor or is incapacitated, tailor the instruction accordingly.

Also, see CACI No. 531, *Consent on Behalf of Another*.

Sources and Authority

- "[W]hen there is a more complicated procedure, … the jury should be instructed that when a given procedure inherently involves a known risk of death or serious bodily harm, a medical doctor has a duty to disclose to his patient the potential of death or serious harm, and to explain in lay terms the complications that might possibly occur. Beyond the foregoing minimal disclosure, a doctor must also reveal to his patient such additional information as a skilled practitioner of good standing would provide under similar circumstances." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 244−245 [104 Cal.Rptr. 505, 502 P.2d 1], internal citations omitted.

- "There must be a causal relationship between the physician's failure to inform and the injury to the plaintiff. Such causal connection arises only if it is established that had revelation been made consent to treatment would not have been given." (*Cobbs, supra,* 8 Cal.3d at p. 245.)

- "[E]ven though a physician has no general duty of disclosure with respect to nonrecommended procedures, he nevertheless must make such disclosures as are required for competent practice within the medical community" (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1071 [9 Cal.Rptr.2d 463].)

- "The patient-plaintiff may testify on this subject but the issue extends beyond his credibility. Since at the time of trial the uncommunicated hazard has materialized, it would be surprising if the patient-plaintiff did not claim that had he been informed of the dangers he would have declined treatment. Subjectively he may believe so, with the 20/20 vision of hindsight, but we doubt that justice will be served by placing the physician in jeopardy of the patient's bitterness and disillusionment. Thus an objective test is preferable: i.e., what would a prudent person in the patient's position have decided if adequately informed of all significant perils." (*Cobbs, supra,* 8 Cal.3d at p. 245.)

- "[T]he objective test required of the plaintiff does not prevent the defendant-physician from showing, *by way of defense,* that even though a reasonably prudent person might not have undergone the procedure if properly informed of the perils, this particular plaintiff still would have consented to the procedure." (*Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1206 [67 Cal.Rptr.2d 573], original italics.)

- "[A]n action for failure to obtain informed consent lies where 'an *undisclosed* inherent complication ... occurs,' not where a disclosed complication occurs." (*Warren, supra,* 57 Cal.App.4th at p. 1202 (citation omitted).)

- "[Plaintiff] is entitled to recover not only for the undisclosed complications, but also for the disclosed complications, because she would not have consented to either surgery had the true risk been disclosed, and therefore would not have suffered either category of complications." (*Warren, supra,* 57 Cal.App.4th at p. 1195.)

Secondary Sources

5 Witkin, Summary of California Law (11th~~10th~~ ed. ~~2005~~2017) Torts, §§ ~~395~~466, ~~400~~471

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.23 et seq. (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, §§ 175.23, 175.29 (Matthew Bender)

535. Risks of Nontreatment—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] was negligent because [he/she/*nonbinary pronoun*] did not adequately inform [***name of plaintiff***] about the risks of refusing the [***insert medical procedure***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] did not perform the [***insert medical procedure***] on [***name of plaintiff***];**

2. **That [***name of defendant***] did not disclose to [***name of plaintiff***] the important potential risks of refusing the [***insert medical procedure***];**

3. **That a reasonable person in [***name of plaintiff***]'s position would have agreed to the [***insert medical procedure***] if ~~he or she~~that person had been adequately informed about these risks; and**

4. **That [***name of plaintiff***] was harmed by the failure to have the [***insert medical procedure***] performed.**

New September 2003; Revised June 2014, May 2020

Directions for Use

This instruction presents the "informed refusal" doctrine. (See *Townsend v. Turk* (1990) 218 Cal.App.3d 278, 284 [266 Cal.Rptr. 821].) It should be given with CACI No. 534, *Informed Refusal—Definition*.

If the patient is a minor or is incapacitated, tailor the instruction accordingly.

Also, see CACI No. 531, *Consent on Behalf of Another*.

Sources and Authority

- "Applying these principles, the court in *Cobbs* [*Cobbs v. Grant* (1972) 8 Cal.3d 229, 243 [104 Cal.Rptr. 505, 502 P.2d 1]] stated that a patient must be apprised not only of the 'risks inherent in the procedure [prescribed, but also] the risks of a decision not to undergo the treatment, and the probability of a successful outcome of the treatment.' This rule applies whether the procedure involves treatment or a diagnostic test. On the one hand, a physician recommending a risk-free procedure may safely forego discussion beyond that necessary to conform to competent medical practice and to obtain the patient's consent. If a patient indicates that he or she is going to decline the risk-free test or treatment, then the doctor has the additional duty of advising of all material risks of which a reasonable person would want to be informed before deciding not to undergo the procedure. On the other hand, if the recommended test or treatment is itself risky, then the physician should always explain the potential consequences of declining to follow the recommended course of action." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 292 [165 Cal.Rptr. 308, 611 P.2d 902], internal citations

omitted.)

- "The duty of reasonable disclosure was expanded in *Truman v. Thomas* [*supra*]. There, a doctor recommended that his patient undergo a risk-free diagnostic procedure but failed to advise her of the risks involved in the failure to follow his recommendation. The Supreme Court concluded that for a patient to make an informed choice to decline a recommended procedure the patient must be adequately advised of the risks of refusing to undergo the procedure. Thus, the high court extended the duty to make disclosure to include recommended diagnostic as well as therapeutic procedures and to include situations in which the patient declines the recommended procedure." (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1069 [9 Cal.Rptr.2d 463].)

- "In a nutshell, a doctor has a duty to disclose all material information to his patient which will enable that patient to make an informed decision regarding the taking or refusal to take such a test." (*Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 736 [223 Cal.Rptr. 859].)

Secondary Sources

5 Witkin, Summary of California Law (11th~~10th~~ ed. ~~2005~~2017) Torts, §§ ~~395, 400–404, 406, 407, 409, 410~~ 466, 471, 475, 477, 480, 481

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.12

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13[2] (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, § 175.33 (Matthew Bender)

550. Affirmative Defense—Plaintiff Would Have Consented

[*Name of defendant*] claims that [he/she/*nonbinary pronoun*] is not responsible for [*name of plaintiff*]'s harm because [*name of plaintiff*] would have consented to the procedure, even if [he/she/*nonbinary pronoun*] had been informed of the risks. To establish this defense, [*name of defendant*] must prove that had [*name of plaintiff*] been adequately informed about the risks of the [*insert medical procedure*], [he/she/*nonbinary pronoun*] would have consented, even if a reasonable person in [*name of plaintiff*]'s position might not have consented.

New September 2003; Revised June 2015, May 2020

Directions for Use

Give this instruction if the defendant asserts as an affirmative defense that the plaintiff would have consented (and thereby would have suffered the same harm) had ~~he or she~~the plaintiff been informed of the risks. This instruction can be modified to cover "informed refusal" cases by redrafting it to state, in substance, that even if the plaintiff had known of the risks of refusal, ~~he or she~~the plaintiff still would have refused the test.

Sources and Authority

- "Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245 [104 Cal.Rptr. 505, 502 P.2d 1].)

- "The patient-plaintiff may testify on this subject but the issue extends beyond his credibility. Since at the time of trial the uncommunicated hazard has materialized, it would be surprising if the patient-plaintiff did not claim that had he been informed of the dangers he would have declined treatment. Subjectively he may believe so, with the 20/20 vision of hindsight, but we doubt that justice will be served by placing the physician in jeopardy of the patient's bitterness and disillusionment. Thus an objective test is preferable: i.e., what would a prudent person in the patient's position have decided if adequately informed of all significant perils." (*Cobbs, supra,* 8 Cal.3d at p. 245.)

- "The prudent person test for causation was established to protect defendant physicians from the unfairness of having a jury consider the issue of proximate cause with the benefit of the '20/20 vision of hindsight . . .' This standard should not be employed to prevent a physician from raising the defense that even given adequate disclosure the injured patient would have made the same decision, regardless of whether a reasonably prudent person would have decided differently if adequately informed." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 294 fn. 5 [165 Cal. Rptr. 308, 611 P.2d 902].)

Secondary Sources

5 Witkin, Summary of California Law (11th~~10th~~ ed. ~~2005~~2017) Torts, §§ ~~395~~466, ~~398~~469

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13 (Matthew Bender)

551. Affirmative Defense—Waiver

[*Name of defendant***] claims that [he/she/*nonbinary pronoun*] did not have to inform [***name of patient***] of the risks of the [***insert medical procedure***] because [***name of patient***] asked not to be told of the risks.**

If [*name of defendant***] has proved that [***name of patient***] told [him/her/*nonbinary pronoun*] that [he/she/*nonbinary pronoun*] did not want to be informed of the risks of the [***insert medical procedure***], then you must conclude that [***name of defendant***] was not negligent in failing to inform [***name of patient***] of the risks.**

New September 2003; Revised May 2020

Directions for Use

"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245 [104 Cal.Rptr. 505, 502 P.2d 1].) This instruction could be modified to cover "informed refusal" cases by redrafting it to state, in substance, that the plaintiff indicated that ~~he or she~~the plaintiff did not want to be informed of the risks of refusing the test.

Sources and Authority

- "[A] medical doctor need not make disclosure of risks when the patient requests that he not be so informed." (*Cobbs, supra,* 8 Cal.3d at p. 245.)

- This defense is considered a "justification." Justification for failure to disclose is an affirmative defense on which the defendant has the burden of proof. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 347, fn. 9 [13 Cal.Rptr.2d 819].)

- In *Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1083–1084 [91 Cal.Rptr. 319], the court held that it was not error for the court to refuse an instruction on informed consent where the evidence showed that the doctor's attempt to explain the medical procedure was prevented by the plaintiff's insistence on remaining ignorant of the risks involved.

Secondary Sources

5 Witkin, Summary of California Law (11th~~10th~~ ed. ~~2005~~2017) Torts, §§ ~~395~~466, ~~398~~469

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13 (Matthew Bender)

555. Affirmative Defense—Statute of Limitations—Medical Malpractice—One-Year Limit (Code Civ. Proc., § 340.5)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that before [***insert date one year before date of filing***], [***name of plaintiff***] discovered, or knew of facts that would have caused a reasonable person to suspect, that [he/she/*nonbinary pronoun*] had suffered harm that was caused by someone's wrongful conduct.**

[If, however, [*name of plaintiff***] proves [***insert tolling provision(s) of general applicability, e.g., Code Civ. Proc., §§ 351 [absence from California], 352 [insanity], 352.1 [prisoners], 352.5 [restitution orders], 353.1 [court's assumption of attorney's practice], 354 [war], 356 [injunction]***], the period within which [***name of plaintiff***] had to file the lawsuit is extended for the amount of time that [***insert tolling provision, e.g., [name of defendant] was absent from California***].]**

New April 2009; Revised May 2020

Directions for Use

Use CACI No. 556, *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit*, if the three-year limitation provision is at issue.

If the notice of intent to sue required by Code of Civil Procedure section 364 is served within 90 days of the date on which the statute of limitations will run, the statute of limitations is tolled for 90 days beyond the end of the limitations period. (See Code Civ. Proc., § 364; *Woods v. Young* (1991) 53 Cal.3d 315, 325–326 [279 Cal.Rptr. 613, 807 P.2d 455].) Adjust the "date one year before the date of filing" in the instruction accordingly. If there is an issue of fact with regard to compliance with the requirements of section 364, the instruction may need to be modified accordingly.

Give the optional last paragraph if there is a question of fact concerning a tolling provision from the Code of Civil Procedure. If so, the verdict form should ask the jury to find (1) the "discovery" date (the date on which the plaintiff discovered or knew of facts that would have caused a reasonable person to suspect that ~~he or she~~the person had suffered harm that was caused by someone's wrongful conduct); (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the discovery date and determine whether the action is timely.

Contrary to the otherwise applicable rule (see CACI No. 455, *Statute of Limitations—Delayed Discovery*), the defendant has been given the burden of proving that the plaintiff discovered or should have discovered the facts alleged to constitute the defendant's wrongdoing more than one year before filing the action. (See *Samuels v. Mix* (1999) 22 Cal.4th 1, 8–10 [91 Cal.Rptr.2d 273, 989 P.2d 701] [construing structurally similar Code Civ. Proc., § 340.6, on legal malpractice, to place burden regarding delayed discovery on the defendant and disapproving *Burgon v. Kaiser Foundation Hospitals* (1979) 93 Cal.App.3d 813 [155 Cal.Rptr. 763], which had reached the opposite result under Code Civ. Proc.,

§ 340.5].) See also CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*.

Sources and Authority

- Statutes of Limitation for Medical Malpractice. Code of Civil Procedure section 340.5.
- Notice of Intent to Commence Action. Code of Civil Procedure section 364(a).
- 90-Day Extension of Limitation Period. Code of Civil Procedure section 364(d).
- "The one-year limitation period of section 340.5 is a codification of the discovery rule, under which a cause of action accrues when the plaintiff is aware, or reasonably should be aware, of 'injury,' a term of art which means 'both the negligent cause and the damaging effect of the alleged wrongful act.' " (*Arroyo v. Plosay* (2014) 225 Cal.App.4th 279, 290 [170 Cal.Rptr.3d 125].)
- "When a plaintiff has information which would put a reasonable person on inquiry, when a plaintiff's "reasonably founded suspicions [have been] aroused" and the plaintiff has "become alerted to the necessity for investigation and pursuit of her remedies," the one-year period commences. "Possession of 'presumptive' as well as 'actual' knowledge will commence the running of the statute." ' " (*Dolan v. Borelli* (1993) 13 Cal.App.4th 816, 823 [16 Cal.Rptr.2d 714], internal citations omitted.)
- "[W]hen the plaintiff in a medical malpractice action alleges the defendant health care provider misdiagnosed or failed to diagnose a preexisting disease or condition, there is no injury for purposes of section 340.5 until the plaintiff first experiences appreciable harm as a result of the misdiagnosis, which is when the plaintiff first becomes aware that a preexisting disease or condition has developed into a more serious one." (*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1183–1184 [209 Cal.Rtpr.3d 332].)
- "The fact that [plaintiff] contemplated suing [defendants] is strong evidence that [plaintiff] suspected the doctors had not properly diagnosed or treated his headaches. Even with the presence of such suspicions, however, the one-year and three-year limitations periods did not begin to run until [plaintiff] discovered his injury—that is, became aware of additional, appreciable harm from his preexisting condition—and, with respect to the one-year limitations period, also had reason to believe that injury was caused by the wrongdoing of [defendants]." (*Drexler, supra,* 4 Cal.App.5th at p. 1190, internal citation omitted.)
- "We see no reason to apply the second sentence of section 340.5 to the one-year period it does not mention, in addition to the three-year period it does mention. The general purpose of MICRA does not require us to expand that sentence beyond its language." (*Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [Code Civ. Proc., § 352.1, which tolls statutes of limitation for prisoners, applies to extend one-year period of Code Civ. Proc., § 340.5].)
- "The implications of *Belton's* analysis for our case here is inescapable. Like tolling the statute of limitations for confined prisoners under section 352.1, tolling under section 351 for a defendant's absence from California is of general applicability [and therefore extends the one-year period of Code

of Civil Procedure section 340.5]. (For other general tolling provisions, see § 352 [minors or insanity]; § 352.5 [restitution orders]; § 353.1 [court's assumption of attorney's practice]; § 354 [war]; § 356 [injunction].)" (*Kaplan v. Mamelak* (2008) 162 Cal.App.4th 637, 643 [75 Cal.Rptr.3d 861].)

- "[A] plaintiff's minority as such does not toll the limitations period of section 340.5. When the Legislature added the separate statute of limitations for minors to section 340.5 in 1975, it clearly intended that the general provision for tolling of statutes of limitation during a person's minority (§ 352, subd. (a)(1)) should no longer apply to medical malpractice actions." (*Steketee v. Lintz* (1985) 38 Cal.3d 46, 53 [210 Cal.Rptr 781, 694 P.2d 1153], internal citations omitted.)

- "Section 340.5 creates two separate statutes of limitations, both of which must be satisfied if a plaintiff is to timely file a medical malpractice action. First, the plaintiff must file within one year after she first 'discovers' the injury *and the negligent cause* of that injury. Secondly, she must file within three years after she first experiences harm from the injury. This means that if a plaintiff does not 'discover' the negligent cause of her injury until more than three years after she first experiences harm from the injury, she will not be able to bring a malpractice action against the medical practitioner or hospital whose malpractice caused her injury." (*Ashworth v. Mem'l Hosp.* (1988) 206 Cal.App.3d 1046, 1054 [254 Cal.Rptr. 104], original italics.)

- "That legislative purpose [re: Code Civ. Proc., § 364] is best effectuated by construing section 364(d) as tolling the one-year statute of limitations when section 364(a)'s ninety-day notice of intent to sue is served during, but not before, the last ninety days of the one-year limitations period. Because the statute of limitations is tolled for 90 days and not merely extended by 90 days from the date of service of the notice, this construction results in a period of 1 year and 90 days in which to file the lawsuit. In providing for a waiting period of at least 90 days before suit can be brought, this construction achieves the legislative objective of encouraging negotiated resolutions of disputes." (*Woods, supra,* 53 Cal.3d at p. 325.)

- "[I]f the act or omission that led to the plaintiff's injuries was negligence in the maintenance of equipment that, under the prevailing standard of care, was reasonably required to treat or accommodate a physical or mental condition of the patient, the plaintiff's claim is one of professional negligence under section 340.5. But section 340.5 does not extend to negligence in the maintenance of equipment and premises that are merely convenient for, or incidental to, the provision of medical care to a patient." (*Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, 88 [201 Cal.Rptr.3d 449, 369 P.3d 229]; see *Johnson v. Open Door Community Health Centers* (2017) 15 Cal.App.5th 153, 157–162 [222 Cal.Rptr.3d 838] [tripping over scale does not involve provision of medical care].)

- "[W]hile MICRA is not limited to suits by patients, it 'applies only to actions alleging injury suffered as a result of negligence in … the provision of medical care to patients.' Driving to an accident victim is not the same as providing medical care to the victim. A paramedic's exercise of due care while driving is not 'necessary or otherwise integrally related to the medical treatment and diagnosis of the patient", at least when the patient is not in the vehicle.' " (*Aldana v. Stillwagon* (2016) 2 Cal.App.5th 1, 8 [205 Cal.Rptr.3d 719], internal citations omitted.)

Secondary Sources

~~Haning, et al., California Practice Guide: Personal Injury, Ch. 1-B, *Initial Evaluation Of Case: Decision To Accept Or Reject Employment Or Undertake Further Evaluation Of Claim*, ¶ 1:67.1 (The Rutter Group)~~

Haning~~,~~ et al., California Practice Guide: Personal Injury, Ch. 5-B, *When To Sue—Statute Of Limitations*, ¶ 5:109 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.26, 9.67–9.72

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Professionals*, § 31.60 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.47 (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice*, § 175.45 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.27

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

VF-501. Medical Negligence—Informed Consent—Affirmative Defense—Plaintiff Would Have Consented Even If Informed

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] perform a [***insert medical procedure***] on [***name of plaintiff***]?**
   ____ Yes ____ No

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

2. **Did [***name of plaintiff***] give [his/her/*nonbinary pronoun*] informed consent for the [***insert medical procedure***]?**
   ____ Yes ____ No

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

3. **Would a reasonable person in [***name of plaintiff***]'s position have refused the [***insert medical procedure***] if ~~he or she~~that person had been adequately informed of the possible results and risks of [and alternatives to] the [***insert medical procedure***]?**
   ____ Yes ____ No

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

4. **Would [***name of plaintiff***] have consented to the [***insert medical procedure***] even if [he/she/*nonbinary pronoun*] had been given adequate information about the risks of the [***insert medical procedure***]?**
   ____ Yes ____ No

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

5. **Was [***name of plaintiff***] harmed as a consequence of a result or risk that [***name of defendant***] should have explained before the [***insert medical procedure***] was performed?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, June 2015, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 533, *Failure to Obtain Informed Consent—Essential Factual*

Elements, and CACI No. 550, *Affirmative Defense—Plaintiff Would Have Consented*.

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

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional depending on the circumstances.

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

If the affirmative defense, which is contained in question 4, is not an issue in the case, question 4 should be omitted and the remaining questions renumbered accordingly.

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

VF-502. Medical Negligence—Informed Consent—Affirmative Defense—Emergency

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] perform a [***insert medical procedure***] on [***name of plaintiff***]?**
   ____ Yes ____ No

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

2. **Did [***name of plaintiff***] give [his/her/*nonbinary pronoun*] informed consent to the [***insert medical procedure***]?**
   ____ Yes ____ No

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

3. **Would a reasonable person in [***name of plaintiff***]'s position have refused the [***insert medical procedure***] if ~~he or she~~that person had been fully informed of the possible results and risks of [and alternatives to] the [***insert medical procedure***]?**
   ____ Yes ____ No

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

4. **Was [***name of plaintiff***] harmed as a consequence of a result or risk that [***name of defendant***] should have explained before the [***insert medical procedure***] was performed?**
   ____ Yes ____ No

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

5. **Did [***name of defendant***] reasonably believe the [***insert medical procedure***] had to be done immediately in order to preserve the life or health of [***name of plaintiff***]?**
   ____ Yes ____ No

   If your answer to question 5 is no, then answer question 7. If you answered yes to this question, answer question 6.

6. **Was [***name of plaintiff***] unconscious?**
   ____ Yes ____ No

If your answer to question 6 is no, then answer question 7. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, October 2008, December 2010, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 533, *Failure to Obtain Informed Consent—Essential Factual Elements,* and CACI No. 554, *Affirmative Defense—Emergency*.

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

Depending on the facts, alternative language may be substituted for question 6 as in item 2 of CACI No. 554. If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

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

If the affirmative defense, which is contained in questions 5 and 6, is not an issue in the case, then questions 5 and 6 should be omitted and the remaining questions renumbered accordingly.

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.

600. Standard of Care

[A/An] [*insert type of professional*] is negligent if [he/she/*nonbinary pronoun*] 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, May 2020

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~~ a 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.)

- "California law does not require an expert witness to prove professional malpractice in all circumstances. 'In professional malpractice cases, expert opinion testimony is required to prove or disprove that the defendant performed in accordance with the prevailing standard of care [citation], except in cases where the negligence is obvious to laymen.' " (*Ryan v. Real Estate of the Pacific, Inc.* (2019) 32 Cal.App.5th 637, 644–645 [244 Cal.Rptr.3d 129].)

- "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~~288

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

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1124, 1125, 1128–1131

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-E~~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)

601. Negligent Handling of Legal Matter

To recover damages from [*name of defendant*], [*name of plaintiff*] must prove that [he/she/*nonbinary pronoun*/it] would have obtained a better result if [*name of defendant*] had acted as a reasonably careful attorney. [*Name of plaintiff*] was not harmed by [*name of defendant*]'s conduct if the same harm would have occurred anyway without that conduct.

New September 2003; Revised June 2015, May 2020

Directions for Use

In cases involving professionals other than attorneys, this instruction would need to be modified by inserting the type of the professional in place of "attorney." (See, e.g., *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 829−830 [60 Cal.Rptr.2d 780] [trial-within-a-trial method was applied to accountants].)

The plaintiff must prove that *but for* the attorney's negligent acts or omissions, ~~he or she~~the plaintiff would have obtained a more favorable judgment or settlement in the underlying action. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241 [135 Cal. Rptr. 2d 629, 70 P.3d 1046].) The second sentence expresses this "but for" standard.

Sources and Authority

- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 749−750 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)

- "In the legal malpractice context, the elements of causation and damage are particularly closely linked." (*Namikas v. Miller* (2014) 225 Cal.App.4th 1574, 1582 [171 Cal.Rptr.3d 23].)

- "In a client's action against an attorney for legal malpractice, the client must prove, among other things, that the attorney's negligent acts or omissions caused the client to suffer some financial harm or loss. When the alleged malpractice occurred in the performance of transactional work (giving advice or preparing documents for a business transaction), must the client prove this causation element according to the 'but for' test, meaning that the harm or loss would not have occurred without the attorney's malpractice? The answer is yes." (*Viner, supra,* 30 Cal.4th at p. 1235.)

- "[The trial-within-a-trial method] is the most effective safeguard yet devised against speculative and conjectural claims in this era of ever expanding litigation. It is a standard of proof designed to limit damages to those actually *caused* by a professional's malfeasance." (*Mattco Forge Inc., supra,* 52 Cal.App.4th at p. 834.)

- " 'Damage to be subject to a proper award must be such as follows the act complained of *as a legal certainty* … .' Conversely, ' " '[t]he mere probability that a certain event would have happened, upon which a claim for damages is predicated, will not support the claim or furnish the foundation of an action for such damages.' " ' " (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 165−166 [149 Cal.Rptr.3d 422], original italics, footnote and internal citations omitted.)

- "One who establishes malpractice on the part of his or her attorney *in prosecuting a lawsuit* must also prove that careful management of it would have resulted in a favorable judgment and collection thereof, as there is no damage in the absence of these latter elements." (*DiPalma v. Seldman* (1994) 27 Cal.App.4th 1499, 1506−1507 [33 Cal.Rptr.2d 219], original italics.)

- " 'The element of collectibility requires a showing of the debtor's solvency. " ['W]here a claim is alleged to have been lost by an attorney's negligence, … to recover more than nominal damages it must be shown that it was a valid subsisting debt, *and that the debtor was solvent*.' [Citation.]" The loss of a collectible judgment "by definition means the lost opportunity to collect a money judgment from a solvent [defendant] and is certainly legally sufficient evidence of actual damage." ' " (*Wise v. DLA Piper LLP (US)* (2013) 220 Cal.App.4th 1180, 1190 [164 Cal.Rptr.3d 54], original italics, internal citations omitted.)

- "Collectibility is part of the plaintiff's case, and a component of the causation and damages showing, rather than an affirmative defense which the Attorney Defendants must demonstrate." (*Wise, supra,* 220 Cal.App.4th at p. 1191.)

- "Because of the legal malpractice, the original target is out of range; thus, the misperforming attorney must stand in and submit to being the target instead of the former target which the attorney negligently permitted to escape. This is the essence of the case-within-a-case doctrine." (*Arciniega v. Bank of San Bernardino* (1997) 52 Cal.App.4th 213, 231 [60 Cal.Rptr.2d 495].)

- "Where the attorney's negligence does not result in a total loss of the client's claim, the measure of damages is the difference between what was recovered and what would have been recovered but for the attorney's wrongful act or omission. [¶] Thus, in a legal malpractice action, if a reasonably competent attorney would have obtained a $3 million recovery for the client but the negligent attorney obtained only a $2 million recovery, the client's damage due to the attorney's negligence would be $1 million-the difference between what a competent attorney would have obtained and what the negligent attorney obtained." (*Norton v. Superior Court* (1994) 24 Cal.App.4th 1750, 1758 [30 Cal.Rptr.2d 217].)

- "[A] plaintiff who alleges an inadequate settlement in the underlying action must prove that, if not for the malpractice, she would *certainly* have received more money in settlement or at trial. [¶] The requirement that a plaintiff need prove damages to 'a legal certainty' is difficult to meet in any case. It is particularly so in 'settle and sue' cases … ." (*Filbin, supra,* 211 Cal.App.4th at p. 166, original italics, internal citation omitted.)

- "In a legal malpractice action, causation is an issue of fact for the jury to decide except in those cases where reasonable minds cannot differ; in those cases, the trial court may decide the issue itself as a matter of law." (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187 [164 Cal.Rptr.3d 309].)

- " 'The trial-within-a-trial method does not "recreate what a particular judge or fact finder would have done. Rather, the jury's task is to determine what a reasonable judge or fact finder would have done … ." … Even though "should" and "would" are used interchangeably by the courts, the standard remains an *objective* one. The trier of fact determines what *should* have been, not what the result *would* have been, or could have been, or might have been, had the matter been before a *particular judge* or jury. …' " (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 357 [89 Cal.Rptr.3d 710], original italics.)

- "If the underlying issue originally was a factual question that would have gone to a tribunal rather than a judge, it is the jury who must decide what a reasonable tribunal would have done. The identity or expertise of the original trier of fact (i.e., a judge or an arbitrator or another type of adjudicator) does not alter the jury's responsibility in the legal malpractice trial-within-a-trial." (*Blanks, supra,* 171 Cal.App.4th at pp. 357–358.)

Secondary Sources

1 Witkin, California Procedure (5th ed. 2008) Attorneys, §§ 319–322

Vapnek et al., California Practice Guide: Professional Responsibility, Ch. 6-ED, *Professional Liability*, ¶ 6:322 (The Rutter Group)

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.10 et seq. (Matthew Bender)

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

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

603. Alternative Legal Decisions or Strategies

An attorney is not necessarily negligent just because ~~he or she~~the attorney [chooses one legal strategy/makes a decision/makes a recommendation] and it turns out that another [strategy/decision/recommendation] would have been a better choice.

New September 2003; Revised May 2020

Sources and Authority

- "We recognize, of course, that an attorney engaging in litigation may have occasion to choose among various alternative strategies available to his client ... ." (*Smith v. Lewis* (1975) 13 Cal.3d 349, 359 [118 Cal.Rptr. 621, 530 P.2d 589], overruled in part on other grounds in *In re Marriage of Brown* (1976) 15 Cal.3d 838, 851 [126 Cal.Rptr. 633, 544 P.2d 561].)

- " 'In view of the complexity of the law and the circumstances which call for difficult choices among possible courses of action, the attorney cannot be held legally responsible for an honest and reasonable mistake of law or an unfortunate selection of remedy *or other procedural step*.' [Citation.]" (*Banerian v. O'Malley* (1974) 42 Cal.App.3d 604, 613 [116 Cal.Rptr. 919].)

Secondary Sources

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.11 (Matthew Bender)

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

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

610. Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit (Code Civ. Proc., § 340.6)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that before [***insert date one year before date of filing***] [***name of plaintiff***] knew, or with reasonable diligence should have discovered, the facts of [***name of defendant***]'s alleged wrongful act or omission.**

[If, however, [*name of plaintiff***] proves**

[*Choose one or more of the following three options:***]**

[that [he/she/*nonbinary pronoun*/it] did not sustain actual injury until on or after [*insert date one year before date of filing***][,/; or]]**

[that on or after [*insert date one year before date of filing***] [***name of defendant***] continued to represent [***name of plaintiff***] regarding the specific subject matter in which the wrongful act or omission occurred[,/; or]]**

[that on or after [*insert date one year before date of filing***] [he/she/*nonbinary pronoun*/it] was under a legal or physical disability that restricted [his/her/*nonbinary pronoun*/its] ability to file a lawsuit[,/;]]**

the period within which [*name of plaintiff***] had to file the lawsuit is extended for the amount of time that [***insert tolling provision, e.g., [name of defendant] continued to represent [name of plaintiff]***].]**

New April 2007; Revised April 2009, May 2020

Directions for Use

Use CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*, if the four-year limitation provision is at issue.

The court may need to define the term "actual injury" depending on the facts and circumstances of the particular case.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the "discovery" date (the date on which the plaintiff discovered or knew of facts that would have caused a reasonable person to suspect that ~~he or she~~ the person had suffered harm that was caused by someone's wrongful conduct); (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the discovery date and determine whether the action is timely.

Sources and Authority

- Statute of Limitation for Attorney Malpractice. Code of Civil Procedure section 340.6.

- Persons Under Disabilities. Code of Civil Procedure section 352.

- "Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)

- "Summary judgment was proper under section 340.6, subdivision (a)'s one-year limitations period only if the undisputed facts compel the conclusion that [plaintiff] was on inquiry notice of his claim more than one year before the complaint was filed. Inquiry notice exist where 'the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them.' ' "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." [Citation.]' " (*Genisman v. Carley* (2018) 29 Cal.App.5th 45, 50–51 [239 Cal.Rptr.3d 780], internal citation omitted.)

- " ' "[S]ubjective suspicion is not required. If a person becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further and is charged with knowledge of matters which would have been revealed by such an investigation." [Citation.]' " (*Genisman, supra,* 29 Cal.App.5th at p. 51.)

- "For purposes of section 340.6, 'actual injury occurs when the plaintiff sustains any loss or injury legally cognizable as damages in a legal malpractice action based on the acts or omissions that the plaintiff alleged.' While 'nominal damages will not end the tolling of section 340.6's limitations period,' it is 'the fact of damage, rather than the amount, [that] is the critical factor.' " (*Genisman, supra,* 29 Cal.App.5th at p. 52, internal citation omitted.)

- "Actual injury refers only to the legally cognizable damage necessary to assert the cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney's error and the asserted injury. The determination of actual injury requires only a factual analysis of the claimed error and its consequences." (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 113 [103 Cal.Rptr.3d 811].)

- " '[S]ection 340.6, subdivision (a)(1), will not toll the limitations period once the client can plead damages that could establish a cause of action for legal malpractice.' '[T]he limitations period is not tolled after the plaintiff sustains actual injury [even] if the injury is, in some sense, remediable. [Citation.] Furthermore, the statutory scheme does not depend on the plaintiff's recognizing actual injury. Actual injury must be noticeable, but the language of the tolling provision does not require that it be noticed.' On the other hand, 'the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence' because the

plaintiff cannot allege actual injury resulted from an attorney's malpractice." (*Croucier v. Chavos* (2012) 207 Cal.App.4th 1138, 1148 [144 Cal.Rptr.3d 180], internal citations omitted.)

- "[A]ctual injury exists even if the client has yet to 'sustain[] all, or even the greater part, of the damages occasioned by his attorney's negligence'; even if the client will encounter 'difficulty in proving damages'; and even if that damage might be mitigated or entirely eliminated in the future. [¶] However, 'actual injury' does not include 'speculative and contingent injuries … that do not yet exist … .' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031, 1036 [190 Cal.Rptr.3d 90], internal citations omitted.)

- "[B]ecause 'determining actual injury is predominately a factual inquiry' to the extent a question remains on this point, the matter is properly resolved by the trier of fact … ." (*Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557, 576 [125 Cal.Rptr.3d 120].)

- "[W]here, as here, the 'material facts are undisputed, the trial court can resolve the matter [of actual injury] as a question of law in conformity with summary judgment principles.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra,* 238 Cal.App.4th at pp. 1037−1038.)

- "[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor." (*Adams v. Paul* (1995) 11 Cal.4th 583, 589, fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205], internal citations omitted.)

- "[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)

- "[D]efendant, if he is to avail himself of the statute's one-year-from-discovery limitation defense, has the burden of proving, under the 'traditional allocation of the burden of proof' that plaintiff discovered or should have discovered the facts alleged to constitute defendant's wrongdoing more than one year prior to filing this action." (*Samuels, supra,* 22 Cal.4th at pp. 8–9, internal citations omitted.)

- "In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)

- "We hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action." (*Neel, supra,* 6 Cal.3d at p. 194.)

- " '[W]here there is a professional relationship, the degree of diligence in ferreting out the negligence for the purpose of the statute of limitations is diminished. [Citation.]' " (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 315 [166 Cal.Rptr.3d 116].)

- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)

- "A plaintiff who is aware of, and has been actually injured by, attorney malpractice in a matter need not file suit for malpractice while that attorney is still representing him on the same 'specific subject matter.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra,* 238 Cal.App.4th at p. 1038.)

- "The continuous representation tolling provision in section 340.6, subdivision (a)(2) 'was adopted in order to "avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired." ' " (*Kelly v. Orr* (2016) 243 Cal.App.4th 940, 950 [196 Cal.Rptr.3d 901].)

- "The mere existence of an attorney-client relationship does not trigger the continuous representation rule: 'Instead, the statute's tolling language addresses a particular phase of such a relationship-representation regarding a *specific subject matter*. Moreover, the limitations period is not tolled when an attorney's subsequent role is only tangentially related to the legal representation the attorney provided to the plaintiff. Therefore, "[t]he *inquiry is not whether an attorney-client relationship still exists but when the representation of the specific matter terminated.*" ' Tolling does not apply where there is a continuing relationship between the attorney and client 'involving only unrelated matters.' " (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1064 [109 Cal.Rptr.3d 392], original italics, internal citations omitted.)

- "[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term 'attorney' in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)

- " '[W]hen an attorney leaves a firm and takes a client with him or her, … the tolling in ongoing matters [does not] continue for claims against the former firm and partners.' " (*Stueve Bros. Farms, LLC, supra,* 222 Cal.App.4th at p. 314.)

- " 'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.' 'The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.' 'Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.' " (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)

- "[T]he continuous representation tolling provision in section 340.6, subdivision (a)(2), applies to toll legal malpractice claims brought by successor trustees against attorneys who represented the predecessor trustee." (*Kelly, supra,* 243 Cal.App.4th at p. 951.)

- "[A]bsent a statutory standard to determine when an attorney's representation of a client regarding a specific subject matter ends, and consistent with the purposes of the continuing representation rule, we conclude that for purposes of … section 340.6, subdivision (a)(2), in the event of an attorney's unilateral withdrawal or abandonment of the client, the representation ends *when the client actually has or reasonably should have no expectation that the attorney will provide further legal services. …* That may occur upon the attorney's express notification to the client that the attorney will perform no further services, or, if the attorney remains silent, may be inferred from the circumstances. *Absent actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude,* a client should be entitled to rely on an attorney to perform the agreed services and should not be required to interrupt the attorney-client relationship by filing a malpractice complaint. *After a client has no reasonable expectation that the attorney will provide further legal services,* however, the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney's continuing representation, so the tolling should end. To this extent and for these reasons, *we conclude that continuous representation should be viewed objectively from the client's perspective … .*" (*Laclette v. Galindo* (2010) 184 Cal.App.4th 919, 928 [109 Cal.Rptr.3d 660], original italics.)

- "Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship." (*GoTek Energy, Inc. v. SoCal IP Law Group, LLP* (2016) 3 Cal.App.5th 1240, 1248 [208 Cal.Rptr.3d 428], original italics.)

- "Section 340.6, subdivision (a), states that 'in no event' shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute." (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [applying rule to one-year limitation period]; cf. *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [substantially similar language in Code Civ. Proc., § 340.5, applicable to medical malpractice, construed to apply only to three-year limitation period].)

- "[T]he fourth tolling provision of section 340.6, subdivision (a)—that is, the provision applicable to legal and physical disabilities—encompasses the circumstances set forth in section 351 [exception,

where defendant is out of the state].” (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 569 [107 Cal.Rptr.3d 539].)

- “[A] would-be plaintiff is ‘imprisoned on a criminal charge’ within the meaning of section 352.1 if he or she is serving a term of imprisonment in the state prison.” (*Austin v. Medicis* (2018) 21 Cal.App.5th 577, 597 [230 Cal.Rptr.3d 528].)

- “In light of the Legislature's intent that section 340.6(a) cover more than claims for legal malpractice, the term ‘professional services’ is best understood to include nonlegal services governed by an attorney's professional obligations.” (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1237 [191 Cal.Rptr.3d 536, 354 P.3d 334].)

- “For purposes of section 340.6(a), the question is not simply whether a claim alleges misconduct that entails the violation of a professional obligation. Rather, the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation.” (*Lee, supra,* 61 Cal.4th at p. 1238.)

- “*Lee* held that ‘section 340.6(a)'s time bar applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. In this context, a “professional obligation” is an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the State Bar Rules of Professional Conduct.’ ” (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 292 [211 Cal.Rptr.3d 372].)

- “In sum, consistent with *Lee,* section 340.6(a) applies to malicious prosecution claims against attorneys who performed professional services in the underlying litigation.” (*Connelly v. Bornstein* (2019) 33 Cal.App.5th 783, 799 [245 Cal.Rptr.3d 452].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ ~~573,~~ 626–655

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

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

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

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

702. Waiver of Right-of-Way

A [driver/pedestrian] who has the right-of-way may give up that right and let [another vehicle/a pedestrian] go first. If a [driver/pedestrian] reasonably believes that [[another/a] driver/a pedestrian] has given up the right-of-way, then ~~he or she~~[the driver/the pedestrian] may go first.

New September 2003; Revised May 2020

Sources and Authority

- "[I]f one who has the right of way 'conducts himself in such a definite manner as to create a reasonable belief in the mind of another person that the right-of-way has been waived, then such other person is entitled to assume that the right of way has been given up to him ...'." (*Hopkins v. Tye* (1959) 174 Cal.App.2d 431, 433 [344 P.2d 640].)

- "A conscious intentional act of waiver of the right of way by the pedestrian is not required. Whether there is a waiver depends upon the acts of the pedestrian. If they are such that a driver could reasonably believe that the pedestrian did not intend to assert her right of way, a waiver occurs." (*Cohen v. Bay Area Pie Company* (1963) 217 Cal.App.2d 69, 72–73 [31 Cal.Rptr. 426], internal citation omitted.)

Secondary Sources

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

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

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.68[1][c] (Matthew Bender)

704. Left Turns (Veh. Code, § 21801)

The statute just read to you uses the word "hazard." A "hazard" exists if any approaching vehicle is so near or is approaching so fast that a reasonably careful person would realize that there is a danger of a collision [or accident].

[A driver who is attempting to make a left turn must make sure that no oncoming vehicles are close enough to be a hazard before ~~he or she~~the driver proceeds across each lane.]

New September 2003; Revised May 2020

Directions for Use

The bracketed paragraph should be given in appropriate cases involving multiple lanes of oncoming traffic. (*Sesler v. Ghumman* (1990) 219 Cal.App.3d 218, 227 [268 Cal.Rptr. 70].)

Sources and Authority

- Duty to Yield Right of Way: Left Turn. Vehicle Code section 21801(a).

- "We hold section 21802, subdivision (a), requires that where, as here, some, but not all, of the oncoming vehicles have yielded their right-of-way to a left-turning driver, that driver has a continuing duty during the turning movement to ascertain, before proceeding across the next open lane(s), if any vehicle is approaching from the opposite direction so close as to constitute a hazard." (*Sesler, supra,* 219 Cal.App.3d at pp. 224–225)

- Noting that in 1957 the Legislature added the phrase "at any time during the turning movement" to this section, the court in *In re Kirk* (1962) 202 Cal.App.2d 288, 291 [20 Cal.Rptr. 787], reasoned that "if the oncoming vehicle in the lane closest to the left turning vehicle surrenders its right of way by indicating to the operator of the left turning vehicle that it desires him to proceed, such operator may not proceed beyond that first lane of traffic, now effectively blocked by the waiving vehicle, if in fact other vehicles approaching in any of the other oncoming lanes will constitute a hazard to the left turning vehicle during the turning movement."

Secondary Sources

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

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 4.10–4.11

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

707. Speed Limit (Veh. Code, § 22352)

The speed limit where the accident occurred was [*insert number***] miles per hour.**

The speed limit is a factor to consider when you decide whether or not [*name of plaintiff/name of defendant***] was negligent. A driver is not necessarily negligent just because ~~he or she~~the driver was driving faster than the speed limit. However, a driver may be negligent even if ~~he or she~~the driver was driving at or below the speed limit.**

New September 2003; Revised May 2020

Sources and Authority

- Speed Limits. Vehicle Code section 22352.
- Speeding as Negligence. Vehicle Code section 40831.
- A party is entitled to an instruction that the prima facie speed limit is a factor for the jury to consider in making its negligence determination. (*Hardin v. San Jose City Lines, Inc.* (1953) 41 Cal.2d 432, 439 [260 P.2d 63].)
- "The mere driving of an automobile in excess of the speed limit does not show negligence as a matter of law. The jury was free to find [defendant] not guilty of negligence even if they found that he was exceeding the speed limit." (*Williams v. Cole* (1960) 181 Cal.App.2d 70, 74 [5 Cal.Rptr. 24], internal citations omitted.)
- The burden of proving negligence in a civil action is on the party charging negligence, and even if such party has established speed in excess of the applicable prima facie limit the party must establish negligence under the circumstances. (*Faselli v. Southern Pacific Co.* (1957) 150 Cal.App.2d 644, 648 [310 P.2d 698].)
- "Even though the Texaco truck was traveling at a speed less than the maximum specified in the Vehicle Code, the reasonableness of its speed was a question of fact under all the circumstances, and circumstances may make travel at a speed less than the maximum rate a negligent operation of a motor vehicle." (*Scott v. Texaco, Inc.* (1966) 239 Cal.App.2d 431, 436–437 [48 Cal.Rptr. 785], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th~~10th~~ ed. ~~2005~~2017) Torts, § ~~878~~1009

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.18

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.63[2][c], [4] (Matthew Bender)

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

709. Driving Under the Influence (Veh. Code, §§ 23152, 23153)

The statute just read to you uses the term "under the influence." A driver is not necessarily "under the influence" just because ~~he or she~~the driver has consumed some alcohol [or drugs]. A driver is "under the influence" when ~~he or she~~the driver has consumed an amount of alcohol [or drugs] that impairs ~~his or her~~the driver's ability to drive in a reasonably careful manner.

New September 2003; Revised May 2020

Directions for Use

This instruction is designed to supplement a negligence per se instruction on driving under the influence.

The presumption of intoxication based on a 0.08 blood level applies to criminal prosecutions only. There is no statutory or case authority supporting the conclusion that the presumption applies in civil cases. (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 334 [145 Cal.Rptr. 47].)

For a definition of "drug," see Vehicle Code section 312: "The term 'drug' means any substance or combination of substances, other than alcohol, which could so affect the nervous system, brain, or muscles of a person as to impair, to an appreciable degree, his ability to drive a vehicle in the manner that an ordinarily prudent and cautious man, in full possession of his faculties, using reasonable care, would drive a similar vehicle under like conditions."

Sources and Authority

- Driving Under the Influence of Alcohol or Drugs. Vehicle Code sections 23152(a), 23153(a).

- "All of the decided cases on the subject recognize that it is negligence as a matter of law to drive a vehicle upon a public highway while in an intoxicated condition." (*Zamucen v. Crocker* (1957) 149 Cal.App.2d 312, 316 [308 P.2d 384], internal citations omitted.)

- The term "under the influence" was first defined in *People v. Dingle* (1922) 56 Cal.App. 445, 449 [205 P. 705], as follows: "[I]f intoxicating liquor has so far affected the nervous system, brain, or muscles of the driver of an automobile as to impair, to an appreciable degree, his ability to operate his car in the manner that an ordinarily prudent and cautious man, in the full possession of his faculties, using reasonable care, would operate or drive a similar vehicle under like conditions, then such driver is 'under the influence of intoxicating liquor' within the meaning of the statute."

- "One is not necessarily under the influence of intoxicating liquor as the result of taking one or more drinks. The circumstances and effect must be considered; whether or not a person was under the influence of intoxicating liquor at a certain time is a question of fact for the jury to decide." (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 217 [57 Cal.Rptr. 319].)

- Driving while "under the influence" under Vehicle Code sections 23152 and 23153 is not the same as

"being under the influence" of a controlled substance under Health and Safety Code section 11550. Under the Vehicle Code provisions, "the defendant's ability to drive must actually be impaired," while the Health and Safety Code provision is violated as soon as the influence is present "in any detectable manner." (*People v. Enriquez* (1996) 42 Cal.App.4th 661, 665 [49 Cal.Rptr.2d 710].)

- Courts have also distinguished the "under the influence" standard from the "obvious intoxication" standard used in Business and Professions Code section 25602.1. (*Jones v. Toyota Motor Co.* (1988) 198 Cal.App.3d 364, 368 [243 Cal.Rptr. 611]: " 'Under the influence' is defined by a person's capability to drive safely, whereas 'obvious intoxication' is defined by a person's appearance.")

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~883~~1014, ~~884~~1015, ~~886~~1017

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.25

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.02[3][b] (Matthew Bender)

2 California Civil Practice: Torts § 25:28 (Thomson Reuters)

710. Duties of Care for Pedestrians and Drivers in Crosswalk (Veh. Code, § 21950)

A driver of a vehicle must yield the right-of-way to a pedestrian who is crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection. When approaching a pedestrian who is within any marked or unmarked crosswalk, a driver must use reasonable care and must reduce ~~his or her~~the vehicle's speed or take any other action necessary to ensure the safety of the pedestrian.

~~A p~~Pedestrians must also use reasonable care for ~~his or her~~ their own safety. ~~A p~~Pedestrians may not suddenly leave a curb or other place of safety and walk or run into the path of a vehicle that is so close as to constitute an immediate hazard. ~~A p~~Pedestrians also must not unnecessarily stop or delay traffic while in a marked or unmarked crosswalk.

The failure of a pedestrian to exercise reasonable care does not relieve a driver of a vehicle from the duty of exercising reasonable care for the safety of any pedestrian within any marked crosswalk or within any unmarked crosswalk at an intersection.

New September 2003; Revised December 2016, May 2020

Directions for Use

This instruction sets forth the respective duties of drivers and pedestrians in a crosswalk. (See Veh. Code, § 21950.) Crosswalk accidents often present a comparative negligence analysis based on the statutory duties of both parties.

Sources and Authority

- Right-of-Way at Crosswalks. Vehicle Code section 21950.
- Vehicles Stopped for Pedestrians at Crosswalks. Vehicle Code section 21951.
- "Driving a motor vehicle may be sufficiently dangerous to warrant special instructions, but it is not so hazardous that it always requires 'extreme caution.' " (*Menchaca v. Helms Bakeries, Inc.* (1968) 68 Cal.2d 535, 544 [67 Cal.Rptr. 775, 439 P.2d 903], internal citations omitted.)
- "When the pedestrian *suddenly* leaves his place of safety, the vehicle must be so close as to constitute an *immediate hazard*. Such wording [in Veh. Code, § 21950] indicates the statute was intended to apply to those situations where a pedestrian unexpectedly asserts his right-of-way in an intersection at a time when the vehicle is so close that it is virtually impossible to avoid an accident. Typical situations include when a pedestrian steps, jumps, walks or runs directly in front of a vehicle travelling in lanes which are adjacent to the curb or other place of safety occupied by the pedestrian. Under such circumstances, the vehicle would most certainly constitute an immediate hazard to the pedestrian." (*Spann v. Ballesty* (1969) 276 Cal.App.2d 754, 761 [81 Cal.Rptr. 229], original italics.)

- "It is undisputed that defendant did not yield the right of way to plaintiff. Such failure constitutes a violation of the statute and negligence as a matter of law in the absence of reasonable explanation for defendant's conduct." (*Schmitt v. Henderson* (1969) 1 Cal.3d 460, 463 [82 Cal.Rptr 502, 462 P.2d 30].)

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

- "While it is the duty of both the driver of a motor vehicle and a pedestrian, using a public roadway, to exercise ordinary care, that duty does not require necessarily the same amount of caution from each. The driver of a motor vehicle, when ordinarily careful, will be alertly conscious of the fact that he is in charge of a machine capable of projecting into serious consequences any negligence of his own. Thus his caution must be adequate to that responsibility as related to all the surrounding circumstances. A pedestrian, on the other hand, has only his own physical body to manage and with which to set in motion a cause of injury. While, usually, that fact limits his capacity to cause injury, as compared with a vehicle driver, still, in exercising ordinary care, he, too, will be alertly conscious of the mechanical power acting, or that may act, on the public roadway, and of the possible, serious consequences from any conflict between himself and such forces. And the caution required of him is measured by the possibilities of injury apparent to him in the conditions at hand, or that would be apparent to a person of ordinary prudence in the same position." (*Cucinella v. Weston Biscuit Co.* (1954) 42 Cal.2d 71, 75−76, 81 [265 P.2d 513] [proposed jury instruction correctly stated the law].)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~881~~1012, ~~882~~1013, ~~885~~1016

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 4.72-4.73

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, §§ 20.10-20.12 (Matthew Bender)

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

711. The Passenger's Duty of Care for Own Safety

A passenger is not required to be aware of the conditions on the highway and is entitled to expect that a driver will use reasonable care. However, if a passenger becomes aware of [a danger on the highway] [the driver's impairment or failure to use reasonable care], then the passenger must take reasonable steps to protect ~~his or her~~the passenger's own safety.

New September 2003; Revised May 2020

Sources and Authority

- " 'In the absence of some fact brought to his attention which would cause a person of ordinary prudence to act otherwise, a passenger in an automobile has no duty to observe traffic conditions on the highway, and his mere failure to do so, without more, will not support a finding of contributory negligence. In other words, an automobile passenger's "duty to look" does not arise until some factor of danger comes to his attention, thus charging him as a person of ordinary prudence to take steps for his own safety. …' " (*Casey v. Russell* (1982) 138 Cal.App.3d 379, 386–387 [188 Cal.Rptr. 18], internal citations omitted.)

- "Even when negligence of a driver may not be imputed to him, the passenger is bound to exercise ordinary care for his own safety. He may not shut his eyes to an obvious danger; he may not blindly rely on the driver in approaching a place of danger. He is normally bound to protest against actual negligence or recklessness of the driver, the extent of his duty in this regard depending upon the particular circumstances of each case and ordinarily being a question of fact for the jury." (*Pobor v. Western Pacific Railroad Co.* (1961) 55 Cal.2d 314, 324 [11 Cal.Rptr. 106, 359 P.2d 474], internal citations omitted.)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 4.67–4.71

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.03[2][c] (Matthew Bender)

2 California Civil Practice: Torts ~~(Thomson West)~~ § 25:29 (Thomson Reuters)

806. Comparative Fault—Duty to Approach Crossing With Care

A driver approaching a railroad crossing is required to use reasonable care to discover whether a train is approaching. The amount of care that is reasonable will depend on the circumstances. A railroad track is itself a warning of danger. If the driver's view of approaching trains is blocked, ~~he or she~~the driver must use greater care than when the view is clear.

If a bell or signal has been placed to warn drivers of danger, a driver is not required to use as much care as when there are no such warnings. However, even if the warning devices are not activated, a driver must use reasonable care in looking and listening for approaching trains.

New September 2003; Revised December 2009, May 2020

Directions for Use

For an instruction regarding the prima facie speed limits set by Vehicle Code section 22352, see CACI No. 707, *Speed Limit*. For an instruction on the duty of care of a passenger, see CACI No. 711, *The Passenger's Duty of Care for Own Safety.* For instructions on negligence per se, see CACI Nos. 418 to 421.

Sources and Authority

- Vehicle Proceeding at Railroad Crossing. Vehicle Code section 22451.
- Speed Limit at Railroad Crossing. Vehicle Code section 22352(a)(1).
- "[T]hat the driver's view is somewhat obstructed does not make him contributorily negligent as a matter of law; whether his failure to stop, the place from which he looks and the character and extent of the obstruction to his view are such that a reasonably prudent person would not have so conducted himself are questions for the jury in determining whether he was guilty of contributory negligence." (*Lucas v. Southern Pacific Co.* (1971) 19 Cal.App.3d 124, 139 [96 Cal.Rptr. 356].)
- "A railroad track is itself a warning of danger and a driver intending to cross must avail himself of every opportunity to look and listen; if there are obstructions to the view, he is required to take greater care." (*Wilkinson v. Southern Pacific Co.* (1964) 224 Cal.App.2d 478, 488 [36 Cal.Rptr. 689], internal citation omitted.)
- "A railroad company will not be permitted to encourage persons to relax their vigil concerning the dangers that lurk in railroad crossings by assuring them, through the erection of safety devices, that the danger has been removed or minimized, and, at the same time, to hold them to the same degree of care as would be required if those devices had not been provided." (*Will v. Southern Pacific Co.* (1941) 18 Cal.2d 468, 474 [116 P.2d 44], internal citation omitted.)
- "[A] driver may not cross tracks in reliance upon the safety appliances installed by the railroad with

complete disregard for his own safety and recover damages for injuries sustained by reason of his own failure to use reasonable care." (*Will, supra,* 18 Cal.2d at p. 475.)

- "Violation of the railroad's statutory duty to sound bell and whistle at a highway crossing does not absolve a driver from his failure to look and listen and, if necessitated by circumstances such as obstructed vision, even to stop." (*Wilkinson, supra,* 224 Cal.App.2d at p. 489.)

- "It is settled that a railroad may not encourage persons traveling on highways to rely on safety devices and then hold them to the same degree of care as if the devices were not present." (*Startup v. Pacific Electric Ry. Co.* (1947) 29 Cal.2d 866, 871 [180 P.2d 896].)

- "When a flagman or mechanical warning device has been provided at a railroad crossing, the driver of an automobile is thereby encouraged to relax his vigilance, and, in using other means to discover whether there is danger of approaching trains, he is not required to exercise the same quantum of care as would otherwise be necessary." (*Spendlove v. Pacific Electric Ry. Co.* (1947) 30 Cal.2d 632, 634 [184 P.2d 873], internal citations omitted.)

- ~~An instruction that a driver must stop, look, and listen when his or her view is obstructed was held prejudicially erroneous in~~"When the case before us was tried January 30, 1958, the stop, look and listen instruction was included in BAJI as instruction Number 203-B. Since the trial, the editors of BAJI have concluded that the instruction does not conform to the standards of negligence which prevail in California." (*Anello v. Southern Pacific Co.* (1959) 174 Cal.App.2d 317, 322 [344 P.2d 843].)

Secondary Sources

6 Witkin, Summary of California Law (5th ed. 2017) Torts §§ 1039, 1239, 1240, 1479

California Tort Guide (Cont.Ed.Bar 3d ed.) Railroad Crossings, §§ 12.10-12.12

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.27 (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads* § 485.67 (Matthew Bender)

907. Status of Passenger Disputed

A common carrier owes the highest care and vigilance to persons only while they are passengers. [*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was [*name of defendant*]'s passenger at the time of the incident.

To establish that [*name of plaintiff*] was a passenger, [he/she/*nonbinary pronoun*] must prove all of the following:

1. **That [*name of plaintiff*] intended to become a passenger;**

2. **That [*name of plaintiff*] was accepted as a passenger by [*name of defendant*]; and**

3. **That [*name of plaintiff*] placed [himself/herself/*nonbinary pronoun*] under the control of [*name of defendant*]**

To be a passenger, it is not necessary for the person to actually enter the carrier's vehicle [*or name mode of travel, e.g., bus, train*]; however, the carrier must have taken some action indicating acceptance of the person as a passenger. A person continues to be a passenger until ~~he or she~~the person safely leaves the carrier's vehicle [or equipment].

A common carrier must use the highest care and vigilance in providing its passengers with a safe place to get on and off its vehicles [or equipment].

New September 2003; Revised May 2020

Sources and Authority

- The heightened degree of care for common carriers is owed only while "passengers are *in transitu*, and until they have safely departed the carrier's vehicle." (*Marshall v. United Airlines* (1973) 35 Cal.App.3d 84, 86 [110 Cal.Rptr. 416].)

- The relationship of carrier and passenger is "created when one offers to become a passenger, and is accepted as a passenger after he has placed himself under the control of the carrier." (*Grier v. Ferrant* (1944) 62 Cal.App.2d 306, 310 [144 P.2d 631].)

- It is not necessary that the passenger have entered the vehicle for the relationship to exist: " 'The relation is in force when one, intending in good faith to become a passenger, goes to the place designated as the site of departure at the appropriate time and the carrier takes some action indicating acceptance of the passenger as a traveler.' " (*Orr v. Pacific Southwest Airlines* (1989) 208 Cal.App.3d 1467, 1473 [257 Cal.Rptr. 18], internal citations omitted.)

- The carrier-passenger relationship terminates once the passenger has disembarked and entered a place of relative safety. (*McGettigan v. Bay Area Rapid Transit Dist.* (1997) 57 Cal.App.4th 1011, 1018 [67

Cal.Rptr.2d 516].)

- Carriers must exercise utmost care " '[u]ntil the passenger reaches a place outside the sphere of any activity of the carrier which might reasonably constitute a mobile or animated hazard to the passenger.' " (*Brandelius v. City and County of San Francisco* (1957) 47 Cal.2d 729, 735 [306 P.2d 432], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~926~~1058, ~~927~~1059

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.02[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* , § 109.36 (Matthew Bender)

2A California Points and Authorities, Ch. 33, *Carriers*, § 33.22 (Matthew Bender)

2 California Civil Practice: Torts ~~(Thomson West)~~ § 28:7 (Thomson Reuters)

1001. Basic Duty of Care

A person who [owns/leases/occupies/controls] property is negligent if ~~he or she~~that person 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, May 2020

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)

1002. Extent of Control Over Premises Area

[*Name of plaintiff*] claims that [*name of defendant*] controlled the property involved in [*name of plaintiff*]'s harm, even though [*name of defendant*] did not own or lease it. A person controls property that ~~he or she~~the person does not own or lease when ~~he or she~~ the person uses the property as if it were ~~his or her~~the person's own. A person is responsible for maintaining, in reasonably safe condition, all areas ~~he or she~~ that person controls.

New September 2003; Revised May 2020

Directions for Use

Use this instruction only for property that is not actually owned or leased by the defendant.

Sources and Authority

- "[A] defendant's duty to maintain land in a reasonably safe condition extends to land over which the defendant exercises control, regardless of who owns the land. 'As long as the defendant exercised control over the land, the location of the property line would not affect the defendant's potential liability.' " (*University of Southern California v. Superior Court* (2018) 30 Cal.App.5th 429, 445 [241 Cal.Rptr.3d 616], internal citation omitted.)

- "[I]t is clear from [*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1167 [60 Cal.Rptr.2d 448, 929 P.2d 1239]] that simple maintenance of an adjoining strip of land owned by another does not constitute an exercise of control over that property. Although evidence of maintenance is considered 'relevant on the issue of control,' the court limited its holding by stating that 'the simple act of mowing a lawn on adjacent property (or otherwise performing minimal, neighborly maintenance of property owned by another) generally will [not], standing alone, constitute an exercise of control over [the] property ... .' " (*Contreras v. Anderson* (1997) 59 Cal.App.4th 188, 198–199 [69 Cal.Rptr.2d 69].)

- "In *Alcaraz ... ,* our Supreme Court held that a landowner who exercises control over an adjoining strip of land has a duty to protect or warn others entering the adjacent land of a known hazard there. This duty arises even if the person does not own or exercise control over the hazard and even if the person does not own the abutting property on which the hazard is located. … [¶] The *Alcaraz* court concluded that such evidence was 'sufficient to raise a triable issue of fact as to whether defendants exercised control over the strip of land containing the meter box and thus owed a duty of care to protect or warn plaintiff of the allegedly dangerous condition of the property.' " (*Contreras, supra,* 59 Cal.App.4th at pp.197–198, footnote and internal citations omitted.)

- " ' "*The crucial element is control.*" [Citation.]' '[W]e have placed major importance on the existence of possession and control as a basis for tortious liability for conditions on the land.' " (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 414 [82 Cal.Rptr.3d 735], original italics, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1225, 1226

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, §§ 15.02–15.03 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, §§ 381.03–381.04 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, § 334.52 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.15 (Matthew Bender)

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

1 California Civil Practice: Torts § 16:2 (Thomson Reuters)

VF-1101. Dangerous Condition of Public Property—Affirmative Defense—Reasonable Act or Omission (Gov. Code, § 835.4)

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] own [or control] the property?
____ Yes ____ No

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

2. Was the property in a dangerous condition at the time of the incident?
____ Yes ____ No

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

3. Did the dangerous condition create a reasonably foreseeable risk that this kind of incident would occur?
____ Yes ____ No

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

4. [Did negligent or wrongful conduct of [*name of defendant*]'s employee acting within the scope of ~~his or her~~the employee's employment create the dangerous condition?]
____ Yes ____ No

[or]

[Did [*name of defendant*] have notice of the dangerous condition for a long enough time to have protected against it?]
____ Yes ____ No

If your answer to [either option for] question 4 is yes, then answer question 5. If you answered no [to both options], stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was the dangerous condition a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. [Answer if you answered yes to the first option for question 4: When you consider the likelihood and seriousness of potential injury, compared with the practicality and cost of either (a) taking alternative action that would not have created the risk of injury, or (b) protecting against the risk of injury, was [*name of defendant***]'s [act/***specify failure to act***] that created the dangerous condition reasonable under the circumstances?]**

____ Yes ____ No

[or]

[Answer if you answered yes to the second option for question 4: When you consider the likelihood and seriousness of potential injury, compared with (a) how much time and opportunity [*name of defendant***] had to take action, and (b) the practicality and cost of protecting against the risk of injury, was [***name of defendant***]'s failure to take sufficient steps to protect against the risk of injury created by the dangerous condition reasonable under the circumstances?]**

____ Yes ____ No

If your answer to [either option for] question 6 is no, then answer question 7. If you answered yes [to both options], stop here, answer no further questions, and have the presiding juror sign and date this form.

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

[a. Past economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]

Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2008, October 2008, June 2010, December 2010, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 1100, *Dangerous Condition on Public Property—Essential Factual Elements*, CACI No. 1111, *Affirmative Defense—Condition Created by Reasonable Act or Omission*, and CACI No. 1112, *Affirmative Defense—Reasonable Act or Omission to Correct*.

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.

For questions 4 and 6, choose the first bracketed options if liability is alleged because of an employee's negligent conduct under Government Code section 835(a). Use the second bracketed options if liability is alleged for failure to act after actual or constructive notice under Government Code section 835(b). Both options may be given if the plaintiff is proceeding under both theories of liability.

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

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

1201. Strict Liability—Manufacturing Defect—Essential Factual Elements

[*Name of plaintiff*] claims that the [*product*] contained a manufacturing defect. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [manufactured/distributed/sold] the [*product*];**
2. **That the [*product*] contained a manufacturing defect when it left [*name of defendant*]'s possession;**
3. **That [*name of plaintiff*] was harmed; and**
4. **That the [*product*]'s defect was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised April 2009, December 2009, June 2011, May 2020

Directions for Use

To make a prima facie case, the plaintiff has the initial burden of producing evidence that ~~he or she~~the plaintiff was injured while the product was being used in an intended or reasonably foreseeable manner. If this prima facie burden is met, the burden of proof shifts to the defendant to prove that the plaintiff's injury resulted from a misuse of the product. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678 [115 Cal.Rptr.3d 590] [risk-benefit design defect case]; *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 125–126 [104 Cal.Rptr. 433, 501 P.2d 1153] [product misuse asserted as a defense to manufacturing defect]; see also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*.) Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole cause of the plaintiff's injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121]; see CACI No. 1245.) Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Sources and Authority

- "[T]he term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts." (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 31 [192 Cal.Rptr.2d 158].)
- "A manufacturing defect occurs when an item is manufactured in a substandard condition." (*Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 792 [64 Cal.Rptr.3d 908].)

- "A product has a manufacturing defect if it differs from the manufacturer's intended result or from other ostensibly identical units of the same product line. In other words, a product has a manufacturing defect if the product as manufactured does not conform to the manufacturer's design." (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 190 [153 Cal.Rptr.3d 693].)

- " 'Regardless of the theory which liability is predicated upon ... it is obvious that to hold a producer, manufacturer, or seller liable for injury caused by a particular product, there must first be proof that the defendant produced, manufactured, sold, or was in some way responsible for the product ... .' " (*Garcia v. Joseph Vince Co.* (1978) 84 Cal.App.3d 868, 874 [148 Cal.Rptr. 843], internal citation omitted.)

- "[W]here a plaintiff alleges a product is defective, proof that the product has malfunctioned is essential to establish liability for an injury *caused by the defect*." (*Khan v. Shiley Inc.* (1990) 217 Cal.App.3d 848, 855 [266 Cal.Rptr. 106], original italics.)

- "We think that a requirement that a plaintiff also prove that the defect made the product 'unreasonably dangerous' places upon him a significantly increased burden and represents a step backward in the area pioneered by this court." (*Cronin, supra,* 8 Cal.3d at pp. 134–135.)

- "[T]he policy underlying the doctrine of strict liability compels the conclusion that recovery should not be limited to cases involving latent defects." (*Luque v. McLean* (1972) 8 Cal.3d 136, 145 [104 Cal.Rptr. 443, 501 P.2d 1163].)

- "A manufacturer is liable only when a defect in its product was a legal cause of injury. A tort is a legal cause of injury only when it is a substantial factor in producing the injury." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 [34 Cal.Rptr.2d 607, 882 P.2d 298], internal citations omitted.)

- "[S]trict liability should not be imposed upon a manufacturer when injury results from a use of its product that is not reasonably foreseeable." (*Cronin, supra,* 8 Cal.3d at p. 126.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~1428–1437~~1591

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1215, 2:1216 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.11, 460.30 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.140 (Matthew Bender)

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

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

1. **That [*name of defendant*] [manufactured/distributed/sold] the [*product*];**

2. **That the [*product*] did not perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way;**

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

4. **That the [*product*]'s failure to perform safely was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised December 2005, April 2009, December 2009, June 2011, January 2018, May 2020

Directions for Use

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

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

To make a prima facie case, the plaintiff has the initial burden of producing evidence that ~~he or she~~the plaintiff was injured while the product was being used in an intended or reasonably foreseeable manner. If this prima facie burden is met, the burden of proof shifts to the defendant to prove that the plaintiff's injury resulted from a misuse of the product. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678 [115 Cal.Rptr.3d 590] [risk-benefit case]; see also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*.) Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole cause of the plaintiff's injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr.

596, 583 P.2d 121]; see CACI No. 1245.) Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff*, and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Sources and Authority

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

- "[T]he term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts." (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 31 [192 Cal.Rptr.2d 158].)

- "[A] product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if, in light of the relevant factors … , the benefits of the challenged design do not outweigh the risk of danger inherent in such design." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 418 [143 Cal.Rptr. 225, 573 P.2d 443].)

- "The [consumer-expectation and risk-benefit] tests provide alternative means for a plaintiff to prove design defect and do not serve as defenses to one another. A product may be defective under the consumer expectation test even if the benefits of the design outweigh the risks. [Citation.] On the other hand, a product may be defective if it satisfies consumer expectations but contains an excessively preventable danger in that the risks of the design outweigh its benefits." (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1303 [144 Cal.Rptr.3d 326].)

- "In order to establish a design defect under the consumer expectation test when a ' " 'product is one within the common experience of ordinary consumers,' " ' the plaintiff must ' " 'provide[] evidence concerning (1) his or her use of the product; (2) the circumstances surrounding the injury; and (3) the objective features of the product which are relevant to an evaluation of its safety.' [Citation.] The test is that of a hypothetical reasonable consumer, not the expectation of the particular plaintiff in the case." ' " (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 157 [220 Cal.Rptr.3d 127].)

- "The rationale of the consumer expectations test is that '[t]he purposes, behaviors, and dangers of certain products are commonly understood by those who ordinarily use them.' Therefore, in some cases, ordinary knowledge of the product's characteristics may permit an inference that the product did not perform as safely as it should. '*If* the facts permit such a conclusion, and *if* the failure resulted from the product's design, a finding of defect is warranted without any further proof,' and the manufacturer may not defend by presenting expert evidence of a risk/benefit analysis. … Nonetheless, the inherent complexity of the product itself is not controlling on the issue of whether the consumer expectations test applies; a complex product 'may perform so unsafely that the defect is apparent to the common reason, experience, and understanding of its ordinary consumers.' " (*Saller, supra,* 187 Cal.App.4th at p. 1232, original italics, internal citations omitted.)

- "The critical question, in assessing the applicability of the consumer expectation test, is not whether the product, when considered in isolation, is beyond the ordinary knowledge of the consumer, but whether the product, *in the context of the facts and circumstances of its failure,* is one about which the ordinary consumers can form minimum safety expectations." (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1311–1312 [120 Cal.Rptr.3d 605].)

- "Whether the jury should be instructed on either the consumer expectations test or the risk/benefit test depends upon the particular facts of the case. In a jury case, the trial court must initially determine as a question of foundation, within the context of the facts and circumstances of the particular case, whether the product is one about which the ordinary consumer can form reasonable minimum safety expectations. 'If the court concludes it is not, no consumer expectation instruction should be given. … If, on the other hand, the trial court finds there is sufficient evidence to support a finding that the ordinary consumer can form reasonable minimum safety expectations, the court should instruct the jury, consistent with Evidence Code section 403, subdivision (c), to determine whether the consumer expectation test applies to the product at issue in the circumstances of the case [or] to disregard the evidence about consumer expectations unless the jury finds that the test is applicable. If it finds the test applicable, the jury then must decide whether the product failed to perform as safely as an ordinary consumer would expect when the product is used in an intended or reasonably foreseeable manner.' " (*Saller, supra,* 187 Cal.App.4th at pp. 1233–1234, internal citations omitted.)

- "[The] dual standard for design defect assures an injured plaintiff protection from products that either fall below ordinary consumer expectations as to safety or that, on balance, are not as safely designed as they should be." (*Barker, supra,* 20 Cal.3d at p. 418.)

- "The consumer expectation test "acknowledges the relationship between strict tort liability for a defective product and the common law doctrine of warranty, which holds that a product's presence on the market includes an implied representation 'that it [will] safely do the jobs for which it was built.' " (*Soule, supra,* 8 Cal.4th at p. 562, internal citations omitted.)

- "[T]he jury may not be left free to find a violation of ordinary consumer expectations whenever it chooses. Unless the facts actually permit an inference that the product's performance did not meet the minimum safety expectations of its ordinary users, the jury must engage in the balancing of risks and benefits required by the second prong of *Barker*. Accordingly, as *Barker* indicated, instructions are misleading and incorrect if they allow a jury to avoid this risk-benefit analysis in a case where it is required." (*Soule, supra,* 8 Cal.4th at p. 568.)

- "[T]he consumer expectation test does not apply merely because the consumer states that he or she did not expect to be injured by the product." (*Trejo, supra,* 13 Cal.App.5th at p. 159.)

- "[T]he consumer expectation test is reserved for cases in which the *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design*." (*Soule, supra,* 8 Cal.4th at p. 567, original italics.)

- "[A] product's users include anyone whose injury was 'reasonably foreseeable.' " (*Demara, supra,* 13 Cal.App.5th at p. 559.)

- "If the facts permit an inference that the product at issue is one about which consumers may form minimum safety assumptions in the context of a particular accident, then it is enough for a plaintiff, proceeding under the consumer expectation test, to show the circumstances of the accident and 'the objective features of the product which are relevant to an evaluation of its safety' [citation], leaving it to the fact finder to 'employ "[its] own sense of whether the product meets ordinary expectations as to its safety under the circumstances presented by the evidence." ' [Citations.] Expert testimony as to what consumers ordinarily 'expect' is generally improper." (*Chavez, supra,* 207 Cal.App.4th at p. 1303.)

- "That causation for a plaintiff's injuries was proved through expert testimony does not mean that an ordinary consumer would be unable to form assumptions about the product's safety. Accordingly, the trial court properly instructed the jury on the consumer expectations test." (*Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1004 [169 Cal.Rptr.3d 208], internal citations omitted.)

- " An exception [to the rule that expert testimony is generally improper] exists where the product is in specialized use with a limited group of consumers. In such cases, 'if the expectations of the product's limited group of ordinary consumers are beyond the lay experience common to all jurors, expert testimony on the limited subject of what the product's actual consumers do expect may be proper.' " (*McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1120 fn. 3 [123 Cal.Rptr.2d 303], internal citations omitted.)

- "In determining whether a product's safety satisfies [the consumer expectation test], the jury considers the expectations of a hypothetical reasonable consumer, rather than those of the particular plaintiff in the case." (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126, fn. 6 [184 Cal.Rptr. 891, 649 P.2d 224].)

- "[E]vidence as to what the scientific community knew about the dangers … and when they knew it is not relevant to show what the ordinary consumer of [defendant]'s product reasonably expected in terms of safety at the time of [plaintiff]' s exposure. It is the knowledge and reasonable expectations of the consumer, not the scientific community, that is relevant under the consumer expectations test." (*Morton v. Owens-Corning Fiberglas Corp.* (1995) 33 Cal.App.4th 1529, 1536 [40 Cal.Rptr.2d 22].)

- "Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge." (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1185 [76 Cal.Rptr.2d 657].)

- " '[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse. … [T]he extent to which designers and manufacturers of dangerous machinery are required to anticipate safety neglect presents an issue of fact.' " (*Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1235 [63 Cal.Rptr.2d 422].)

- "[T]he plaintiff bears an initial burden of making 'a prima facie showing that the injury was proximately caused by the product's design.' This showing requires evidence that the plaintiff was injured *while using the product in an intended or reasonably foreseeable manner* and that the

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

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

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1615–1631

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

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

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

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

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

[*Name of plaintiff***] claims that the [***product***]'s design caused harm to [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [manufactured/distributed/sold] the [***product***];**

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

3. **That the [***product***]'s design was a substantial factor in causing harm to [***name of plaintiff***].**

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

(a) The gravity of the potential harm resulting from the use of the [*product***];**

(b) The likelihood that this harm would occur;

(c) The feasibility of an alternative safer design at the time of manufacture;

(d) The cost of an alternative design; [and]

(e) The disadvantages of an alternative design; [and]

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

New September 2003; Revised February 2007, April 2009, December 2009, December 2010, June 2011, January 2018, May 2019, May 2020

Directions for Use

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

To make a prima facie case, the plaintiff has the initial burden of producing evidence that ~~he or~~

~~she~~the plaintiff was injured while the product was being used in an intended or reasonably foreseeable manner. If this prima facie burden is met, the burden of proof shifts to the defendant to prove that the plaintiff's injury resulted from a misuse of the product. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678 [115 Cal.Rptr.3d 590]; see also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*.) Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole cause of the plaintiff's injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121]; see CACI No. 1245.) Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

If evidence of industry custom and practice has been admitted for a limited purpose, at the timely request of a party opposing this evidence, the jury must be given a limiting instruction on how this evidence may and may not be considered under the risk-benefit test. (See *Kim v. Toyota Motor Corp.* (2018) 6 Cal.5th 21, 30, 38 [237 Cal.Rptr.3d 205, 424 P.3d 290].)

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

Sources and Authority

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

- "[T]he term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts." (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 31 [192 Cal.Rptr.3d 158].)

- "The risk-benefit test requires the plaintiff to first 'demonstrate[] that the product's design proximately caused his injury.' If the plaintiff makes this initial showing, the defendant must then 'establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.' " (*Kim, supra,* 6 Cal.5th at p. 30, internal citation omitted.)

- "Appellants are therefore correct in asserting that it was not their burden to show that the risks involved in the loader's design—the lack of mechanical safety devices, or of a warning—outweighed the benefits of these aspects of its designs. The trial court's instruction to the jury, which quite likely would have been understood to place this burden on appellants, was therefore an error." (*Lunghi v. Clark Equipment Co., Inc.* (1984) 153 Cal.App.3d 485, 497–498 [200 Cal.Rptr. 387], internal citations omitted.)

- "[U]nder the risk/benefit test, the plaintiff may establish the product is defective by showing that its design proximately caused his injury and the defendant then fails to establish that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design. In such case, the jury must evaluate the product's design by considering the gravity of the danger posed by the design, the likelihood such danger would occur, the feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the consumer resulting from an alternative design. 'In such cases, the jury must consider the manufacturer's evidence of competing design considerations … , and the issue of design defect cannot fairly be resolved by standardless reference to the "expectations" of an "ordinary consumer." '" (*Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1233 [115 Cal.Rptr.3d 151], internal citations omitted.)

- "[T]he defendant's burden is one 'affecting the burden of proof, rather than simply the burden of producing evidence.' " (*Moreno v. Fey Manufacturing Corp.* (1983) 149 Cal.App.3d 23, 27 [196 Cal.Rptr. 487].)

- "The [consumer-expectation and risk-benefit] tests provide alternative means for a plaintiff to prove design defect and do not serve as defenses to one another. A product may be defective under the consumer expectation test even if the benefits of the design outweigh the risks. [Citation.] On the other hand, a product may be defective if it satisfies consumer expectations but contains an excessively preventable danger in that the risks of the design outweigh its benefits." (*Chavez, supra,* 207 Cal.App.4th at p. 1303.)

- "Under *Barker,* in short, the plaintiff bears an initial burden of making 'a prima facie showing that the injury was proximately caused by the product's design.' This showing requires evidence that the plaintiff was injured *while using the product in an intended or reasonably foreseeable manner* and that the plaintiff's ability to avoid injury was frustrated by the absence of a safety device, or by the nature of the product's design. If this prima facie burden is met, the burden of proof shifts to the defendant to prove, in light of the relevant factors, that the product is not defective. Importantly, the plaintiff's prima facie burden of producing evidence that injury occurred while the product was being used in an intended or reasonably foreseeable manner must be distinguished from the ultimate burden of proof that rests with the defendant to establish that its product was not defective because the plaintiff's injury resulted from a misuse of the product." (*Perez, supra,* 188 Cal.App.4th at p. 678, original italics, internal citations omitted.)

- " '[I]n evaluating the adequacy of a product's design pursuant to [the risk-benefit] standard, a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.'" (*Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 786–787 [64 Cal.Rptr.3d 908], internal citations omitted.)

- "[E]xpert evidence about compliance with industry standards can be considered on the issue of defective design, in light of all other relevant circumstances, even if such compliance is

not a complete defense. An action on a design defect theory can be prosecuted and defended through expert testimony that is addressed to the elements of such a claim, including risk-benefit considerations." (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 426 [136 Cal.Rptr.3d 739].)

- "We stress that while industry custom and practice evidence is not categorically inadmissible, neither is it categorically admissible; its admissibility will depend on application of the ordinary rules of evidence in the circumstances of the case. … First, the party seeking admission of such evidence must establish its relevance to at least one of the elements of the risk-benefit test, either causation or the *Barker* factors. The evidence is relevant to the *Barker* inquiry if it sheds light on whether, objectively speaking, the product was designed as safely as it should have been, given 'the complexity of, and trade-offs implicit in, the design process.' Whether the evidence serves this purpose depends on whether, under the circumstances of the case, it is reasonable to conclude that other manufacturers' choices do, as the Court of Appeal put it, 'reflect legitimate, independent research and practical experience regarding the appropriate balance of product safety, cost, and functionality.' If the proponent of the evidence establishes a sufficient basis for drawing such a conclusion, the evidence is admissible, even though one side or the other may argue it is entitled to little weight because industry participants have weighed the relevant considerations incorrectly. The evidence may not, however, be introduced simply for the purpose of showing the manufacturer was acting no worse than its competitors." (*Kim, supra,* 6 Cal.5th at p. 37, internal citations omitted.)

- "[I]f the party opposing admission of this evidence makes a timely request, the trial court must issue a jury instruction that explains how this evidence may and may not be considered under the risk-benefit test." (*Kim, supra,* 6 Cal.5th at p. 38.)

- "Plaintiffs contend aesthetics is not a proper consideration in the risk-benefit analysis, and the trial court's ruling to the contrary was an '[e]rror in law.' We disagree. In our view, much of the perceived benefit of a car lies in its appearance. A car is not a strictly utilitarian product. We believe that a jury properly may consider aesthetics in balancing the benefits of a challenged design against the risk of danger inherent in the design. Although consideration of the disadvantages of an alternative design (CACI No. 1204, factor (e)) would encompass any impact on aesthetics, we conclude that there was no error in the trial court's approval of the modification listing aesthetics as a relevant factor." (*Bell, supra,* 181 Cal.App.4th at p. 1131, internal citations omitted.)

- "Taken together, section 2, subdivision (b), and section 5 of the Restatement indicate that a component part manufacturer may be held liable for a defect in the component. When viewed in its entirety, the Restatement does not support [defendant]'s argument that '[o]nly if the component part analysis establishes sufficient control over the design of the alleged defect should the component manufacturer be held to the standard of the risk-benefit test.' Instead, the test considering foreseeable risks of harm and alternative designs is applied to the component part manufacturer when the alleged defect is in the component." (*Gonzalez, supra,* 154 Cal.App.4th at pp. 789–790.)

- "Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge." (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1185 [76 Cal.Rptr.2d 657].)

Secondary Sources

~~9~~ 6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1615–1631

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

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

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

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

1205. Strict Liability—Failure to Warn—Essential Factual Elements

[*Name of plaintiff***] claims that the [***product***] lacked sufficient [instructions] [or] [warning of potential [risks/side effects/allergic reactions]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [manufactured/distributed/sold] the [***product***];**

2. **That the [***product***] had potential [risks/side effects/allergic reactions] that were [known/ [or] knowable in light of the [scientific/ [and] medical] knowledge that was generally accepted in the scientific community] at the time of [manufacture/distribution/sale];**

3. **That the potential [risks/side effects/allergic reactions] presented a substantial danger when the [***product***] is used or misused in an intended or reasonably foreseeable way;**

4. **That ordinary consumers would not have recognized the potential [risks/side effects/allergic reactions];**

5. **That [***name of defendant***] failed to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions];**

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

7. **That the lack of sufficient [instructions] [or] [warnings] was a substantial factor in causing [***name of plaintiff***]'s harm.**

[The warning must be given to the prescribing physician and must include the potential risks, side effects, or allergic reactions that may follow the foreseeable use of the product. [*Name of defendant***] had a continuing duty to warn physicians as long as the product was in use.]**

New September 2003; Revised April 2009, December 2009, June 2011, December 2011, May 2020

Directions for Use

With regard to element 2, it has been often stated in the case law that a manufacturer is liable for failure to warn of a risk that is "knowable in light of generally recognized and prevailing best scientific and medical knowledge available." (See, e.g., *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002 [281 Cal.Rptr. 528, 810 P.2d 549]; *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112 [56 Cal.Rptr.2d 162, 920 P.2d 1347]; *Saller v. Crown Cork & Seal Company* (2010) 187 Cal.App.4th 1220, 1239 [115 Cal.Rptr.3d 151]; *Rosa v. City of Seaside* (N.D. Cal. 2009) 675 F.Supp.2d 1006, 1012.) The advisory committee believes that this standard is captured by the phrase "generally accepted in the scientific community." A risk may be "generally recognized" as a view (knowledge) advanced by one

body of scientific thought and experiment, but it may not be the "prevailing" or "best" scientific view; that is, it may be a minority view. The committee believes that when a risk is (1) generally recognized (2) as prevailing in the relevant scientific community, and (3) represents the best scholarship available, it is sufficient to say that the risk is knowable in light of "the generally accepted" scientific knowledge.

The last bracketed paragraph should be read only in prescription product cases: In the case of *prescription drugs* and *implants*, the physician stands in the shoes of the ordinary user because it is through the physician that a patient learns of the properties and proper use of the drug or implant. Thus, the duty to warn in these cases runs to the physician, not the patient. (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App 5th 276, 319 [213 Cal.Rptr.3d 82], original italics.)

To make a prima facie case, the plaintiff has the initial burden of producing evidence that ~~he or she~~the plaintiff was injured while the product was being used in an intended or reasonably foreseeable manner. If this prima facie burden is met, the burden of proof shifts to the defendant to prove that the plaintiff's injury resulted from a misuse of the product. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678 [115 Cal.Rptr.3d 590] [risk-benefit design defect case].) See also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole cause of the plaintiff's injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121]; see CACI No. 1245.) Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Sources and Authority

- "Our law recognizes that even ' "a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes 'defective' simply by the absence of a warning." …' Thus, manufacturers have a duty to warn consumers about the hazards inherent in their products. The purpose of requiring adequate warnings is to inform consumers about a product's hazards and faults of which they are unaware, so that the consumer may then either refrain from using the product altogether or avoid the danger by careful use." (*Taylor v. Elliott Turbomachinery Co., Inc.* (2009) 171 Cal.App.4th 564, 577 [90 Cal.Rptr.3d 414], internal citations and footnote omitted.)

- "Negligence and strict products liability are separate and distinct bases for liability that do not automatically collapse into each other because the plaintiff might allege both when a product warning contributes to her injury." (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 101 [85 Cal.Rptr.3d 299].)

- "The 'known or knowable' standard arguably derives from negligence principles, and failure to warn claims are generally ' "rooted in negligence" to a greater extent than' manufacturing or design defect claims. Unlike those other defects, a ' "warning defect" relates to a failure extraneous to the product itself' and can only be assessed by examining the manufacturer's conduct. These principles notwithstanding, California law recognizes separate failure to warn claims under both strict liability and negligence theories. In general, a product seller will be *strictly liable* for failure to warn if a

warning was feasible and the absence of a warning caused the plaintiff's injury. Reasonableness of the seller's failure to warn is immaterial in the strict liability context. Conversely, to prevail on a claim for *negligent* failure to warn, the plaintiff must prove that the seller's conduct fell below the standard of care. If a prudent seller would have acted reasonably in not giving a warning, the seller will not have been negligent." (*Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 181 [202 Cal.Rptr.3d 460, 370 P.3d 1022], original italics, footnote and internal citations omitted.)

- "It is true that the two types of failure to warn claims are not necessarily exclusive: 'No valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence. … [¶] Nor does it appear that instructions on the two theories will be confusing to the jury. There is nothing inconsistent in instructions on the two theories and to a large extent the two theories parallel and supplement each other.' Despite the often significant overlap between the theories of negligence and strict liability based on a product defect, a plaintiff is entitled to instructions on both theories if both are supported by the evidence." (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 717 [99 Cal.Rptr.3d 418].)

- "The actual knowledge of the individual manufacturer, even if reasonably prudent, is not the issue. We view the standard to require that the manufacturer is held to the knowledge and skill of an expert in the field; it is obliged to keep abreast of any scientific discoveries and is presumed to know the results of all such advances." (*Carlin, supra,* 13 Cal.4th at p. 1113, fn. 3.)

- "[A] defendant in a strict products liability action based upon an alleged failure to warn of a risk of harm may present evidence of the state of the art, i.e., evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution." (*Anderson, supra,* 53 Cal.3d at p. 1004.)

- "[T]here can be no liability for failure to warn where the instructions or warnings sufficiently alert the user to the possibility of danger." (*Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1042 [228 Cal.Rptr. 768], internal citation omitted.)

- "A duty to warn or disclose danger arises when an article is or should be known to be dangerous for its intended use, either inherently or because of defects." (*DeLeon v. Commercial Manufacturing and Supply Co.* (1983) 148 Cal.App.3d 336, 343 [195 Cal.Rptr. 867], internal citation omitted.)

- " California is well settled into the majority view that knowledge, actual or constructive, is a requisite for strict liability for failure to warn ... ." (*Anderson, supra,* 53 Cal.3d at p. 1000.)

- "[T]he duty to warn is not conditioned upon [actual or constructive] knowledge [of a danger] where the defectiveness of a product depends on the adequacy of instructions furnished by the supplier which are essential to the assembly and use of its product." (*Midgley v. S. S. Kresge Co.* (1976) 55 Cal.App.3d 67, 74 [127 Cal.Rptr. 217].)

- Under *Cronin,* plaintiffs in cases involving manufacturing and design defects do not have to prove that a defect made a product unreasonably dangerous; however, that case "did not preclude weighing the degree of dangerousness in the failure to warn cases." (*Cavers v. Cushman Motor Sales, Inc.* (1979) 95 Cal.App.3d 338, 343 [157 Cal.Rptr. 142].)

- "Two types of warnings may be given. If the product's dangers may be avoided or mitigated by proper use of the product, 'the manufacturer may be required adequately to instruct the consumer as to how the product should be used.' If the risks involved in the use of the product are unavoidable, as in the case of potential side effects of prescription drugs, the supplier must give an adequate warning to enable the potential user to make an informed choice whether to use the product or abstain." (*Buckner v. Milwaukee Electric Tool Corp.* (2013) 222 Cal.App.4th 522, 532 [166 Cal.Rptr.3d 202], internal citation omitted.)

- "[T]he warning requirement is not limited to unreasonably or unavoidably dangerous products. Rather, directions or warnings are in order where reasonably required *to prevent the use of a product from becoming unreasonably dangerous*. It is the lack of such a warning which renders a product unreasonably dangerous and therefore defective." (*Gonzales v. Carmenita Ford Truck Sales, Inc.* (1987) 192 Cal.App.3d 1143, 1151 [238 Cal.Rptr. 18], original italics.)

- "In most cases, ... the adequacy of a warning is a question of fact for the jury." (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1320 [273 Cal.Rptr. 214].)

- "There is no duty to warn of known risks or obvious dangers." (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1304 [144 Cal.Rptr.3d 326].)

- "In the context of prescription drugs, a manufacturer's duty is to warn physicians about the risks known or reasonably known to the manufacturer. The manufacturer has no duty to warn of risks that are 'merely speculative or conjectural, or so remote and insignificant as to be negligible.' " (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 164 [226 Cal.Rptr.3d 336, 407 P.3d 18], internal citations omitted.)

- "[A] pharmaceutical manufacturer may not be required to provide warning of a risk known to the medical community." (*Carlin, supra,* 13 Cal.4th at p. 1116.)

- "To be liable in California, even under a strict liability theory, the plaintiff must prove that the defendant's failure to warn was a substantial factor in causing his or her injury. (CACI No. 1205.) The natural corollary to this requirement is that a defendant is not liable to a plaintiff if the injury would have occurred even if the defendant had issued adequate warnings." (*Huitt v. Southern California Gas Co.* (2010) 188 Cal.App.4th 1586, 1604 [116 Cal.Rptr.3d 453].)

- "When a manufacturer or distributor has no effective way to convey a product warning to the ultimate consumer, the manufacturer should be permitted to rely on downstream suppliers to provide the warning. 'Modern life would be intolerable unless one were permitted to rely to a certain extent on others doing what they normally do, particularly if it is their duty to do so.' " (*Persons v. Salomon N. Am.* (1990) 217 Cal.App.3d 168, 178 [265 Cal.Rptr. 773], internal citation omitted.)

- "[A] manufacturer's liability to the ultimate consumer may be extinguished by 'intervening cause' where the manufacturer either provides adequate warnings to a middleman or the middleman alters the product before passing it to the final consumer." (*Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651, 661 [74 Cal.Rptr.3d 359].)

- " 'A manufacturer's duty to warn is a continuous duty which lasts as long as the product is in use.' [¶] ... [T]he manufacturer must continue to provide physicians with warnings, at least so long as it is manufacturing and distributing the product." (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1482 [81 Cal.Rptr.2d 252].)

- " '[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse. … [T]he extent to which designers and manufacturers of dangerous machinery are required to anticipate safety neglect presents an issue of fact. … [A] manufacturer owes a foreseeable user of its product a duty to warn of risks of using the product.' " (*Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1235 [63 Cal.Rptr.2d 422].)

- "California law does not impose a duty to warn about dangers arising entirely from another manufacturer's product, even if it is foreseeable that the products will be used together." (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 361 [135 Cal.Rptr.3d 288, 266 P.3d 987].)

- "The *O'Neil* [*supra*] court concluded that *Tellez-Cordova* [*Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal.App.4th 577] marked an exception to the general rule barring imposition of strict liability on a manufacturer for harm caused by another manufacturer's product. That exception is applicable when 'the defendant's own product contributed substantially to the harm … .' In expounding the exception, the court rejected the notion that imposition of strict liability on manufacturers is appropriate when it is merely foreseeable that their products will be used in conjunction with products made or sold by others. The *O'Neil* court further explained: 'Recognizing a duty to warn was appropriate in *Tellez-Cordova* because there the defendant's product was intended to be used with another product *for the very activity that created a hazardous situation*. Where the intended use of a product inevitably creates a hazardous situation, it is reasonable to expect the manufacturer to give warnings. Conversely, where the hazard arises entirely from another product, and the defendant's product does not create or contribute to that hazard, liability is not appropriate.' " (*Sherman v. Hennessy Industries, Inc.* (2015) 237 Cal.App.4th 1133, 1142 [188 Cal.Rptr.3d 769], original italics, internal citations omitted ; see also *Hetzel v. Hennessy Industries, Inc.* (2016) 247 Cal.App.4th 521, 529 [202 Cal.Rptr.3d 310] [*O'Neil* does not require evidence of exclusive use, but rather requires a showing of inevitable use]; *Rondon v. Hennessy Industries, Inc.* (2016) 247 Cal.App.4th 1367, 1379 [202 Cal.Rptr.3d 773] [same].)

- "[L]ike a manufacturer, a raw material supplier has a duty to warn about product risks that are known or knowable in light of available medical and scientific knowledge." (*Webb, supra,* 63 Cal.4th at p. 181.)

- "[T]he duty of a component manufacturer or supplier to warn about the hazards of its products is not unlimited. … 'Making suppliers of inherently safe raw materials and component parts pay for the mistakes of the finished product manufacturer would not only be unfair, but it also would impose and intolerable burden on the business world . . . . Suppliers of versatile materials like chains, valves, sand gravel, etc., cannot be expected to become experts in the infinite number of finished products that might conceivably incorporate their multi-use raw materials or components.' Thus, cases have subjected claims made against component suppliers to two related doctrines, the 'raw material

supplier defense' and 'the bulk sales/sophisticated purchaser rule.' Although the doctrines are distinct, their application oftentimes overlaps and together they present factors which should be carefully considered in evaluating the liability of component suppliers. Those factors include whether the raw materials or components are inherently dangerous, whether the materials are significantly altered before integration into an end product, whether the supplier was involved in designing the end-product and whether the manufacturer of the end product was in a position to discover and disclose hazards." (*Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, 837 [71 Cal.Rptr.2d 817].)

Secondary Sources

~~9~~6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1631–1643

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability for Defective Products*, ¶¶ 2:1275–2:1276 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11[4]; Ch. 7, *Proof*, § 7.05 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.11, 460.164 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, §§ 190.193–190.194 (Matthew Bender)

1207A. Strict Liability—Comparative Fault of Plaintiff

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

1. **[*insert one or more of the following:*]**

   [That [*name of plaintiff*] negligently [used/misused/modified] the [*product*];] [or]

   [That [*name of plaintiff*] was [otherwise] negligent;]

   and

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

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

Derived from former CACI No. 1207 April 2009; Revised December 2009, May 2020

Directions for Use

Give this instruction if the defendant alleges that the plaintiff's own negligence contributed to ~~his or her~~the plaintiff's harm. See also CACI No. 405, *Comparative Fault of Plaintiff*. For an instruction on the comparative fault of a third person, see CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Subsequent misuse or modification may be considered in determining comparative fault if it was a substantial factor in causing the plaintiff's injury. (See *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 17 [56 Cal.Rptr.2d 455].) Unforeseeable misuse or modification can be a complete defense if it is the sole cause of the plaintiff's harm. (See *Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121].) See also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*.

Sources and Authority

- "[W]e do not permit plaintiff's own conduct relative to the product to escape unexamined, and as to that share of plaintiff's damages which flows from his own fault we discern no reason of policy why it should, following *Li,* be borne by others." (*Daly v. General Motors Corp*. (1978) 20 Cal.3d 725, 737 [144 Cal.Rptr. 380, 575 P.2d 1162] [comparative fault applies to strict product liability actions].)

- "[A] petitioner's recovery may accordingly be reduced, but not barred, where his lack of reasonable

care is shown to have contributed to his injury." (*Bradfield v. Trans World Airlines, Inc.* (1979) 88 Cal.App.3d 681, 686 [152 Cal.Rptr. 172].)

- "The record does not support [defendant]'s assertion that modification of the bracket was the sole cause of the accident. The record does indicate that if the bracket had not been modified there would have been no need to remove it to reach the flange bolts, and thus the modification was one apparent cause of [plaintiff]'s death. However, a number of other causes, or potential causes, were established, including: [plaintiff]'s failure to wear protective clothing; [third party]'s failure to furnish the correct replacement bracket for the valve; [third party]'s failure to furnish [employer] with all of the literature it received from [defendant]; and negligence on the part of [employer] independent of its modification of the valve, including violations of various federal Occupational Safety and Health Administration regulations governing equipment and training in connection with the accident." (*Torres, supra,* 49 Cal.App.4th at p. 17.)

- "While a jury may well find [plaintiff]'s conduct substantially contributed to the accident [citing this instruction], we cannot say that conduct, even if sufficient to establish criminal storage of a firearm, absolves [defendants], as a matter of law, from all liability for a design defect that may otherwise be shown to exist in the Glock 21. [Plaintiff]'s responsibility for his own injuries is quintessentially a question for the jury." (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1308 [144 Cal.Rptr.3d 326], internal citations omitted.)

Secondary Sources

Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § ~~1542~~1709

California Products Liability Actions, Ch. 8, *Defenses*, §§ 8.03, 8.04 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.53, 460.182 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.253 (Matthew Bender)

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

[*Name of plaintiff*] claims that [*name of defendant*] was negligent by not using reasonable care to warn [or instruct] about the [*product*]'s dangerous condition or about facts that made the [*product*] likely to be dangerous. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [manufactured/distributed/sold] the [*product*];**

2. **That [*name of defendant*] knew or reasonably should have known that the [*product*] was dangerous or was likely to be dangerous when used or misused in a reasonably foreseeable manner;**

3. **That [*name of defendant*] knew or reasonably should have known that users would not realize the danger;**

4. **That [*name of defendant*] failed to adequately warn of the danger [or instruct on the safe use of the [*product*]];**

5. **That a reasonable [manufacturer/distributor/seller] under the same or similar circumstances would have warned of the danger [or instructed on the safe use of the [*product*]];**

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

7. **That [*name of defendant*]'s failure to warn [or instruct] was a substantial factor in causing [*name of plaintiff*]'s harm.**

[The warning must be given to the prescribing physician and must include the potential risks or side effects that may follow the foreseeable use of the product. [*Name of defendant*] had a continuing duty to warn physicians as long as the product was in use.]

New September 2003; Revised June 2011, December 2012, May 2020

Directions for Use

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

To make a prima facie case, the plaintiff has the initial burden of producing evidence that ~~he or she~~the plaintiff was injured while the product was being used in an intended or reasonably foreseeable manner.

If this prima facie burden is met, the burden of proof shifts to the defendant to prove that the plaintiff's injury resulted from a misuse of the product. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678 [115 Cal.Rptr.3d 590] [strict liability design defect risk-benefit case].) See also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole cause of the plaintiff's injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121]; see CACI No. 1245.) Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

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

Sources and Authority

- "[T]he manufacturer has a duty to use reasonable care to give warning of the dangerous condition of the product or of facts which make it likely to be dangerous to those whom he should expect to use the product or be endangered by its probable use, if the manufacturer has reason to believe that they will not realize its dangerous condition." (*Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1076–1077 [91 Cal.Rptr. 319].)

- "Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about." (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1305 [144 Cal.Rptr.3d 326], internal citation omitted.)

- "Thus, the question defendants wanted included in the special verdict form—whether a reasonable manufacturer under the same or similar circumstances would have given a warning—is an essential inquiry in the negligent failure to warn claim." (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 137 [220 Cal.Rptr.3d 127] [citing this instruction].)

- "Negligence and strict products liability are separate and distinct bases for liability that do not automatically collapse into each other because the plaintiff might allege both when a product warning contributes to her injury." (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 101 [85 Cal.Rptr.3d 299].)

- "The 'known or knowable' standard arguably derives from negligence principles, and failure to warn claims are generally ' "rooted in negligence" to a greater extent than' manufacturing or design defect claims. Unlike those other defects, a ' "warning defect" relates to a failure extraneous to the product itself' and can only be assessed by examining the manufacturer's conduct. These principles notwithstanding, California law recognizes separate failure to warn claims under both strict liability and negligence theories. In general, a product seller will be strictly liable for failure to warn if a warning was feasible and the absence of a warning caused the plaintiff's injury. Reasonableness of the seller's failure to warn is immaterial in the strict liability context. Conversely, to prevail on a claim for negligent failure to warn, the plaintiff must prove that the seller's conduct fell below the

standard of care. If a prudent seller would have acted reasonably in not giving a warning, the seller will not have been negligent." (*Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 181 [202 Cal.Rptr.3d 460, 370 P.3d 1022], footnote and internal citations omitted.)

- "It is true that the two types of failure to warn claims are not necessarily exclusive: 'No valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence. … [¶] Nor does it appear that instructions on the two theories will be confusing to the jury. There is nothing inconsistent in instructions on the two theories and to a large extent the two theories parallel and supplement each other.' Despite the often significant overlap between the theories of negligence and strict liability based on a product defect, a plaintiff is entitled to instructions on both theories if both are supported by the evidence." (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 717 [99 Cal.Rptr.3d 418].)

- "(1) [T]he strict liability instructions 'more than subsumed the elements of duty to warn set forth in the negligence instructions'; (2) under the instructions, there is no 'real difference between a warning to ordinary users about a product *use* that involves a substantial danger, and a warning about a product that is dangerous or likely to be dangerous for its intended use'; (3) [defendant]'s duty under the strict liability instructions 'to warn of potential risks and side effects envelope[d] a broader set of risk factors than the duty, [under the] negligence instructions, to warn of facts which make the product "likely to be dangerous" for its intended use'; (4) the reference in the strict liability instructions here to 'potential risks … that were known or knowable through the use of scientific knowledge' encompasses the concept in the negligence instructions of risks [defendant] 'knew or reasonably should have known'; and (5) for all these reasons, the jury's finding that [defendant] was not liable under a strict liability theory 'disposed of any liability for failure to warn' on a negligence theory." (*Trejo, supra,* 13 Cal.App.5th at pp. 132–133, original italics, internal citations omitted.)

- "In the context of prescription drugs, a manufacturer's duty is to warn physicians about the risks known or reasonably known to the manufacturer. The manufacturer has no duty to warn of risks that are 'merely speculative or conjectural, or so remote and insignificant as to be negligible.' If the manufacturer provides an adequate warning to the prescribing physician, the manufacturer need not communicate a warning directly to the patient who uses the drug." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 164 [226 Cal.Rptr.3d 336, 407 P.3d 18], internal citations omitted.)

- "Because the same warning label must appear on the brand-name drug as well as its generic bioequivalent, a brand-name drug manufacturer owes a duty of reasonable care in ensuring that the label includes appropriate warnings, regardless of whether the end user has been dispensed the brand-name drug or its generic bioequivalent. If the person exposed to the generic drug can reasonably allege that the brand-name drug manufacturer's failure to update its warning label foreseeably and proximately caused physical injury, then the brand-name manufacturer's liability for its own negligence does not automatically terminate merely because the brand-name manufacturer transferred its rights in the brand-name drug to a successor manufacturer." (*T.H., supra,* 4 Cal.5th at p. 156.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1317–1321

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective*

Products, ¶¶ 2:1271, 2:1295 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.21, Ch. 7, *Proof*, § 7.05 (Matthew Bender)

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

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.165 et seq. (Matthew Bender)

1224. Negligence—Negligence for Product Rental/Standard of Care

[A person who rents products to others for money is negligent if ~~he or she~~that person fails to use reasonable care to:

1. **Inspect the products for defects;**

2. **Make them safe for their intended use; and**

3. **Adequately warn of any known dangers.]**

[*or*]

[A person who lends products to others without charge only is required to use reasonable care to warn of known defects.]

New September 2003; Revised May 2020

Directions for Use

Use this instruction in conjunction with CACI No. 1220, *Negligence—Essential Factual Elements*, and instead of CACI No. 1221, *Negligence—Basic Standard of Care*, in cases involving rentals.

If the case involves a product lent gratuitously for the mutual benefit of the parties (e.g., to a prospective purchaser), the first paragraph is applicable and the instruction needs to be modified.

In a purely gratuitous lending case, if the object is a "dangerous instrumentality" there may be a duty to conduct a reasonable inspection before lending. (See *Tierstein v. Licht* (1959) 174 Cal.App.2d 835, 842 [345 P.2d 341].)

Sources and Authority

- Duties of Lessor of Personal Property. Civil Code section 1955.

- If a bailment is for hire, or provides a mutual benefit, the bailor has a duty to the bailee and to third persons to (1) warn of actually known defects and (2) to use reasonable care to make an examination of the good before lending it "in order to make certain that it [is] fit for the use known to be intended." (*Tierstein, supra,* 174 Cal.App.2d at pp. 840–841.)

- A bailment, otherwise gratuitous, where made to induce a purchase, has been considered sufficient to give rise to the same duty of reasonable care on the part of the bailor as an ordinary bailment for hire. This is regarded as a bailment for mutual benefit. (*Tierstein, supra,* 174 Cal.App.2d at p. 842.)

- Under either a negligence or an implied warranty theory, "the essential inquiry ... is whether [the

defendants] made such inspection of their equipment as was necessary to discharge their duty of reasonable care." (*McNeal v. Greenberg* (1953) 40 Cal.2d 740, 742 [255 P.2d 810].) The bailor is not an insurer or guarantor. (*Tierstein, supra,* 174 Cal.App.2d at p. 841.)

- Restatement Second of Torts, section 408, provides: "One who leases a chattel as safe for immediate use is subject to liability to those whom he should expect to use the chattel, or to be endangered by its probable use, for physical harm caused by its use in a manner for which, and by a person for whose use, it is leased, if the lessor fails to exercise reasonable care to make it safe for such use or to disclose its actual condition to those who may be expected to use it."

- This Restatement section was cited with approval in *Rae v. California Equipment Co.* (1939) 12 Cal.2d 563, 569 [86 P.2d 352].

- "The general rule is that the only duty which a gratuitous bailor owes either to the bailee or to third persons is to warn them of actually known defects which render the chattel dangerous for the purpose for which it is ordinarily used; he has no liability for injuries caused by defects in the subject matter of the bailment of which he was not aware." (*Tierstein, supra,* 174 Cal.App.2d at p. 841.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § ~~1506~~1670

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.053 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 413, *Personal Property Leases*, § 413.34 (Matthew Bender)

VF-1206. Products Liability—Express Warranty—Affirmative Defense—Not "Basis of Bargain"

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] represent to [***name of plaintiff***] by a [statement/description/sample/model/***other***] that the [***product***] [***insert description of alleged express warranty***]?**

____ Yes ____ No

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

2. Was the resulting bargain between the parties in which [*name of plaintiff***] decided to [purchase/use] the [***product***] based in any way on [***name of defendant***]'s [statement/description/sample/model/***other***]?**

____ Yes ____ No

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

3. Did the [*product***] fail to [perform] [or] [have the same quality] as represented?**

____ Yes ____ No

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

4. Was the failure of the [*product***] to [perform] [or] [meet the quality] as represented a substantial factor in causing harm to [***name of plaintiff***]?**

____ Yes ____ No

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

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

[a. Past economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]

Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised February 2005, April 2007, December 2010, June 2011, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 1230, *Express Warranty—Essential Factual Elements*, and CACI No. 1240, *Affirmative Defense to Express Warranty—Not "Basis of Bargain."*

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.

Under various circumstances, the plaintiff must also prove that ~~he or she~~the plaintiff made a reasonable attempt to notify the defendant of the defect. Thus, if appropriate, the following question should be added before the question regarding the plaintiff's harm: "Did [*name of plaintiff*] take reasonable steps to notify [*name of defendant*] within a reasonable time that the [*product*] [was not/did not perform] as requested?"

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional depending on the circumstances.

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

Do not include question 2 if the affirmative defense is not at issue.

VF-1207. Products Liability—Implied Warranty of Merchantability—Affirmative Defense—Exclusion of Implied Warranties

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We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] buy the [*product*] from [*name of defendant*]?**
   ____ Yes ____ No

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

2. **Was [*name of defendant*] in the business of selling these goods?**
   ____ Yes ____ No

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

3. **Did the sale of the [*product*] include notice that would have made a buyer aware that it was being sold without any representations relating to the quality that a buyer would expect?**
   ____ Yes ____ No

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

4. **Was the [*product*] fit for the ordinary purposes for which such goods are used?**
   ____ Yes ____ No

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

5. **Was the failure of the [*product*] to have the expected quality a substantial factor in causing harm to [*name of plaintiff*]?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no stop here, answer no further questions, and have the presiding juror sign and date this form.

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

[a. Past economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]

Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 1231, *Implied Warranty of Merchantability—Essential Factual Elements*, and CACI No. 1242, *Affirmative Defense—Exclusion of Implied Warranties*.

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.

Under various circumstances, the plaintiff must also prove that ~~he or she~~the plaintiff made a reasonable attempt to notify the defendant of the defect. Thus, where appropriate, the following question should be added prior to the question regarding the plaintiff's harm: "Did [*name of plaintiff*] take reasonable steps to notify [*name of defendant*] within a reasonable time that the [*product*] [was not/did not perform] as requested?"

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional depending on the circumstances.

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

Question 2 should be modified if the defendant ~~held himself or herself out as having~~ purported to have special knowledge or skill regarding the goods. Question 3 should be modified if a different ground of liability is asserted under Commercial Code section 2314(2). Question 6 should be modified if the defendant is asserting other grounds under Commercial Code section 2316(3). This form should also be modified if notification is an issue.

Do not include question 3 if the affirmative defense is not at issue.

VF-1208. Products Liability—Implied Warranty of Fitness for a Particular Purpose

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] buy the [*product*] from [*name of defendant*]?
____ 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. At the time of purchase, did [*name of defendant*] know or have reason to know that [*name of plaintiff*] intended to use the [*product*] for a particular purpose?
____ 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. At the time of purchase, did [*name of defendant*] know that [*name of plaintiff*] was relying on [*name of defendant*]'s skill and judgment to select or furnish a product that was suitable for the particular purpose?
____ Yes ____ No

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

4. Did [*name of plaintiff*] justifiably rely on [*name of defendant*]'s skill and judgment?
____ Yes ____ No

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

5. Was the [*product*] suitable for the particular purpose?
____ Yes ____ No

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was the failure of the [*product*] to be suitable a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

[a. Past economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]

Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 1232, *Implied Warranty of Fitness for a Particular Purpose—Essential Factual Elements.*

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

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

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

Question 2 of this form should be modified if the defendant ~~held himself or herself out as having~~ purported to have special knowledge or skill regarding the goods. Question 3 should be modified if a different ground of liability is asserted under Commercial Code section 2314(2). This form should also be modified if notification is an issue.

1400. No Arrest Involved—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/*nonbinary pronoun*] was wrongfully [restrained/confined/detained] by [***name of defendant***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] intentionally deprived [***name of plaintiff***] of [his/her/*nonbinary pronoun*] freedom of movement by use of [physical barriers/force/threats of force/menace/fraud/deceit/unreasonable duress];**

2. **That the [restraint/confinement/detention] compelled [***name of plaintiff***] to stay or go somewhere for some appreciable time, however short;**

3. **That [***name of plaintiff***] did not [knowingly or voluntarily] consent;**

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

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

[If you find elements 1, 2, and 3 above, but you find that [*name of plaintiff***] was not actually harmed, [he/she/*nonbinary pronoun*] is still entitled to a nominal sum, such as one dollar.]**

[[*Name of plaintiff***] need not have been aware that [he/she/*nonbinary pronoun*] was being [restrained/confined/detained] at the time.]**

New September 2003; Revised December 2010, December 2011, May 2020

Directions for Use

In element 3, include the words "knowingly or voluntarily" if it is alleged that the plaintiff's consent was obtained by fraud.(See *Scofield v. Critical Air Medicine, Inc.* (1996) 45 Cal.App.4th 990, 1006, fn. 16 [52 Cal.Rptr.2d 915].)

Include the paragraph about nominal damages if there is a dispute about whether the plaintiff was actually harmed. (See *Scofield, supra,* 45 Cal.App.4th at p. 1007.) Include the last paragraph if applicable. (See *Id.* at pp. 1006–1007.)

If the defendant alleges ~~that he or she had~~ the existence of a lawful privilege, the judge should read the applicable affirmative defense instructions immediately following this one.

Sources and Authority

- "The crime of false imprisonment is defined by Penal Code section 236 as the 'unlawful violation of the personal liberty of another.' The tort is identically defined. As we recently formulated it, the tort

consists of the ‘ “nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short.” ’ That length of time can be as brief as 15 minutes. Restraint may be effectuated by means of physical force, threat of force or of arrest, confinement by physical barriers, or by means of any other form of unreasonable duress.” (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 716 [30 Cal.Rptr.2d 18, 872 P.2d 559], internal citations omitted.)

- “ ‘[T]he tort [of false imprisonment] consists of the “ ‘nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short.’ ” ’ ” (*Scofield, supra,* 45 Cal.App.4th at p. 1001, internal citations omitted.)

- “The only mental state required to be shown to prove false imprisonment is the intent to confine, or to create a similar intrusion.” (*Fermino, supra,* 7 Cal.4th at p. 716.)

- “[False imprisonment] requires some restraint of the person and that he be deprived of his liberty or compelled to stay where he does not want to remain, or compelled to go where he does not wish to go; and that the person be restrained of his liberty without sufficient complaint or authority.” (*Collins v. County of Los Angeles* (1966) 241 Cal.App.2d 451, 459–460 [50 Cal.Rptr. 586], internal citations omitted.)

- “[I]t is clear that force or the threat of force are not the only means by which the tort of false imprisonment can be achieved. Fraud or deceit or any unreasonable duress are alternative methods of accomplishing the tort.” (*Scofield, supra,* 45 Cal.App.4th at p. 1002, internal citations omitted.)

- “Because ‘[t]here is no real or free consent when it is obtained through fraud’ … the [plaintiffs’] confinement on the aircraft was nonconsensual and therefore actionable as a false imprisonment.” (*Scofield, supra,* 45 Cal.App.4th at p. 1006, fn. 16, internal citations omitted.)

- “[C]ontemporaneous awareness of the false imprisonment is not, and need not be, an essential element of the tort.” (*Scofield, supra,* 45 Cal.App.4th at p. 1006.)

- “[T]he critical question as to causation in intentional torts is whether the actor’s conduct is a substantial factor in bringing about the type of harm which he intended from his original act.” (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1536, fn. 6 [254 Cal.Rptr. 492], internal citations omitted.)

- “[T]he law of this state clearly allows a cause of action for false imprisonment notwithstanding the fact a plaintiff suffered merely nominal damage.” (*Scofield, supra,* 45 Cal.App.4th at p. 1007.)

- “In addition to recovery for emotional suffering and humiliation, one subjected to false imprisonment is entitled to compensation for other resultant harm, such as loss of time, physical discomfort or inconvenience, any resulting physical illness or injury to health, business interruption, and damage to reputation, as well as punitive damages in appropriate cases.” (*Scofield, supra,* 45 Cal.App.4th at p. 1009, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~426~~499 ~~429~~502

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, §§ 42.01, 42.07, 42.20 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment*, § 257.17 (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment*, § 103.40 et seq. (Matthew Bender)

1 California Civil Practice: Torts §§ 13:8–13:10 (Thomson Reuters ~~West~~)

1511. Wrongful Use of Civil Proceedings—Affirmative Defense—Attorney's Reliance on Information Provided by Client

When filing a lawsuit for a client, an attorney is entitled to rely on the facts and information provided by the client.

[*Name of attorney defendant***] claims that [he/she/*nonbinary pronoun*] had reasonable grounds for bringing the lawsuit against [***name of plaintiff***] because [he/she/*nonbinary pronoun*] was relying on facts and information provided by [his/her/*nonbinary pronoun*] client. To succeed on this defense, [***name of attorney defendant***] must prove all of the following:**

1. **That [***name of client***] provided [***name of attorney defendant***] with the following information: [***specify information on which attorney relied***];**

2. **That [***name of attorney defendant***] did not know that this information was false or inaccurate; and**

3. **That [***name of attorney defendant***] relied on the facts and information provided by the client.**

New June 2013; Revised June 2014, May 2020

Directions for Use

Give this instruction if an attorney defendant alleges ~~that he or she relied~~ reliance on information provided by the client to establish probable cause. If a civil proceeding other than a lawsuit is involved, substitute the appropriate word for "lawsuit" throughout.

The presence or absence of probable cause on undisputed facts is a question of law for the court. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498]; CACI No. 1501, *Wrongful Use of Civil Proceedings*.) The questions here for the jury to resolve are what information was communicated to the attorney that established apparent probable cause, and whether the attorney knew that the information was inaccurate.

The attorney generally has no obligation to investigate the information provided by the client before filing suit. (See *Sheldon Appel Co., supra,* 47 Cal.3d at pp. 882–883.) Therefore, there is no liability under a theory that the attorney should have known that the information was false. Actual knowledge is required. But if the attorney later learns that the client has not been truthful, the attorney may no longer rely on the client's information to continue the lawsuit. (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 223 [105 Cal.Rptr.3d 683].)

Sources and Authority

- "In general, a lawyer 'is entitled to rely on information provided by the client.' If the lawyer discovers the client's statements are false, the lawyer cannot rely on such statements in

prosecuting an action." (*Daniels, supra,* 182 Cal.App.4th at p. 223, internal citation omitted.)

- "[W]hen evaluating a client's case and making an initial assessment of tenability, the attorney is entitled to rely on information provided by the client. An exception to this rule exists where the attorney is on notice of specific factual mistakes in the client's version of events. Absent such notice, an attorney 'may, without being guilty of malicious prosecution, vigorously pursue litigation in which he is unsure of whether his client or the client's adversary is truthful, so long as that issue is genuinely in doubt.' A respected authority has summed up the issue as follows: 'Usually, the client imparts information upon which the attorney relies in determining whether probable cause exists for initiating a proceeding. The rule is that the attorney may rely on those statements as a basis for exercising judgment and providing advice, unless the client's representations are known to be false.' " (*Morrison v. Rudolph* (2002) 103 Cal.App.4th 506, 512–513 [126 Cal.Rprt.2d 747], disapproved on other grounds in *Zamos v. Stroud* (2004) 32 Cal.4th 958, 972 [12 Cal.Rptr.3d 54, 87 P.3d 802], internal citations omitted.)

- "The trial court found the undisputed facts establish that the lawyers had probable cause to assert the fraudulent inducement claim. We agree. It is undisputed that the allegations in the complaint accurately reflected the facts as given to the lawyers by [client] and that she never told them those facts were incorrect. The information provided to the lawyers, if true, was sufficient to state a cause of action … ." (*Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 625 [124 Cal.Rptr.2d 556], disapproved on other grounds in *Zamos, supra,* 32 Cal.4th at p. 972.)

- "Normally, the adequacy of a prefiling investigation is not relevant to the determination of probable cause." (*Swat-Fame, Inc., supra,* 101 Cal.App.4th at p. 627, disapproved on other grounds in *Zamos, supra,* 32 Cal.4th at p. 972.)

- "If the lawyer discovers the client's statements are false, the lawyer cannot rely on such statements in prosecuting an action." (*Daniels, supra,* 182 Cal.App.4th at p. 223.)

Secondary Sources

5 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~471 et seq.~~554, ~~510~~603

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, § 43.05 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, § 357.23 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, § 147.27 et seq. (Matthew Bender)

1803. Appropriation of Name or Likeness—Essential Factual Elements

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

1. **That [*name of defendant*] used [*name of plaintiff*]'s name, likeness, or identity;**
2. **That [*name of plaintiff*] did not consent to this use;**
3. **That [*name of defendant*] gained a commercial benefit [or some other advantage] by using [*name of plaintiff*]'s name, likeness, or identity;**
4. **That [*name of plaintiff*] was harmed; and**
5. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised December 2014, November 2017, May 2020

Directions for Use

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

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

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

Even if the elements are established, the First Amendment may require that the right to be protected from unauthorized publicity be balanced against the public interest in the dissemination of news and information. (See *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409 [114 Cal.Rptr.2d 307].) In a closely related right-of-publicity claim, the California Supreme Court has held that an artist who is faced with a challenge to ~~his or her~~the artist's work may raise as affirmative defense that the work is protected by the First Amendment because it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame. (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797]; see CACI No. 1805, *Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (Comedy III)*.) Therefore, if there is an issue of fact regarding a First Amendment balancing test, it most probably should be considered to be an affirmative defense. (Cf. *Gionfriddo, supra,* 94 Cal.App.4th at p. 414 ["Given the significant public interest in this sport, plaintiffs can only prevail if they demonstrate a substantial competing interest~~.~~"].)

Sources and Authority

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

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

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

- "[B]oth the statutory and common law versions of a right of publicity claim require that the defendant actually use the plaintiff's likeness … ." (*Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 210 [222 Cal.Rptr.3d 250].)

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

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

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

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

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

- "Even if each of these elements is established, however, the common law right does not provide relief for every publication of a person's name or likeness. The First Amendment requires that the right to be protected from unauthorized publicity 'be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.' " (*Gionfriddo, supra,* 94 Cal.App.4th at pp. 409–410, internal citations and footnote omitted.)

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

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

Secondary Sources

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

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

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

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

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

1821. Damages for Use of Name or Likeness (Civ. Code § 3344(a))

If you decide that [*name of plaintiff***] has proved [his/her/*nonbinary pronoun*] claim against [***name of defendant***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

[*Name of plaintiff***] must prove the amount of [his/her/*nonbinary pronoun*] damages. [***Name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of plaintiff***]:**

1. **[Humiliation, embarrassment, and mental distress, including any physical ~~symptons~~symptoms;]**

2. **[Harm to [***name of plaintiff***]'s reputation;] [and]**

3. **[***Insert other item(s) of claimed harm***].**

In addition, [*name of plaintiff***] may recover any profits that [***name of defendant***] received from the use of [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] [that have not already been taken into account with regard to the above damages]. To establish the amount of these profits you must:**

1. **Determine the gross, or total, revenue that [***name of defendant***] received from the use;**

2. **Determine the expenses that [***name of defendant***] had in obtaining the gross revenue; and**

3. **Deduct [***name of defendant***]'s expenses from the gross revenue.**

[*Name of plaintiff***] must prove the amount of gross revenue, and [***name of defendant***] must prove the amount of expenses.**

New September 2003; Revised June 2012, December 2012

Directions for Use

Under Civil Code section 3344(a), an injured party may recover either actual damages or $750, whichever is greater, as well as profits from the unauthorized use that were not taken into account in calculating actual damages. (*Orthopedic Systems Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 547 [135 Cal.Rptr.3d 200].) If no actual damages are sought, the first part of the instruction may be deleted or modified to simply instruct the jury to award $750 if it finds liability.

The plaintiff might claim that ~~he or she~~ the plaintiff would have earned the same profits that the

defendant wrongfully earned. In such a case, to avoid a double recovery, the advisory committee recommends computing damages to recover the defendant's wrongful profits separately from actual damages, that is, under the second part of the instruction and not under actual damages item 3 ("other item(s) of claimed harm"). See also CACI No. VF-1804, *Privacy—Use of Name or Likeness*. Give the bracketed phrase in the paragraph that introduces the second part of the instruction if the plaintiff alleges lost profits that are different from the defendant's wrongful profits and that are claimed under actual damages item 3.

Sources and Authority

- Liability for Use of Name or Likeness. Civil Code section 3344.

- "[Plaintiff] alleges, and submits evidence to show, that he was injured economically because the ad will make it difficult for him to endorse other automobiles, and emotionally because people may be led to believe he has abandoned his current name and assume he has renounced his religion. These allegations suffice to support his action. Injury to a plaintiff's right of publicity is not limited to present or future economic loss, but 'may induce humiliation, embarrassment, and mental distress.' " (*Abdul-Jabbar v. General Motors Corp.* (9th Cir. 1996) 85 F.3d 407, 416, internal citation omitted.)

- "The statutory language of section 3344 is unambiguous—the plaintiff bears the burden of presenting proof of the gross revenue attributable to the defendant's unauthorized use of the plaintiff's likeness, and the defendant must then prove its deductible expenses. CACI No. 1821 mirrors the language of section 3344: '[plaintiff] must prove the amount of gross revenue, and [… defendant] must prove the amount of expenses.' (CACI No. 1821.)" (*Olive v. General Nutrition Centers, Inc.* (2018) 30 Cal.App.5th 804, 814 [242 Cal.Rptr.3d 15], internal citation omitted.)

- "CACI No. 1821 adequately explained the applicable law to the jury." (*Olive, supra,* 30 Cal.App.5th at p. 815.)

- "We can conceive no rational basis for the Legislature to limit the $750 as an alternative to all other damages, including profits. If someone profits from the unauthorized use of another's name, it makes little sense to preclude the injured party from recouping those profits because he or she is entitled to statutory damages as opposed to actual damages. Similar reasoning appears to be reflected in the civil jury instructions for damages under section 3344, which provides: 'If [name of plaintiff] has not proved the above damages, or has proved an amount of damages less than $750, then you must award [him/her] $750. [¶] In addition, [name of plaintiff] may recover any profits that [name of defendant] received from the use of [name of plaintiff]'s [name …] [that have not already been taken into account in computing the above damages].' (CACI No. 1821, italics omitted.)." (*Orthopedic Systems Inc., supra,* 202 Cal.App.4th at p. 546.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1715–1724

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-L~~K~~, *Invasion Of Privacy*, ¶¶ ~~5:710–5:891~~ 5:1116–5:1118 (The Rutter Group)

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.13 (Matthew Bender)

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

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.35 (Matthew Bender)

California Civil Practice, Torts § 20:17 (Thomson Reuters)

1904. Opinions as Statements of Fact

Ordinarily, an opinion is not considered a representation of fact. An opinion is a person's belief that a fact exists, a statement regarding a future event, or a judgment about quality, value, authenticity, or similar matters. However, [*name of defendant***]'s opinion is considered a representation of fact if [***name of plaintiff***] proves that:**

[[*Name of defendant***] claimed to have special knowledge about the subject matter that [***name of plaintiff***] did not have;] [or]**

[[*Name of defendant***] made a representation, not as a casual expression of belief, but in a way that declared the matter to be true;] [or]**

[[*Name of defendant***] had a relationship of trust and confidence with [***name of plaintiff***];] [or]**

[[*Name of defendant***] had some other special reason to expect that [***name of plaintiff***] would rely on ~~his or her~~the defendant's opinion.]**

New September 2003; Revised April 2004, May 2020

Directions for Use

This is not a stand-alone instruction. It should be read in conjunction with one of the elements instructions (CACI Nos. 1900–1903).

The second bracketed option appears to be limited to cases involving professional opinions. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 408 [11 Cal.Rptr.2d 51, 834 P.2d 745].)

Alternative bracketed options that do not apply to the facts of the case may be deleted.

Sources and Authority

- "Representations of opinion, particularly involving matters of value, are ordinarily not actionable representations of fact. A representation is an opinion ' "if it expresses only (a) the belief of the maker, without certainty, as to the existence of a fact; or (b) his judgment as to quality, value … or other matters of judgment." ' " (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 606−607 [172 Cal.Rptr.3d 218], internal citations omitted.)

  "Plaintiffs cite the exceptions to the general rule that, to be actionable, a misrepresentation must be of an existing fact, not an opinion or prediction of future events. They arise '(1) where a party holds himself out to be specially qualified and the other party is so situated that he may reasonably rely upon the former's superior knowledge; (2) where the opinion is by a fiduciary or other trusted person; (3) where a party states his opinion as an existing fact or as implying facts which justify a belief in the truth of the opinion. [Citation.]' " (*Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 769 [153 Cal.Rptr.3d 1], internal citation omitted.)

- "[W]hen one of the parties possesses, or assumes to possess, superior knowledge or special information regarding the subject matter of the representation, and the other party is so situated that he may reasonably rely upon such supposed superior knowledge or special information, a representation made by the party possessing or assuming to possess such knowledge or information, though it might be regarded as but the expression of an opinion if made by any other person, is not excused if it be false." (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 892 [153 Cal.Rptr.3d 546].)

- "Since the appraisal is a value opinion performed for the benefit of the lender, there is no representation of fact upon which a buyer may reasonably rely." (*Graham, supra,* 226 Cal.App.4th at p. 607.)

- "Whether a statement is nonactionable opinion or actionable misrepresentation of fact is a question of fact for the jury." (*Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1080–1081 [76 Cal.Rptr.2d 911], internal citations omitted.)

- "If defendants' assertion of safety is merely a statement of opinion—mere 'puffing'—they cannot be held liable for its falsity." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 111 [120 Cal.Rptr. 681, 534 P.2d 377].)

- "The alleged false representations in the subject brochures were not statements of 'opinion' or mere 'puffing.' They were, in essence, representations that the DC-10 was a safe aircraft. In *Hauter,* [*supra,*] the Supreme Court held that promises of safety are not statements of opinion—they are 'representations of fact.' " (*Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 424 [264 Cal.Rptr. 779].)

- "Under certain circumstances, expressions of professional opinion are treated as representations of fact. When a statement, although in the form of an opinion, is 'not a casual expression of belief' but 'a deliberate affirmation of the matters stated,' it may be regarded as a positive assertion of fact. Moreover, when a party possesses or holds itself out as possessing superior knowledge or special information or expertise regarding the subject matter and a plaintiff is so situated that it may reasonably rely on such supposed knowledge, information, or expertise, the defendant's representation may be treated as one of material fact." (*Bily, supra,* 3 Cal.4th at p. 408, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Torts, §§ ~~774~~892–~~778~~896

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.03[1][b] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit,* § 269.17 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit,* § 105.50 (Matthew Bender)

2 California Civil Practice: Torts, §§ 22:21–22:28 (Thomson Reuters)

1908. Reasonable Reliance

In determining whether [*name of plaintiff*]'s reliance on the [misrepresentation/concealment/false promise] was reasonable, [he/she/*nonbinary pronoun*/it] must first prove that the matter was material. A matter is material if a reasonable person would find it important in deciding what to do ~~determining his or her choice of action~~.

If you decide that the matter is material, you must then decide whether it was reasonable for [*name of plaintiff*] to rely on the [misrepresentation/concealment/false promise]. In making this decision, take into consideration [*name of plaintiff*]'s intelligence, knowledge, education, and experience.

However, it is not reasonable for anyone to rely on a [misrepresentation/concealment/false promise] that is preposterous. It also is not reasonable for anyone to rely on a [misrepresentation/concealment/false promise] if facts that are within [his/her/*nonbinary pronoun*] observation show that it is obviously false.

New September 2003; Revised October 2004, December 2013, May 2020

Directions for Use

There would appear to be three considerations in determining reasonable reliance. First, the representation or promise must be material, as judged by a reasonable-person standard. (*Charpentier v. Los Angeles Rams* (1999) 75 Cal.App.4th 301, 312–313 [89 Cal.Rptr.2d 115].) Second, if the matter is material, reasonableness must take into account the plaintiff's own knowledge, education, and experience; the objective reasonable person is irrelevant at this step. Third, some matters are simply too preposterous to be believed by anyone, notwithstanding limited knowledge, education, and experience. (*Blankenheim v. E. F. Hutton, Co., Inc.* (1990) 217 Cal.App.3d 1463, 1474 [266 Cal.Rptr. 593].)

See also CACI No. 1907, *Reliance*.

Sources and Authority

- "After establishing actual reliance, the plaintiff must show that the reliance was reasonable by showing that (1) the matter was material in the sense that a reasonable person would find it important in determining how he or she would act, and (2) it was reasonable for the plaintiff to have relied on the misrepresentation." (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1194 [175 Cal.Rptr.3d 820], internal citations omitted.)

- "According to the Restatement of Torts, '[r]eliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material. ... The matter is material if ... a reasonable [person] would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question ... .' But materiality is a jury question, and a 'court may [only] withdraw the case from the jury if the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.' " (*Charpentier, supra,* 75

Cal.App.4th at pp. 312–313, internal citations omitted.)

- "[T]he issue is whether the person who claims reliance was justified in believing the representation in the light of his own knowledge and experience." (*Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503 [198 Cal.Rptr. 551, 674 P.2d 253], internal citations omitted.)

- "[N]or is a plaintiff held to the standard of precaution or of minimum knowledge of a hypothetical, reasonable man. Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.'" (*Blankenheim, supra,* 217 Cal.App.3d at p. 1474, internal citations omitted.)

- "[G]enerally speaking, ' "[a] plaintiff will be denied recovery only if his conduct is manifestly unreasonable in the light of his own intelligence or information. It must appear that he put faith in representations that were 'preposterous' or 'shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.' [Citation.] Even in case of a mere negligent misrepresentation, a plaintiff is not barred unless his conduct, in the light of his own information and intelligence, is preposterous and irrational. … The effectiveness of disclaimers is assessed in light of these principles. [Citation.]" ' " (*Public Employees' Retirement System v. Moody's Investors Service, Inc.* (2014) 226 Cal.App.4th 643, 673 [172 Cal.Rptr.3d 238].)

- "[I]f the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery." (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1239 [160 Cal.Rptr.3d 718].)

- "Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1067 [141 Cal.Rptr.3d 142].)

- " 'What would constitute fraud in a given instance might not be fraudulent when exercised toward another person. The test of the representation is its actual effect on the particular mind ... .' " (*Blankenheim, supra,* 217 Cal.App.3d at p. 1475, internal citation omitted.)

- "[Plaintiff]'s deposition testimony on which appellants rely also reveals that she is a practicing attorney and uses releases in her practice. In essence, she is asking this court to rule that a practicing attorney can rely on the advice of an equestrian instructor as to the validity of a written release of liability that she executed without reading. In determining whether one can reasonably or justifiably rely on an alleged misrepresentation, the knowledge, education and experience of the person claiming reliance must be considered. Under these circumstances, we conclude as a matter of law that any such reliance was not reasonable." (*Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843–844 [2 Cal.Rptr.2d 437], internal citations omitted.)

- "[I]t is inherently unreasonable for any person to rely on a prediction of future IRS enactment, enforcement, or non-enforcement of the law by someone unaffiliated with the federal government. As such, the reasonable reliance element of any fraud claim based on these predictions fails as a matter

of law." (*Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 769 [153 Cal.Rptr.3d 1].)

- "[A] presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material. A misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question' and as such, materiality is generally a question of fact unless the 'fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977 [64 Cal.Rptr.2d 843, 938 P.2d 903], internal citations omitted.)

- "[I]t is well established that the kind of disclaimers and exculpatory documents—such as the 'estoppel' attached to the lease and signed by [plaintiff] that disavowed any representations made by landlord or its agents to him—do not operate to insulate defrauding parties from liability or preclude [plaintiff] from demonstrating justifiable reliance on misrepresentations." (*Orozco v. WPV San Jose, LLC* (2019) 36 Cal.App.5th 375, 393 [248 Cal.Rptr.3d 623].)

Secondary Sources

5 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Torts, §§ ~~812~~933 ~~815~~937

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.06 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.19 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit*, § 105.229 (Matthew Bender)

2 California Civil Practice: Torts, § 22:32 (Thomson Reuters)

1910. Real Estate Seller's Nondisclosure of Material Facts

[*Name of plaintiff***] claims that [***name of defendant***] failed to disclose certain information, and that because of this failure to disclose, [***name of plaintiff***] was harmed. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] purchased [***describe real property***] from [***name of defendant***];**
2. **That [***name of defendant***] knew that [***specify information that was not disclosed***];**
3. **That [***name of defendant***] did not disclose this information to [***name of plaintiff***];**
4. **That [***name of plaintiff***] did not know, and could not reasonably have discovered, this information;**
5. **That [***name of defendant***] knew that [***name of plaintiff***] did not know, and could not reasonably have discovered, this information;**
6. **That this information significantly affected the value or desirability of the property;**
7. **That [***name of plaintiff***] was harmed; and**
8. **That [***name of defendant***]'s failure to disclose the information was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2009; Revised May 2020

Directions for Use

This instruction sets forth the common law duty of disclosure that a real estate seller has to ~~his or her~~ a buyer. Nondisclosure is tantamount to a misrepresentation. (See *Calemine v. Samuelson* (2009) 171 Cal.App.4th 153, 161 [89 Cal.Rptr.3d 495].)

For certain transfers, there is also a statutory duty of disclosure. (See Civ. Code, § 1102 et seq.) The scope of the required disclosure is set forth on a statutory form. (See Civ. Code, § 1102.6.) The common law duty is not preempted by the statutory duty (see Civ. Code, § 1102.1(a)), but breach of the statutory duty can constitute proof of breach of the common law duty if all of the elements are established. (See, e.g., *Calemine, supra,* 171 Cal.App.4th at pp. 164–165 [seller did not disclose earlier lawsuits, as required by statutory form].)

Sources and Authority

- Real Estate Buyer's Action Against Seller. Civil Code section 1102.13.

- " 'A real estate seller has both a common law and statutory duty of disclosure. … "In the context of a real estate transaction, '[i]t is now settled in California that where the seller knows of facts materially affecting the value or desirability of the property … and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. [Citations.]' [Citations.] Undisclosed facts are material if they would have a significant and measurable effect on market value. [Citation.]" … Where a seller fails to disclose a material fact, he may be subject to liability 'for mere nondisclosure since his conduct in the transaction *amounts to a representation of the nonexistence of the facts which he has failed to disclose* [citation]." [Citation.]' " (*RSB Vineyards, LLC v. Orsi* (2017) 15 Cal.App.5th 1089, 1097 [223 Cal.Rptr.3d 458], original italics.)

- "Generally, whether the undisclosed matter was of sufficient materiality to have affected the value or desirability of the property is a question of fact." (*Calemine, supra,* 171 Cal.App.4th at p. 161, internal citations omitted.)

- "Actual knowledge can, and often is, shown by inference from circumstantial evidence. In that case, however, ' "actual knowledge can be inferred from the circumstances only if, in the light of the evidence, such inference is not based on speculation or conjecture. Only where the circumstances are such that the defendant 'must have known' and not 'should have known' will an inference of actual knowledge be permitted." ' " (*RSB Vineyards, LLC, supra,* 15 Cal.App.5th at p. 1098, internal citation omitted.)

- "Generally, where one party to a transaction has sole knowledge or access to material facts and knows that such facts are not known or reasonably discoverable by the other party, then a duty to disclose exists." (See *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1544 [76 Cal.Rptr.2d 101].)

- "Failure of the seller to fulfill [the] duty of disclosure constitutes actual fraud." (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 736 [29 Cal.Rptr. 201].)

- "When and where the action by the purchaser is based on conditions that are visible and that a personal inspection at once discloses and, when it is admitted that such personal inspection was in fact made, then manifestly it cannot be successfully contended that the purchaser relied upon any alleged misrepresentations with regard to such visible conditions. But personal inspection is no defense when and where the conditions are not visible and are known only to the seller, and 'where material facts are accessible to the vendor only and he knows them not to be within the reach of the diligent attention and observation of the vendee, the vendor is bound to disclose such facts to the vendee.' " (*Buist v. C. Dudley De Velbiss Corp.* (1960) 182 Cal.App.2d 325, 331 [6 Cal.Rptr. 259].)

- "In enacting [Civil Code section 1102 et seq.], the Legislature made clear it did not intend to alter a seller's common law duty of disclosure. The purpose of the enactment was instead to make the required disclosures specific and clear. (*Calemine, supra,* 171 Cal.App.4th at pp. 161–162.)

- "The legislation was sponsored by the California Association of Realtors to provide a framework

for formal disclosure of facts relevant to a decision to purchase realty. The statute therefore confirms and perhaps clarifies a disclosure obligation that existed previously at common law." (*Shapiro, supra,* 64 Cal.App.4th at p. 1539, fn. 6.)

Secondary Sources

1 California Real Estate Law and Practice, Ch. 71, *Real Property Purchase and Sale Agreements*, § 71.30 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 (Matthew Bender)

50 California Forms of Pleading and Practice, Ch. 569, *Vendor and Purchaser of Real Property*, § 569.11 (Matthew Bender)

2A California Points and Authorities, Ch. 31, *Brokers and Salesperson*, § 31.142 (Matthew Bender)

Greenwald et al., California Practice Guide: Real Property Transactions, Ch. 4-E, *Purchase and Sale Agreement—Terms and Conditions*, ~~(The Rutter Group)~~ ¶ 4:351 et seq. (The Rutter Group)

2000. Trespass—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] trespassed on [his/her/*nonbinary pronoun*/its] property. To establish this claim, [*name of plaintiff*] must prove all of the following:

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

2. **That [*name of defendant*] [intentionally/, although not intending to do so, [recklessly [or] negligently]] entered [*name of plaintiff*]'s property] [or]**

   [intentionally/, although not intending to do so, [recklessly [or] negligently]] caused [another person/[*insert name of thing*]] to enter [*name of plaintiff*]'s property];

3. **That [*name of plaintiff*] did not give permission for the entry [or that [*name of defendant*] exceeded [*name of plaintiff*]'s permission];**

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

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

[Entry can be on, above, or below the surface of the land.]

[Entry may occur indirectly, such as by causing vibrations that damage the land or structures or other improvements on the land.]

New September 2003; Revised June 2013, May 2020

Directions for Use

With regard to element 2, liability for trespass may be imposed for conduct that is intentional, reckless, negligent, or the result of an extra-hazardous activity. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406 [235 Cal.Rptr. 165].) However, intent to trespass means only that the person intended to be in the particular place where the trespass is alleged to have occurred. (*Miller v. National Broadcasting Corp.* (1986) 187 Cal.App.3d 1463, 1480–1481 [232 Cal.Rptr. 668].) Liability may be also based on the defendant's unintentional, but negligent or reckless, act, for example, an automobile accident. An intent to damage is not necessary. (*Meyer v. Pacific Employers Insurance Co.* (1965) 233 Cal.App.2d 321, 326 [43 Cal.Rptr. 542].)

It is no defense that the defendant mistakenly, but in good faith, believed that ~~he or she~~the defendant had a right to be in that location. (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1780 [18 Cal.Rptr.2d 574].) In such a case, the word "intentionally" in element 2 might be confusing to the jury. To alleviate this possible confusion, give the third option to CACI No. 2004, *"Intentional Entry" Explained*.

If plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 4, add "and" at the end of element 2, and adjust punctuation accordingly:

> If you find all of the above, then the law assumes that [*name of plaintiff*] has been harmed and [*name of plaintiff*] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is entitled to additional damages if [*name of plaintiff*] proves the following:

The last sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the fourth element only if nominal damages are also being sought.

Nominal damages alone are not available in cases involving intangible intrusions such as noise and vibrations; proof of actual damage to the property is required: "[T]he rule is that actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion. …" (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 936 [55 Cal.Rptr.2d 724, 920 P.2d 669], internal citation omitted.) For an instruction on control of property, see CACI No. 1002, *Extent of Control Over Premises Area*, in the Premises Liability series.

Sources and Authority

- "Generally, landowners and tenants have a right to exclude persons from trespassing on private property; the right to exclude persons is a fundamental aspect of private property ownership." (*Ralphs Grocery Co. v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245, 258 [225 Cal.Rptr.3d 305].)

- " 'Trespass is an unlawful interference with possession of property.' The elements of trespass are: (1) the plaintiff's ownership or control of the property; (2) the defendant's intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the defendant's conduct was a substantial factor in causing the harm. (See CACI No. 2000.)" (*Ralphs Grocery Co., supra,* 17 Cal.App.5th at pp. 261–262, internal citation omitted.)

- "[I]n order to state a cause of action for trespass a plaintiff must allege an unauthorized and tangible entry on the land of another, which interfered with the plaintiff's exclusive possessory rights." (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1174 [227 Cal.Rptr.3d 390].)

- "The emission of sound waves which cause actual physical damage to property constitutes a trespass. Liability for trespass may be imposed for conduct which is intentional, reckless, negligent or the result of an extra-hazardous activity." (*Staples, supra,* 189 Cal.App.3d at p. 1406, internal citations omitted.)

- "California's definition of trespass is considerably narrower than its definition of nuisance. " 'A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it ... . A nuisance is an interference with the interest in the private use and enjoyment of the land and does not require interference with the possession.' " California has adhered firmly to the view that '[t]he cause of action for trespass is designed to protect possessory-not necessarily ownership-interests in land from unlawful interference.' " (*Capogeannis v. Superior Court* (1993) 12 Cal.App.4th 668, 674 [15 Cal.Rptr.2d 796], internal citations omitted.)

- "In the context of a trespass action, 'possession' is synonymous with 'occupation' and connotes a subjection of property to one's will and control." (*Veiseh v. Stapp* (2019) 35 Cal.App.5th 1099, 1105 [247 Cal.Rptr.3d 868].)

- " '[A] trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it.' Under this definition, 'tortious conduct' denotes that conduct, whether of act or omission, which subjects the actor to liability under the principles of the law of torts." (*Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 345 [23 Cal.Rptr.2d 377], internal citations omitted.)

- The common-law distinction between direct and constructive trespass is not followed in California. A trespass may be committed by consequential and indirect injuries as well as by direct and forcible harm. (*Gallin v. Poulou* (1956) 140 Cal.App.2d 638, 641 [295 P.2d 958].)

- " 'It is a well-settled proposition that the proper party plaintiff in an action for trespass to real property is the person in actual possession. No averment of title in plaintiff is necessary. [Citations.]' … 'A defendant who is a mere stranger to the title will not be allowed to question the title of a plaintiff in possession of the land. It is only where the trespasser claims title himself, or claims under the real owner, that he is allowed to attack the title of the plaintiff whose peaceable possession he has disturbed.' " (*Veiseh, supra,* 35 Cal.App.5th at p. 1104, internal citation omitted.)

- "An action for trespass may technically be maintained only by one whose right to possession has been violated; however, an out-of-possession property owner may recover for an injury to the land by a trespasser which damages the ownership interest." (*Smith v. Cap Concrete, Inc.* (1982) 133 Cal.App.3d 769, 774 [184 Cal.Rptr. 308], internal citation omitted.)

- "Under the forcible entry statutes the fact that a defendant may have title or the right to possession of the land is no defense. The plaintiff's interest in peaceable even if wrongful possession is secured against forcible intrusion by conferring on him the right to restitution of the premises, the primary remedy, and incidentally awarding damages proximately caused by the forcible entry." (*Allen v. McMillion* (1978) 82 Cal.App.3d 211, 218–219 [147 Cal.Rptr. 77], internal citations omitted.)

- "Where there is a consensual entry, there is no tort, because lack of consent is an element of the wrong." (*Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 16–17 [135 Cal.Rptr. 915].)

- " 'A conditional or restricted consent to enter land creates a privilege to do so only insofar as the condition or restriction is complied with.' " (*Civic Western Corp., supra,* 66 Cal.App.3d at p. 17, quoting Rest.2d Torts, § 168.)

- "Where one has permission to use land for a particular purpose and proceeds to abuse the privilege, or commits any act hostile to the interests of the lessor, he becomes a trespasser. [¶] 'A good faith belief that entry has been authorized or permitted provides no excuse for infringement of property rights if consent was not in fact given by the property owner whose rights are at issue. Accordingly, by

showing they gave no authorization, [plaintiffs] established the lack of consent necessary to support their action for injury to their ownership interests.' " (*Cassinos, supra,* 14 Cal.App.4th at p. 1780, internal citations omitted.)

- " '[T]he intent required as a basis for liability as a trespasser is simply an intent to be at the place on the land where the trespass allegedly occurred ... . The defendant is liable for an intentional entry although he has acted in good faith, under the mistaken belief, however reasonable, that he is committing no wrong.' " (*Miller, supra,* 187 Cal.App.3d at pp. 1480–1481, internal citation omitted.)

- "The general rule is simply that damages may be recovered for annoyance and distress, including mental anguish, proximately caused by a trespass." (*Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905 [267 Cal.Rptr. 399], internal citations omitted.)

- "Causes of action for conversion and trespass support an award for exemplary damages." (*Krieger v. Pacific Gas & Electric Co.* (1981) 119 Cal.App.3d 137, 148 [173 Cal.Rptr. 751], internal citation omitted.)

- "It is true that an action for trespass will support an award of nominal damages where actual damages are not shown. However, nominal damages need not be awarded where no actual loss has occurred. 'Failure to return a verdict for nominal damages is not in general ground for reversing a judgment or granting a new trial.' " (*Staples, supra,* 189 Cal.App.3d at p. 1406, internal citations omitted.)

- "Trespass may be ' "by personal intrusion of the wrongdoer or by his failure to leave; by throwing or placing something on the land; or by causing the entry of some other person." ' A trespass may be on the surface of the land, above it, or below it. The migration of pollutants from one property to another may constitute a trespass, a nuisance, or both." (*Martin Marietta Corp. v. Insurance Co. of North America* (1995) 40 Cal.App.4th 1113, 1132 [47 Cal.Rptr.2d 670], internal citations omitted.)

- "Respondent's plant was located in a zone which permitted its operation. It comes within the protection of section 731a of the Code of Civil Procedure which, subject to certain exceptions, generally provides that where a manufacturing or commercial operation is permitted by local zoning, no private individual can enjoin such an operation. It has been determined, however, that this section does not operate to bar recovery for damages for trespassory invasions of another's property occasioned by the conduct of such manufacturing or commercial use." (*Roberts v. Permanente Corp*. (1961) 188 Cal.App.2d 526, 529 [10 Cal.Rptr. 519], internal citations omitted.)

- "[A]s a matter of law, [plaintiff] cannot state a cause of action against the [defendants] for trespassing on the Secondary Access Easement because they own that land and her easement does not give her a possessory right, not to mention an exclusive possessory right in that property." (*McBride, supra,* 18 Cal.App.5th at p. 1174.)

- "[A] failure to comply with one or more provisions of the California Uniform Transfers to Minors Act does not render the grantor's continued possession and control of the real property unlawful for purposes of the tort of trespass to realty." (*Veiseh, supra*, 35 Cal.App.5th at p. 1107.)

Secondary Sources

5 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Torts, §§ ~~693~~803–~~695~~805

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.20 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass*, §§ 550.11, 550.19 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.20 (Matthew Bender)

1 California Civil Practice: Torts §§ 18:1, 18:4–18:8, 18:10 (Thomson Reuters)

2002. Trespass to Timber—Essential Factual Elements (Civ. Code, § 3346)

[*Name of plaintiff***] claims that [***name of defendant***] trespassed on [his/her/*nonbinary pronoun*/its] property and [cut down or damaged trees/took timber]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of defendant***] intentionally entered [***name of plaintiff***]'s property and [cut down or damaged trees/took timber] located on the property;**

   [*or***]**

   That [*name of defendant***], although not intending to do so, [recklessly/ [or] negligently] entered [***name of plaintiff***]'s property and damaged trees located on the property;**

3. **That [***name of plaintiff***] did not give permission to [cut down or damage the trees/take timber] [or that [***name of defendant***] exceeded [***name of plaintiff***]'s permission];**

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

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

[In considering whether [*name of plaintiff***] was harmed, you may take into account the lost aesthetics and functionality of an injured tree.]**

New September 2003; Revised June 2013, May 2020

Directions for Use

Give this instruction for loss of timber or damages to trees. Note that actual damages are to be doubled regardless of the defendant's intent. (See Civ. Code, § 3346(a).) If treble damages for willful and malicious conduct are sought, also give CACI No. 2003, *Damage to Timber—Willful and Malicious Conduct*.

With regard to element 2, liability for trespass may be imposed for conduct that is intentional, reckless, negligent, or the result of an extra-hazardous activity. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406 [235 Cal.Rptr. 165].) However, intent to trespass means only that the person intended to be in the particular place where the trespass is alleged to have occurred. (*Miller v. National Broadcasting Corp.* (1986) 187 Cal.App.3d 1463, 1480–1481 [232 Cal.Rptr. 668].) Liability may be also based on the defendant's unintentional, but negligent or reckless, act; for example an automobile accident that damages a tree. An intent to damage is not necessary. (*Meyer v. Pacific Employers Insurance Co.* (1965)

233 Cal.App.2d 321 [43 Cal.Rptr. 542].)

It is no defense that the defendant mistakenly, but in good faith, believed that ~~he or she~~the defendant had a right to be in that location. (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1780 [18 Cal.Rptr.2d 574].) In such a case, the word "intentionally" in element 2 might be confusing to the jury. To alleviate this possible confusion, give the third option to CACI No. 2004, *"Intentional Entry" Explained*. See also the Sources and Authority to CACI No. 2000, *Trespass—Essential Factual Elements*.

Include the last paragraph if the plaintiff claims harm based on lost aesthetics and functionality.

Sources and Authority

- Damages for Injury to Timber. Civil Code section 3346(a).

- "[T]he effect of [Civil Code] section 3346 as amended, read together with [Code of Civil Procedure] section 733, is that the Legislature intended, insofar as wilful and malicious trespass is concerned under either section, to leave the imposition of treble damages discretionary with the court, but to place a floor upon that discretion at double damages which must be applied whether the trespass be wilful and malicious or casual and involuntary, etc. There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, etc., the court must impose double damages; and (3) for trespass under authority actual damages." (*Salazar v. Matejcek* (2016) 245 Cal.App.4th 634, 645, fn.3 [199 Cal.Rptr.3d 705].)

- "The measure of damages to be doubled or trebled under Code of Civil Procedure section 733 and Civil Code section 3346 is not limited to the value of the timber or the damage to the trees. The statutes have been interpreted to permit doubling or trebling the full measure of compensable damages for tortious injury to property." (*Fulle v. Kanani* (2017) 7 Cal.App.5th 1305, 1312 [212 Cal.Rptr.3d 920] [annoyance and discomfort damages resulting from tortious injuries to timber or trees are subject to the damage multiplier under Code of Civil Procedure section 733 and Civil Code section 3346].)

- The damages provisions in sections 3346 and 733 must be "treated as penal and punitive." (*Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1138 [235 Cal.Rptr. 857], internal citation omitted.)

- " 'However, due to the penal nature of these provisions, the damages should be neither doubled nor tripled under section 3346 if punitive damages are awarded under section 3294. That would amount to punishing the defendant twice and is not necessary to further the policy behind section 3294 of educating blunderers (persons who mistake location of boundary lines) and discouraging rogues (persons who ignore boundary lines).' " (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169 [100 Cal.Rptr.2d 662], internal citations omitted.)

- "Diminution in market value ... is not an absolute limitation; several other theories are available to fix appropriate compensation for the plaintiff's loss. ... [¶] One alternative measure of damages is the cost of restoring the property to its condition prior to the injury. Courts will normally not award costs of restoration if they exceed the diminution in the value of the property; the plaintiff may be awarded the

lesser of the two amounts." (*Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 862 [162 Cal.Rptr. 104], internal citations omitted.)

- "The rule precluding recovery of restoration costs in excess of diminution in value is, however, not of invariable application. Restoration costs may be awarded even though they exceed the decrease in market value if 'there is a reason personal to the owner for restoring the original condition,' or 'where there is reason to believe that the plaintiff will, if fact, make the repairs.' " (*Heninger, supra*, 101 Cal.App.3d at p. 863, internal citations omitted.)

- "Courts have stressed that only reasonable costs of replacing destroyed trees with identical or substantially similar trees may be recovered." (*Heninger, supra,* 101 Cal.App.3d at p. 865.)

- "As a tree growing on a property line, the Aleppo pine tree was a 'line tree.' Civil Code section 834 provides: 'Trees whose trunks stand partly on the land of two or more coterminous owners, belong to them in common.' As such, neither owner 'is at liberty to cut the tree without the consent of the other, nor to cut away the part which extends into his land, if he thereby injures the common property in the tree.' " (*Kallis v. Sones* (2012) 208 Cal.App.4th 1274, 1278 [146 Cal.Rptr.3d 419].)

- "[W]hen considering the diminished value of an injured tree, the finder of fact may account for lost aesthetics and functionality." (*Rony v. Costa* (2012) 210 Cal.App.4th 746, 755 [148 Cal.Rptr.3d 642].)

- "Although [plaintiff] never quantified the loss of aesthetics at $15,000, she need not have done so. As with other hard-to-quantify injuries, such as emotional and reputational ones, the trier of fact court was free to place any dollar amount on aesthetic harm, unless the amount was ' "so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the [trier of fact] was under the influence of passion or prejudice." ' " (*Rony, supra,* 210 Cal.App.4th at p. 756.)

- "[P]laintiffs here showed (i) the tree's unusual size and form made it very unusual for a 'line tree'—it functioned more like two trees growing on the separate properties; (ii) the tree's attributes, such as its broad canopy, provided significant benefits to the [plaintiffs'] property; and (iii) the [plaintiffs] placed great personal value on the tree. The trial court correctly recognized that it could account for these factors when determining damages, including whether or not damages should be reduced." (*Kallis, supra,* 208 Cal.App.4th at p. 1279.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1917−1919

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.20 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass*, § 550.10 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.161 et seq. (Matthew Bender)

2003. Damage to Timber—Willful and Malicious Conduct

[*Name of plaintiff*] also claims that [*name of defendant*]'s conduct in cutting down, damaging, or harvesting [*name of plaintiff*]'s trees was willful and malicious.

"Willful" simply means that [*name of defendant*]'s conduct was intentional.

"Malicious" means that [*name of defendant*] acted with intent to vex, annoy, harass, or injure, or that [*name of defendant*]'s conduct was done with a knowing disregard of the rights or safety of another. A person acts with knowing disregard when ~~he or she~~the person is aware of the probable dangerous consequences of ~~his or her~~the person's conduct and deliberately fails to avoid those consequences.

New September 2003; Revised December 2010, May 2020

Directions for Use

Read this instruction if the plaintiff is seeking double or treble damages because the defendant's conduct was willful and malicious. (See Civ. Code, § 3346; Code Civ. Proc., § 733; *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1742 [33 Cal.Rptr.2d 391].) The judge should ensure that this finding is noted on the special verdict form. The jury should find the actual damages suffered. If the jury finds willful and malicious conduct, the court must award double damages and may award treble damages. (See *Ostling, supra,* 27 Cal.App.4th at p. 1742.)

Sources and Authority

- Damages for Injury to Timber. Civil Code section 3346(a).
- Treble Damages for Injury to Timber. Code of Civil Procedure section 733.
- "[T]he effect of [Civil Code] section 3346 as amended, read together with [Code of Civil Procedure] section 733, is that the Legislature intended, insofar as wilful and malicious trespass is concerned under either section, to leave the imposition of treble damages discretionary with the court, but to place a floor upon that discretion at double damages which must be applied whether the trespass be wilful and malicious or casual and involuntary, etc. There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, etc., the court must impose double damages; and (3) for trespass under authority actual damages." (*Salazar v. Matejcek* (2016) 245 Cal.App.4th 634, 645, fn. 3 [199 Cal.Rptr.3d 705].)
- "The measure of damages to be doubled or trebled under Code of Civil Procedure section 733 and Civil Code section 3346 is not limited to the value of the timber or the damage to the trees. The statutes have been interpreted to permit doubling or trebling the full measure of compensable damages for tortious injury to property." (*Fulle v. Kanani* (2017) 7 Cal.App.5th 1305, 1312 [212

Cal.Rptr.3d 920] [annoyance and discomfort damages resulting from tortious injuries to timber or trees are subject to the damage multiplier under Code of Civil Procedure section 733 and Civil Code section 3346].)

- The damages provisions in sections 3346 and 733 must be "treated as penal and punitive." (*Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1138 [235 Cal.Rptr. 857], internal citation omitted.)

- " 'However, due to the penal nature of these provisions, the damages should be neither doubled nor tripled under section 3346 if punitive damages are awarded under section 3294. That would amount to punishing the defendant twice and is not necessary to further the policy behind section 3294 of educating blunderers (persons who mistake location of boundary lines) and discouraging rogues (persons who ignore boundary lines).' " (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169 [100 Cal.Rptr.2d 662], internal citations omitted.)

- " ' " '[T]reble damages may only be awarded when the wrongdoer intentionally acted wilfully or maliciously. The intent required is the intent to vex, harass, or annoy or injure the plaintiff. It is a question of fact for the trial court whether or not such intent exists.' [Civil Code section 3346 and Code of Civil Procedure section 733] are permissive and not mandatory and while they 'prescribe the degree of penalty to be invoked they commit to the sound discretion of the trial court the facts and circumstances under which it shall be invoked.' " ' " (*Salazar, supra,* 245 Cal.App.4th at p. 646, internal citation omitted.)

- "Although neither section [3346 or 733] expressly so provides, it is now settled that to warrant such an award of treble damages it must be established that the wrongful act was willful and malicious." (*Caldwell v. Walker* (1963) 211 Cal.App.2d 758, 762 [27 Cal.Rptr. 675], internal citations omitted.)

- "A proper and helpful analogue here is the award of exemplary damages under section 3294 of the Civil Code when a defendant has been guilty, inter alia, of 'malice, express or implied.' … 'In order to warrant the allowance of such damages the act complained of must not only be wilful, in the sense of intentional, but it must be accompanied by some aggravating circumstance, amounting to malice. Malice implies an act conceived in a spirit of mischief or with criminal indifference towards the obligations owed to others. There must be an intent to vex, annoy or injure. Mere spite or ill will is not sufficient.' … Malice may consist of a state of mind determined to perform an act with reckless or wanton disregard of or indifference to the rights of others. Since a defendant rarely admits to such a state of mind, it must frequently be established from the circumstances surrounding his allegedly malicious acts." (*Caldwell, supra*, 211 Cal.App.2d at pp. 763–764, internal citations omitted.)

- "Under [Health and Safety Code] section 13007, a tortfeasor generally is liable to the owner of property for damage caused by a negligently set fire. '[T]he statute places no restrictions on the type of property damage that is compensable.' Such damages might include, for example, damage to structures, to movable personal property, to soil, or to undergrowth; damages may even include such elements as the lost profits of a business damaged by fire. If the fire also damages trees—that is, causes 'injuries to … trees … upon the land of another'—then the actual damages recoverable under section 13007 may be doubled (for negligently caused fires) or trebled (for fires intended to spread to the plaintiff's property) pursuant to section 3346." (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 461 [102 Cal.Rptr.3d 32], internal citations omitted; but see *Gould v. Madonna*

(1970) 5 Cal.App.3d 404, 407–408 [85 Cal.Rptr. 457] [Civ. Code, § 3346 does not apply to fires negligently set; Health & Saf. Code, § 13007 provides sole remedy].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1918

4 Levy et al., California Torts, Ch. 52, *Recovery for Medical Expenses and Economic Loss*, § 52.34 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 350, *Logs and Timber*, § 350.12 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.161 et seq. (Matthew Bender)

2004. "Intentional Entry" Explained

[An entry is intentional if a person knowingly goes onto the property of another or knowingly causes something to go onto that property.]

[An entry is intentional if a person engages in conduct that is substantially certain to cause something to go onto that property.]

[Intent to trespass means only that a person intended to be in the particular location where the trespass is alleged to have occurred. An entry is intentional even if the person reasonably but mistakenly thought that ~~he or she~~the person had a right to come onto that property.]

An intent to do harm to the property or to the owner is not required.

New September 2003; Revised June 2013, May 2020

Directions for Use

This instruction is not intended for general use in every case. Give one of the three bracketed optionsif an issue regarding the intent of the entry is raised and further explanation is required. The third option should be given if the entry could appear to the jury to be unintentional, such as if the defendant was not aware that ~~he or she~~the defendant was trespassing. (See *Miller v. National Broadcasting Corp.* (1986) 187 Cal.App.3d 1463, 1480–1481 [232 Cal.Rptr. 668].)

Sources and Authority

- "The doing of an act which will to a substantial certainty result in the entry of foreign matter upon another's land suffices for an intentional trespass to land upon which liability may be based. It was error to instruct the jury that an 'intent to harm' was required." (*Roberts v. Permanente Corp*. (1961) 188 Cal.App.2d 526, 530–531 [10 Cal.Rptr. 519], internal citation omitted.)

- An instruction on the definition of intentional trespass is considered a proper statement of law. Failure to give this instruction on request where appropriate is error. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1407 [235 Cal.Rptr. 165].)

- "As Prosser and Keeton on Torts ... explained, '[t]he intent required as a basis for liability as a trespasser is simply an intent to be at the place on the land where the trespass allegedly occurred ... . The defendant is liable for an intentional entry although he has acted in good faith, under the mistaken belief, however reasonable, that he is committing no wrong.' " (*Miller, supra,* 187 Cal.App.3d at pp. 1480–1481, internal citation omitted.)

- "Intent to cause damage was not, however, an element of [trespass] and … the trespasser was liable for such damage as he caused even though that damage was not intended or foreseen by him." (*Meyer*

v. Pacific Employers Ins. Co. (1965) 233 Cal.App.2d 321, 326 [43 Cal.Rptr. 542].)

Secondary Sources

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.20[3] (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass*, § 550.15 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.40 (Matthew Bender)

~~1~~ California Civil Practice: Torts § 18:4 (Thomson Reuters ~~West~~)

2200. Inducing Breach of Contract

[*Name of plaintiff***] claims that [***name of defendant***] intentionally caused [***name of third party***] to breach [his/her/*nonbinary pronoun*/its] contract with [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That there was a contract between [***name of plaintiff***] and [***name of third party***];**

2. **That [***name of defendant***] knew of the contract;**

3. **That [***name of defendant***] intended to cause [***name of third party***] to breach the contract;**

4. **That [***name of defendant***]'s conduct caused [***name of third party***] to breach the contract;**

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

Directions for Use

If the validity of a contract is an issue, see the series of contracts instructions (CACI No. 300 et seq.).

Sources and Authority

- "[C]ases have pointed out that while the tort of inducing breach of contract requires proof of a breach, the cause of action for interference with contractual relations is distinct and requires only proof of interference." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1129 [270 Cal.Rptr. 1, 791 P.2d 587], internal citations omitted.)

- "The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1126, internal citations omitted.)

- "[A] cause of action for intentional interference with contract requires an underlying enforceable contract. Where there is no existing, enforceable contract, only a claim for interference with prospective advantage may be pleaded." (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 601 [52 Cal.Rptr.2d 877].)

- "The act of inducing the breach must be an intentional one. If the actor had no knowledge of the existence of the contract or his actions were not intended to induce a breach, he cannot be held liable though an actual breach results from his lawful and proper acts." (*Imperial Ice Co. v. Rossier* (1941) 18 Cal.2d 33, 37 [112 P.2d 631], internal citations omitted.)

- " 'To recover damages for inducing a breach of contract, the plaintiff need not establish that the defendant had full knowledge of the contract's terms. Comment i to Restatement Second of Torts, section 766, … states: "To be subject to liability [for inducing a breach of contract], the actor must have knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract." ' " (*Jenni Rivera Enterprises, LLC v. Latin World Entertainment Holdings, Inc.* (2019) 36 Cal.App.5th 766, 783 [249 Cal.Rptr.3d 122].)

- "It is not enough that the actor intended to perform the acts which caused the result-he or she must have intended to cause the result itself." (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 261 [45 Cal.Rptr.2d 90].)

- "The question is whether a plaintiff must plead and prove that the defendant engaged in wrongful acts *with the specific intent* of interfering with the plaintiff's business expectancy. We conclude that specific intent is not a required element of the tort of interference with prospective economic advantage. While a plaintiff may satisfy the intent requirement by pleading specific intent, i.e., that the defendant desired to interfere with the plaintiff's prospective economic advantage, a plaintiff may alternately plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1154 [131 Cal.Rptr.2d 29, 63 P.3d 937], original italics.)

- "The actionable wrong lies in the inducement to break the contract or to sever the relationship, not in the kind of contract or relationship so disrupted, whether it is written or oral, enforceable or not enforceable." (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1127.)

- " '[I]t may be actionable to induce a party to a contract to terminate the contract according to its terms.' … '[I]t is the contractual relationship, not any term of the contract, which is protected against outside interference.' " (*I-CA Enterprises, Inc. v. Palram Americas, Inc.* (2015) 235 Cal.App.4th 257, 289 [185 Cal.Rptr.3d 24], internal citation omitted.)

- "[T]he tort cause of action for interference with a contract does not lie against a party to the contract. [Citations.] [¶] ... The tort duty not to interfere with the contract falls only on strangers-interlopers who have no legitimate interest in the scope or course of the contract's performance." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514 [28 Cal.Rptr.2d 475, 869 P.2d 454], internal citations omitted.)

- "[I]nterference with an at-will contract is actionable interference with the contractual relationship, on the theory that a contract 'at the will of the parties, respectively, does not make it one at the will of others. [Citations]'" (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1127, internal citations and quotations omitted.)

- "Because interference with an existing contract receives greater solicitude than does interference with prospective economic advantage, it is not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55 [77 Cal.Rptr.2d 709, 960 P.2d 513], internal citations omitted.)

- " '[A] person is not justified in inducing a breach of contract simply because he is in competition with one of the parties to the contract and seeks to further his own economic advantage at the expense of the other. [Citations.]' This is because, '[w]hatever interest society has in encouraging free and open competition by means not in themselves unlawful, contractual stability is generally accepted as of greater importance than competitive freedom.' A party may not, 'under the guise of competition actively and affirmatively induce the breach of a competitor's contract.' " (*I-CA Enterprises, Inc., supra,* 235 Cal.App.4th at p. 290, internal citations omitted.)

- "We conclude that a plaintiff seeking to state a claim for intentional interference with contract or prospective economic advantage because defendant induced another to undertake litigation, must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor." (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1137.)

Secondary Sources

5 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Torts, §§ ~~730~~842–~~740~~853

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, §§ 40.110–40.117 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.132 et seq (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference*, § 122.20 et seq. (Matthew Bender)

2308. Affirmative Defense—Misrepresentation or Concealment in Insurance Application

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

1. **That [***name of insured***] submitted an application for insurance with [***name of insurer***];**

2. **That in the application for insurance [***name of insured***], whether intentionally or unintentionally, [failed to state/represented] that [***insert omission or alleged misrepresentation***];**

3. **[That the application asked for that information;]**

4. **That [***name of insured***] knew that [***specify facts that were misrepresented or omitted***]; and**

5. **That [***name of insurer***] would not have issued the insurance policy if [***name of insured***] had stated the true facts in the application.**

New September 2003; Revised April 2004, October 2004, June 2015, May 2020

Directions for Use

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

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

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

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

Sources and Authority

- Rescission of Contract. Civil Code section 1689(b)(1).
- Time of Insurer's Rescission of Policy. Insurance Code section 650.
- Concealment by Failure to Communicate. Insurance Code section 330.
- Concealment Entitles Insurer to Rescind. Insurance Code section 331.
- Duty to Communicate in Good Faith. Insurance Code section 332.
- Materiality. Insurance Code section 334.
- Intentional Omission of Information Tending to Prove Falsity. Insurance Code section 338.
- False Representation: Time for Rescission. Insurance Code section 359.
- "It is well established that material misrepresentations or concealment of material facts in an application for insurance entitle an insurer to rescind an insurance policy, even if the misrepresentations are not intentionally made. Additionally, '[a] misrepresentation or concealment of a material fact in an insurance application also establishes a complete defense in an action on the policy. [Citations.] As with rescission, an insurer seeking to invalidate a policy based on a material misrepresentation or concealment as a defense need not show an intent to deceive. [Citations.]' " (*Douglas, supra,* 229 Cal.App.4th at p. 408, internal citations omitted.)
- "When the [automobile] insurer fails ... to conduct ... a reasonable investigation [of insurability] it cannot assert ... a right of rescission" under section 650 of the Insurance Code as an affirmative defense to an action by an injured third party. (*Barrera v. State Farm Mutual Automobile Insurance Co.* (1969) 71 Cal.2d 659, 678 [79 Cal.Rptr. 106, 456 P.2d 674].)
- "[A]n insurer has a right to know all that the applicant for insurance knows regarding the state of his health and medical history. Material misrepresentation or concealment of such facts [is] grounds for rescission of the policy, and an actual intent to deceive need not be shown. Materiality is determined solely by the probable and reasonable effect [that] truthful answers would have had upon the insurer. The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law." (*Thompson, supra,* 9 Cal.3d at pp. 915–916, internal citations omitted.)
- "[A]lthough an insurer generally 'has the right to rely on the applicant's answers without verifying their accuracy[,] … [¶] … [t]he insurer cannot rely on answers given where the applicant-insured was *misled* by vague or ambiguous questions.' " (*Duarte v. Pacific Specialty Ins. Co.* (2017) 13 Cal.App.5th 45, 54 [220 Cal.Rptr.3d 170], original italics.)

- "[I]f the applicant for insurance had no present knowledge of the facts sought, or failed to appreciate the significance of information related to him, his incorrect or incomplete responses would not constitute grounds for rescission. Moreover, '[questions] concerning illness or disease do not relate to minor indispositions but are to be construed as referring to serious ailments which undermine the general health.' Finally, as the misrepresentation must be a material one, 'incorrect answer on an insurance application does not give rise to the defense of fraud where the true facts, if known, would not have made the contract less desirable to the insurer.' And the trier of fact is not required to believe the 'post mortem' testimony of an insurer's agents that insurance would have been refused had the true facts been disclosed." (*Thompson, supra,* 9 Cal.3d at p. 916, internal citations omitted.)

- "[T]he burden of proving misrepresentation [for purposes of rescission] rests upon the insurer." (*Thompson, supra,* 9 Cal.3d at p. 919.)

- "To prevail, the insurer must prove that the insured made a material 'false representation' in an insurance application. 'A representation is false when the facts fail to correspond with its assertions or stipulations.' The test for materiality of the misrepresentation or concealment is the same as it is for rescission, 'a misrepresentation or concealment is material if a truthful statement would have affected the insurer's underwriting decision.' " (*Douglas, supra,* 229 Cal.App.4th at p. 408, internal citations omitted.)

- "The materiality of a representation made in an application for a contract of insurance is determined by a *subjective* standard (i.e., its effect on the *particular* insurer to whom it was made) and rescission will be allowed even though the misrepresentation was the result of negligence or the product of innocence. On the other hand, in order to void a policy based upon the insured's violation of the standard fraud and concealment clause ... , the false statement must have been knowingly and wilfully made with the intent (express or implied) of deceiving the insurer. The materiality of the statement will be determined by the *objective* standard of its effect upon a *reasonable* insurer." (*Cummings v. Fire Insurance Exchange* (1988) 202 Cal.App.3d 1407, 1415, fn.7 [249 Cal.Rptr. 568], original italics, internal citation omitted.)

- "The insurer is not required to show a causal relationship between the material misrepresentation or concealment of material fact and the nature of the claim." (*Duarte, supra,* 13 Cal.App.5th at p. 53.)

- "Cancellation and rescission are not synonymous. One is prospective, while the other is retroactive." (*Fireman's Fund American Insurance Co. v. Escobedo* (1978) 80 Cal.App.3d 610, 619 [145 Cal.Rptr. 785].)

- "[U]pon a rescission of a policy of insurance, based upon a material concealment or misrepresentation, all rights of the insured thereunder (except the right to recover any consideration paid in the purchase of the policy) are extinguished ... ." (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 184 [243 Cal.Rptr. 639].)

- "The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received. ... [T]his would require the refund by [the insurer] of any premiums and the repayment by

the defendants of any proceed advance which they may have received." (*Imperial Casualty & Indemnity Co., supra,* 198 Cal.App.3d at p. 184, internal citation omitted.)

Secondary Sources

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

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

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

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

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

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

2333. Bad Faith (First Party)—Breach of Duty to Inform Insured of Rights—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] breached the obligation of good faith and fair dealing by failing to reasonably inform [him/her/*nonbinary pronoun*/it] of [his/her/*nonbinary pronoun*/its] rights and obligations under an insurance policy. To succeed, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] suffered a loss covered under an insurance policy with [*name of defendant*];**

2. **That [*name of defendant*] [denied coverage for/refused to pay] [*name of plaintiff*]'s loss;**

3. **That under the policy [*name of plaintiff*] had the [right/obligation] to [*describe right or obligation at issue, e.g., "to request arbitration within 180 days"*];**

4. **That [*name of defendant*] did not reasonably inform [*name of plaintiff*] of [his/her/*nonbinary pronoun*/its] [right/obligation] to [*describe right or obligation*];**

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

6. **That [*name of defendant*]'s failure to reasonably inform [*name of plaintiff*] was a substantial factor in causing [his/her/*nonbinary pronoun*/its] harm.**

New September 2003; Revised May 2020

Directions for Use

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

This instruction is intended for use in appropriate cases if the insured alleges that the insurer breached the implied covenant of good faith and fair dealing by failing to reasonably inform the insured of ~~his or her~~the insured's remedial rights and obligations under an insurance policy.

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

Sources and Authority

- The insurer's implied duty of good faith and fair dealing includes "the duty reasonably to inform an insured of the insured's rights and obligations under the insurance policy. In particular, in situations in which an insured's lack of knowledge may potentially result in a loss of benefits or a forfeiture of rights, an insurer [is] required to bring to the insured's attention relevant information so as to enable

the insured to take action to secure rights afforded by the policy." (*Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 428 [158 Cal.Rptr. 828, 600 P.2d 1060].)

- The trial court in the instant case found that [the insurer] knew that in many instances its insureds would not be aware of the arbitration clause and that, despite this knowledge, [it] deliberately decided not to inform its insureds of the arbitration procedure. In this context, the practical effect of the insurer's practice was to transform its arbitration clause into a unilateral provision, establishing a procedure to which the insurer could require its insureds to resort when [it] deemed it advisable, but one that would not generally provide a speedy, economic or readily accessible remedy for the bulk of [its] uninformed insureds. [¶] We think the trial court was fully justified in finding that [the insurer] had breached its duty of good faith and fair dealing in adopting such a course of conduct. (*Davis, supra,* 25 Cal.3d at pp. 430–431.)

- "When a court is reviewing claims under an insurance policy, it must hold the insured bound by clear and conspicuous provisions in the policy even if evidence suggests that the insured did not read or understand them. Once it becomes clear to the insurer that its insured disputes its denial of coverage, however, the duty of good faith does not permit the insurer passively to assume that its insured is aware of his rights under the policy. The insurer must instead take affirmative steps to make sure that the insured is informed of his remedial rights." (*Sarchett v. Blue Shield of California* (1987) 43 Cal.3d 1, 14–15 [233 Cal.Rptr. 76, 729 P.2d 267], plurality opinion.)

- But see *Chase v. Blue Cross of California* (1996) 42 Cal.App.4th 1142, 1155 [50 Cal.Rptr.2d 178] [while insurer may not misrepresent facts or fail to clarify an insured's obvious misunderstanding of the policy coverage, it does not have an ongoing duty to keep the insured informed of his or her rights once those rights have been clearly set forth in the policy].)

- "In order to find a forfeiture by the insurer of the right to arbitration, we understand *Davis* and *Sarchett* to require conduct *designed* to mislead policyholders." (*Chase, supra,* 42 Cal.App.4th at p. 1157, original italics.)

- An insurer owes a duty to an additional insured under an automobile policy to disclose within a reasonable time the existence and amount of any underinsured motorist coverage. (*Ramirez v. USAA Casualty Insurance Co.* (1991) 234 Cal.App.3d 391, 397–402 [285 Cal.Rptr. 757].)

- "California courts have imposed a duty on the insurer to advise its insureds of the availability of and procedure for initiating arbitration; to notify him of a 31-day option period in which to convert his group insurance policy into individual coverage after termination; and to notify an assignee of a life insurance policy taken as security for a loan to the insured of previous assignments of the policy known to the insurer." (*Westrick v. State Farm Insurance* (1982) 137 Cal.App.3d 685, 692 [187 Cal.Rptr. 214], internal citations omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12C-D, *Application–Matters Held "Unreasonable"*, ~~(The Rutter Group)~~ ¶¶ 12:953–12:963 (The Rutter Group)

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.05 (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.22 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.383–120.384, 120.390 (Matthew Bender)

2337. Factors to Consider in Evaluating Insurer's Conduct

In determining whether [*name of defendant*] acted unreasonably, that is, without proper cause, you may consider whether the defendant did any of the following:

[(a) Misrepresented to [*name of plaintiff*] relevant facts or insurance policy provisions relating to any coverage at issue.]

[(b) Failed to acknowledge and act reasonably promptly after receiving communications about [*name of plaintiff*]'s claim arising under the insurance policy.]

[(c) Failed to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under its insurance policies.]

[(d) Failed to accept or deny coverage of claims within a reasonable time after [*name of plaintiff*] completed and submitted proof-of-loss requirements.]

[(e) Did not attempt in good faith to reach a prompt, fair, and equitable settlement of [*name of plaintiff*]'s claim after liability had become reasonably clear.]

[(f) Required [*name of plaintiff*] to file a lawsuit to recover amounts due under the policy by offering substantially less than the amount that [he/she/*nonbinary pronoun*/it] ultimately recovered in the lawsuit, even though [*name of plaintiff*] had made a claim for an amount reasonably close to the amount ultimately recovered.]

[(g) Attempted to settle [*name of plaintiff*]'s claim for less than the amount to which a reasonable person would have believed ~~he or she~~[*name of plaintiff*] was entitled by referring to written or printed advertising material accompanying or made part of the application.]

[(h) Attempted to settle the claim on the basis of an application that was altered without notice to, or knowledge or consent of, [*name of plaintiff*], [his/her/*nonbinary pronoun*/its] representative, agent, or broker.]

[(i) Failed, after payment of a claim, to inform [*name of plaintiff*] at [his/her/*nonbinary pronoun*/its] request, of the coverage under which payment was made.]

[(j) Informed [*name of plaintiff*] of its practice of appealing from arbitration awards in favor of insureds or claimants for the purpose of forcing them to accept settlements or compromises less than the amount awarded in arbitration.]

[(k) Delayed the investigation or payment of the claim by requiring [*name of plaintiff*], [or [his/her/*nonbinary pronoun*] physician], to submit a preliminary claim report, and then also required the submission of formal proof-of-loss forms, both of which contained substantially the same information.]

**[(*l*) Failed to settle a claim against [*name of plaintiff*] promptly once [his/her/*nonbinary*

pronoun/**its] liability had become apparent, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.]**

[(m) Failed to promptly provide a reasonable explanation of its reasons for denying the claim or offering a compromise settlement, based on the provisions of the insurance policy in relation to the facts or applicable law.]

[(n) Directly advised [*name of plaintiff***] not to hire an attorney.]**

[(o) Misled [*name of plaintiff***] as to the applicable statute of limitations, that is, the date by which an action against [***name of defendant***] on the claim had to be filed.]**

[(p) Delayed the payment or provision of hospital, medical, or surgical benefits for services provided with respect to acquired immune deficiency syndrome (AIDS) or AIDS-related complex for more than 60 days after it had received [*name of plaintiff***]'s claim for those benefits, doing so in order to investigate whether [***name of plaintiff***] had the condition before obtaining the insurance coverage. However, the 60-day period does not include any time during which [***name of defendant***] was waiting for a response for relevant medical information from a healthcare provider.]**

The presence or absence of any of these factors alone is not enough to determine whether [*name of defendant***]'s conduct was or was not unreasonable, that is, without proper cause. You must consider [***name of defendant***]'s conduct as a whole in making this determination.**

New April 2008; Revised December 2015, May 2020

Directions for Use

Although there is no private cause of action under Insurance Code section 790.03(h) (see *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 304–305 [250 Cal.Rptr. 116, 758 P.2d 58]), this instruction may be given in an insurance bad-faith action to assist the jury in determining whether the insurer's conduct was unreasonable or without proper cause. (See *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1078 [56 Cal.Rptr.3d 312], internal citations omitted.)

Include only the factors that are relevant to the case.

Sources and Authority

- Bad-Faith Insurance Practices. Insurance Code section 790.03.
- "[Plaintiff] was not seeking to recover on a claim based on a violation of Insurance Code section 790.03, subdivision (h). Rather, her claim was based on a claim of common law bad faith arising from [defendant]'s breach of the implied covenant of good faith and fair dealing which she is entitled to pursue. [Plaintiff]'s reliance upon the [expert's] declaration was for the purpose of providing evidence supporting her contention that [defendant] had breached the implied covenant by its actions. This is a *proper* use of evidence of an insurer's violations of the statute and the corresponding regulations." (*Jordan, supra,* 148 Cal.App.4th at p. 1078, original italics, internal

citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Insurance §§ ~~252, 253, 255, 321~~360, 361, 365, 461

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 14-A, *Statutory and Administrative Regulation—The California Regulator*, ¶ 14:109 et seq. (The Rutter Group)

1 California Liability Insurance Practice: Claims and Litigation, Ch. 24, *General Principles of Contract and Bad Faith* (Cont.Ed.Bar) § 24.30 et seq.

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.25 (Matthew Bender)

1 Rushing et al., Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 2, *Unfair Competition*, 2.11 (Matthew Bender)

2403. Breach of Employment Contract—Unspecified Term—Implied-in-Fact Promise Not to Discharge Without Good Cause

An employer promises to [discharge/demote] an employee only for good cause if it is reasonable for an employee to conclude, from the employer's words or conduct, that ~~[he/she]~~ the employee will be [discharged/demoted] only for good cause.

In deciding whether [*name of defendant***] promised to [discharge/demote] [***name of plaintiff***] only for good cause, you may consider, among other factors, the following:**

(a) [*Name of defendant***]'s personnel policies [and/or] practices;**

(b) [*Name of plaintiff***]'s length of service;**

(c) Any raises, commendations, positive evaluations, and promotions received by [*name of plaintiff***]; [and]**

(d) Whether [*name of defendant***] said or did anything to assure [***name of plaintiff***] of continued employment; [and]**

(e) [*Insert other relevant factor(s).***]**

Length of service, raises, and promotions by themselves are not enough to imply such a promise, although they are factors for you to consider.

New September 2003; Revised April 2009, June 2013, May 2020

Directions for Use

This instruction should be read when an employee is basing ~~his or her~~the claim of wrongful discharge on an implied covenant not to terminate except for good cause. Only those factors that apply to the facts of the particular case should be read.

In certain cases, it may be necessary to instruct the jury that if it finds there is an at-will provision in an express written agreement, there may not be an implied agreement to the contrary. (See *Faigin v. Signature Group Holdings, Inc.* (2012) 211 Cal.App.4th 726, 739 [150 Cal.Rptr.3d 123] [there cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results].)

Sources and Authority

- Express and Implied Contracts. Civil Code sections 1619–1621.
- "Labor Code section 2922 establishes a statutory presumption of at-will employment. However, an

employer and an employee are free to depart from the statutory presumption and specify that the employee will be terminated only for good cause, either by an express, or an implied, contractual agreement." (*Stillwell v. The Salvation Army* (2008) 167 Cal.App.4th 360, 380 [84 Cal.Rptr.3d 111], internal citations omitted.)

- "[M]ost cases applying California law … have held that an at-will provision in an *express written agreement*, signed by the employee, *cannot* be overcome by proof of an implied contrary understanding." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 340 fn. 10 [100 Cal.Rptr.2d 352, 8 P.3d 1089], original italics.)

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented." (*Guz, supra,* 24 Cal.4th at p. 337, internal citations omitted.)

- "The question whether such an implied-in-fact agreement [to termination only for cause] exists is a factual question for the trier of fact unless the undisputed facts can support only one reasonable conclusion." (*Faigin, supra,* 211 Cal.App.4th at p. 739.)

- "In the employment context, factors apart from consideration and express terms may be used to ascertain the existence and content of an employment agreement, including 'the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373], internal citation omitted.)

- "[A]n employee's *mere* passage of time in the employer's service, even where marked with tangible indicia that the employer approves the employee's work, cannot *alone* form an implied-in-fact contract that the employee is no longer at will. Absent other evidence of the employer's intent, longevity, raises and promotions are their own rewards for the employee's continuing valued service; they do not, *in and of themselves*, additionally constitute a contractual guarantee of future employment security." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 341–342 [100 Cal.Rptr.2d 352, 8 P.3d 1089], original italics.)

- "We agree that disclaimer language in an employee handbook or policy manual does not necessarily mean an employee is employed at will. But even if a handbook disclaimer is not controlling in every case, neither can such a provision be ignored in determining whether the parties' conduct was intended, and reasonably understood, to create binding limits on an employer's statutory right to terminate the relationship at will. Like any direct expression of employer intent, communicated to employees and intended to apply to them, such language must be taken into account, along with all other pertinent evidence, in ascertaining the terms on which a worker was employed." (*Guz, supra,* 24 Cal.4th at p. 340, internal citations omitted.)

- "Conceptually, there is no rational reason why an employer's policy that its employees will not be demoted except for good cause, like a policy restricting termination or providing for severance pay, cannot become an implied term of an employment contract. In each of these instances, an employer

promises to confer a significant benefit on the employee, and it is a question of fact whether that promise was reasonably understood by the employee to create a contractual obligation." (*Scott v. Pac. Gas & Elec. Co.* (1995) 11 Cal.4th 454, 464 [46 Cal.Rptr.2d 427, 904 P.2d 834].)

- "[Employer] retained the right to terminate [employee] for any lawful reason. Thus, … the fact that [employer] was obligated to pay compensation if it terminated [employee] for reasons other than his misconduct did not convert an otherwise at-will agreement into a for-cause agreement." (*Popescu v. Apple Inc.* (2016) 1 Cal.App.5th 39, 59 [204 Cal.Rptr.3d 302].)

Secondary Sources

3 Witkin, Summary of California Law (11~~10~~th ed. ~~2005~~2017) Agency and Employment, §§ ~~233, 237, 238~~246, 250, 251

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-B, *Agreements Limiting At–Will Termination*, ¶¶ 4:81, 4:105, 4:112 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.6–8.16

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.05[2][a]–[e] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.01, 249.13, 249.15, 249.50 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.21, 100.22, 100.25–100.27, 100.29, 100.34 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:14–6:16 (Thomson Reuters)

2423. Breach of Implied Covenant of Good Faith and Fair Dealing—Employment Contract—Essential Factual Elements

In every employment [contract/agreement] there is an implied promise of good faith and fair dealing. This implied promise means that neither the employer nor the employee will do anything to unfairly interfere with the right of the other to receive the benefits of the employment relationship. Good faith means honesty of purpose without any intention to mislead or to take unfair advantage of another. Generally speaking, it means being faithful to one's duty or obligation. However, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the terms of the contract.

[*Name of plaintiff***] claims that [***name of defendant***] violated the duty implied in their employment [contract/agreement] to act fairly and in good faith. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into an employment relationship;**

[2. **That [***name of plaintiff***] substantially performed [his/her/*nonbinary pronoun*] job duties [unless [***name of plaintiff***]'s performance was excused [or prevented]];]**

[3. **That all conditions required for [***name of defendant***]'s performance [had occurred/ [or] were excused];]**

4. **That [***name of defendant***] [***specify conduct that the plaintiff claims prevented ~~him/her~~ plaintiff from receiving the benefits ~~that he/she was entitled to have received~~ under the contract***];**

5. **That by doing so, [***name of defendant***] did not act fairly and in good faith; and**

6. **That [***name of plaintiff***] was harmed by [***name of defendant***]'s conduct.**

New September 2003; Revised November 2019, May 2020

Directions for Use

In every contract, there is an implied promise that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract. (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [328 P.2d 198].) Give this instruction if the employee asserts a claim that ~~his or her~~the employee's termination or other adverse employment action was in breach of this implied covenant. If the existence of a contract is at issue, see instructions on contract formation in the 300 series.

Include element 2 if the employee's substantial performance of ~~his or her~~the employee's required job

duties is at issue. Include element 3 if there are conditions precedent that the employee must fulfill before the employer is required to perform. In element 4, insert an explanation of the employer's conduct that violated the duty to act in good faith.

Do not give this instruction if the alleged breach is only the termination of an at-will contract. (See *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1391 [88 Cal.Rptr.2d 802].)

See also the Sources and Authority to CACI No. 325, *Breach of Implied Covenant of Good Faith and Fair Dealing—Essential Factual Elements*, for more authorities on the implied covenant outside of employment law.

Sources and Authority

- Contractual Conditions Precedent. Civil Code section 1439.

- "We therefore conclude that the employment relationship is not sufficiently similar to that of insurer and insured to warrant judicial extension of the proposed additional tort remedies in view of the countervailing concerns about economic policy and stability, the traditional separation of tort and contract law, and finally, the numerous protections against improper terminations already afforded employees." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 693 [254 Cal.Rptr. 211, 765 P.2d 373].)

- "A breach of the contract may also constitute a breach of the implied covenant of good faith and fair dealing. But insofar as the employer's acts are directly actionable as a breach of an implied-in-fact contract term, a claim that merely realleges that breach as a violation of the covenant is superfluous. This is because, as we explained at length in *Foley*, the remedy for breach of an employment agreement, including the covenant of good faith and fair dealing implied by law therein, is solely contractual. In the employment context, an implied covenant theory affords no separate measure of recovery, such as tort damages." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 352 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citation omitted.)

- "We do not suggest the covenant of good faith and fair dealing has no function whatever in the interpretation and enforcement of employment contracts. As indicated above, the covenant prevents a party from acting in bad faith to frustrate the contract's actual benefits. Thus, for example, the covenant might be violated if termination of an at-will employee was a mere pretext to cheat the worker out of another contract benefit to which the employee was clearly entitled, such as compensation already earned." (*Guz, supra,* 24 Cal.4th at p. 353, fn. 18.)

- "The reason for an employee's dismissal and whether that reason constitutes bad faith are evidentiary questions most properly resolved by the trier of fact." (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 26 [267 Cal.Rptr. 618], internal citations omitted.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-D, *Implied Covenant of Good Faith and Fair Dealing*, ¶¶ 4:330, 4:331, 4:340, 4:343, 4:346 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.27–8.28

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, §§ 60.02[2][c], 60.06 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.14 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:21–6:22 (Thomson Reuters)

2424. Affirmative Defense—Breach of the Implied Covenant of Good Faith and Fair Dealing—Good Faith Though Mistaken Belief

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[*Name of defendant*] claims that [he/she/*nonbinary pronoun*/it] did not breach the duty to act fairly and in good faith because [he/she/*nonbinary pronoun*/it] believed that there was a legitimate and reasonable business purpose for the conduct.

To succeed, [*name of defendant*] must prove both of the following:

1. **That [his/her/*nonbinary pronoun*/its] conduct was based on an honest belief that [*insert alleged mistake*]; and**

2. **That, if true, [*insert alleged mistake*] would have been a legitimate and reasonable business purpose for the conduct.**

New September 2003; Revised November 2019, May 2020

Directions for Use

In every contract, there is an implied promise that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract. (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [328 P.2d 198].) Give CACI No. 2423, *Breach of Implied Covenant of Good Faith and Fair Dealing—Employment Contract—Essential Factual Elements*, if the employee asserts a claim that ~~his or her~~the employee's termination or other adverse employment action was in breach of this implied covenant. Give this instruction if the employer asserts the defense that an honest, though mistaken, belief does not constitute a breach.

Sources and Authority

- "[B]ecause the implied covenant of good faith and fair dealing requires the employer to act fairly and in good faith, an employer's honest though mistaken belief that legitimate business reasons provided good cause for discharge, will negate a claim it sought in bad faith to deprive the employee of the benefits of the contract." (*Wilkerson v. Wells Fargo Bank* (1989) 212 Cal.App.3d 1217, 1231 [261 Cal.Rptr. 185], internal citation omitted, disapproved on other grounds in *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93, 96 [69 Cal.Rptr.2d 900, 948 P.2d 412].)

- "The jury was instructed that the neglect or refusal to fulfill a contractual obligation based on an honest, mistaken belief did not constitute a breach of the implied covenant." (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 26 [267 Cal.Rptr. 618].)

- "[*F*]*oley* does not preclude inquiry into an employer's motive for discharging an employee ... ." (*Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514, 1521 [273 Cal.Rptr. 296], overruled on other grounds, *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389 [46 Cal.Rptr.3d 668, 139 P.3d 56].)

- "[T]he jury was asked to determine in its special verdict whether appellants had a legitimate reason to terminate [plaintiff]'s employment and whether appellants acted in good faith on an honest but mistaken belief that they had a legitimate business reason to terminate [plaintiff]'s employment." (*Seubert, supra,* 223 Cal.App.3d at p. 1521 [upholding jury instruction].)

Secondary Sources

Chin et al., California. Practice Guide: Employment Litigation, Ch. 4-A, ~~Employment Contract Claims — *Employment Presumed At Will*~~, ¶¶ 4:5~~, 4:271~~ (The Rutter Group)

Chin et al., California. Practice Guide: Employment Litigation, Ch.4-C, *"Good Cause" for Termination*~~Ch. 4-D, Employment Contract Claims — Implied Covenant of Good Faith and Fair Dealing~~, ¶¶ 4:271 ~~et seq., 4:342 et seq.~~ (The Rutter Group)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.30 (Matthew Bender)

2430. Wrongful Discharge in Violation of Public Policy—Essential Factual Elements

[*Name of plaintiff***] claims [he/she/*nonbinary pronoun*] was discharged from employment for reasons that violate a public policy. It is a violation of public policy [***specify claim in case, e.g., to discharge someone from employment for refusing to engage in price fixing***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**

2. **That [***name of defendant***] discharged [***name of plaintiff***];**

3. **That [***insert alleged violation of public policy, e.g., "***[***name of plaintiff***]***'s refusal to engage in price fixing"***] was a substantial motivating reason for [***name of plaintiff***]'s discharge;**

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

5. **That the discharge was a substantial factor in causing [***name of plaintiff***] harm.**

New September 2003; Revised June 2013, June 2014, December 2014, November 2018, May 2020

Directions for Use

The judge should determine whether the purported reason for firing the plaintiff would amount to a violation of public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1092 [4 Cal.Rptr.2d 874, 824 P.2d 680]; overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80 fn. 6 [78 Cal. Rptr.2d 16, 960 P.2d 1046].) The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Note that there are two causation elements. First, there must be causation between the public policy violation and the discharge (element 3). This instruction uses the term "substantial motivating reason" to express this causation element. "[S]ubstantial motivating reason" has been held to be the appropriate standard for cases alleging termination in violation of public policy. (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 479 [161 Cal.Rptr.3d 758]; see *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Element 5 then expresses a second causation requirement; that the plaintiff was harmed as a result of the wrongful discharge.

If plaintiff alleges ~~he or she~~the plaintiff was forced or coerced to resign, then CACI No. 2431, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy*, or CACI No. 2432, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions That Violate Public Policy*, should be given instead. See also CACI No. 2510, *"Constructive Discharge" Explained*.

This instruction may be modified for adverse employment actions other than discharge, for example demotion, if done in violation of public policy. (See *Garcia v. Rockwell Internat. Corp.* (1986) 187 Cal.App.3d 1556, 1561 [232 Cal.Rptr. 490], disapproved on other grounds in *Gantt v. Sentry Ins.* (1992) 1 Cal.4th 1083, 1093 [4 Cal.Rptr.2d 874, 824 P.2d 680] [public policy forbids retaliatory action taken by employer against employee who discloses information regarding employer's violation of law to government agency].) See also CACI No. 2509, *"Adverse Employment Action" Explained*.

For an instruction on damages, give CACI No. 3903P, *Damages From Employer for Wrongful Discharge (Economic Damage).*

Sources and Authority

- " '[W]hile an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy. Any other conclusion would sanction lawlessness, which courts by their very nature are bound to oppose.' " (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1138–1139 [69 Cal.Rptr.3d 445], internal citations omitted.)

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330].)

- "The elements of a claim for wrongful discharge in violation of public policy are (1) an employer-employee relationship, (2) the employer terminated the plaintiff's employment, (3) the termination was substantially motivated by a violation of public policy, and (4) the discharge caused the plaintiff harm." (*Yau v. Allen* (2014) 229 Cal.App.4th 144, 154 [176 Cal.Rptr.3d 824].)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889–890 [66 Cal.Rptr.2d 888, 941 P.2d 1157], footnote omitted.)

- "Policies are not 'public' (and thus do not give rise to a common law tort claim) when they are derived from statutes that 'simply regulate conduct between private individuals, or impose requirements whose fulfillment does not implicate fundamental public policy concerns.' " (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 926 [180 Cal.Rptr.3d 359].)

- "[T]he cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute; (2) performing a statutory obligation (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance." (*Gantt, supra,* 1 Cal.4th at pp. 1090–1091, internal citations and footnote omitted, overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6 [78 Cal.Rptr.2d 16, 960 P.2d 1046];

accord *Stevenson, supra,* 16 Cal.4th at p. 889.)

- " [T]ermination of an employee most clearly violates public policy when it contravenes the provision of a statute forbidding termination for a specified reason … ." (*Diego, supra,* 231 Cal.App.4th at p. 926)

- "[Discharge because of employee's] [r]efusal to violate a governmental regulation may also be the basis for a tort cause of action where the administrative regulation enunciates a fundamental public policy and is authorized by statute." (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 708–709 [96 Cal.Rptr.3d 159].)

- "In the context of a tort claim for wrongful discharge, tethering public policy to specific constitutional or statutory provisions serves not only to avoid judicial interference with the legislative domain, but also to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees they discharge ... ." (*Stevenson, supra,* 16 Cal.4th at p. 889.)

- "[A]n employee need not prove an actual violation of law; it suffices if the employer fired him for reporting his 'reasonably based suspicions' of illegal activity." (*Green, supra,* 19 Cal.4th at p. 87, internal citation omitted.)

- "[A]n employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order ... ." (*Tameny, supra,* 27 Cal.3d at p. 178.)

- " [T]here is a 'fundamental public interest in a workplace free from illegal practices … .' '[T]he public interest is in a lawful, not criminal, business operation. Attainment of this objective requires that an employee be free to call his or her employer's attention to illegal practices, so that the employer may prevent crimes from being committed by misuse of its products by its employees.' " (*Yau, supra,* 229 Cal.App.4th at p. 157.)

- "An action for wrongful termination in violation of public policy 'can only be asserted against *an employer*. An individual who is not an employer cannot commit the tort of wrongful discharge in violation of public policy; rather, he or she can only be the agent by which *an employer* commits that tort.' " (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1351 [172 Cal.Rptr.3d 686], original italics.)

- Employees in both the private and public sector may assert this claim. (*See Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407 [4 Cal.Rptr.2d 203].)

- "Sex discrimination in employment may support a claim of tortious discharge in violation of public policy." (*Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 214 [126 Cal.Rptr.3d 651].)

- "In sum, a wrongful termination against public policy common law tort based on sexual harassment can be brought against an employer of any size." (*Kim, supra,* 226 Cal.App.4th at p. 1351.)

- "To establish a claim for wrongful termination in violation of public policy, an employee must prove causation. (See CACI No. 2430 [using phrase 'substantial motivating reason' to express causation].) Claims of whistleblower harassment and retaliatory termination may not succeed where a plaintiff 'cannot demonstrate the required nexus between his reporting of alleged statutory violations and his allegedly adverse treatment by [the employer].' " (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1357 [181 Cal.Rptr.3d 68].)

- "It would be nonsensical to provide a different standard of causation in FEHA cases and common law tort cases based on public policies encompassed by FEHA." (*Mendoza v. Western Medical Center Santa Ana* (2014) 222 Cal.App.4th 1334, 1341 [166 Cal.Rptr.3d 720].)

- "If claims for wrongful termination in violation of public policy must track FEHA, it necessarily follows that jury instructions pertinent to causation and motivation must be the same for both. Accordingly, we conclude the trial court did not err in giving the instructions set forth in the CACI model jury instructions." (*Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1323 [200 Cal.Rptr.3d 315].)

- "Under California law, if an employer did not violate FEHA, the employee's claim for wrongful termination in violation of public policy necessarily fails." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1169 [217 Cal.Rptr.3d 258].)

- "FEHA's policy prohibiting disability discrimination in employment is sufficiently substantial and fundamental to support a claim for wrongful termination in violation of public policy." (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 660 [163 Cal.Rptr.3d 392].)

- "Although the fourth cause of action references FEHA as one source of the public policy at issue, this is not a statutory FEHA cause of action. FEHA does not displace or supplant common law tort claims for wrongful discharge." (*Kim, supra,* 226 Cal.App.4th at p. 1349.)

- "[T]o the extent the trial court concluded Labor Code section 132a is the exclusive remedy for work-related injury discrimination, it erred. The California Supreme Court held '[Labor Code] section 132a does not provide an exclusive remedy and does not preclude an employee from pursuing FEHA and common law wrongful discharge remedies.' " (*Prue v. Brady Co./San Diego, Inc.* (2015) 242 Cal.App.4th 1367, 1381 [196 Cal.Rptr.3d 68].)

- "California's minimum wage law represents a fundamental policy for purposes of a claim for wrongful termination or constructive discharge in violation of public policy." (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 831−832 [166 Cal.Rptr.3d 242].)

- " 'Labor Code section 1102.5, subdivision (b), which prohibits employer retaliation against an employee who reports a reasonably suspected violation of the law to a government or law enforcement agency, reflects the broad public policy interest in encouraging workplace "whistleblowers," who may without fear of retaliation report concerns regarding an employer's illegal conduct. This public policy is the modern day equivalent of the long-established duty of the citizenry to bring to public attention the doings of a lawbreaker. [Citation.] …' " (*Ferrick, supra,* 231 Cal.App.4th at p. 1355.)

- "That [defendant]'s decision not to renew her contract for an additional season *might* have been influenced by her complaints about an unsafe working condition … does not change our conclusion in light of the principle that a decision not to renew a contract set to expire is not actionable in tort." (*Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 682 [145 Cal.Rptr.3d 766], original italics.)

- " ' "[P]ublic policy' as a concept is notoriously resistant to precise definition, and … courts should venture into this area, if at all, with great care … ." [Citation.] Therefore, *when the constitutional provision or statute articulating a public policy also includes certain substantive limitations in scope or remedy, these limitations also circumscribe the common law wrongful discharge cause of action.* Stated another way, the common law cause of action cannot be broader than the constitutional provision or statute on which it depends, and therefore it 'presents no impediment to employers that operate within the bounds of law." [Citation.]' " (*Dutra v. Mercy Medical Center Mt. Shasta* (2012) 209 Cal.App.4th 750, 756 [146 Cal.Rptr.3d 922], original italics.)

Secondary Sources

~~4~~ 3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § ~~255 et seq.~~272

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-(I)B~~A~~, *Wrongful Discharge In Violation Of Public Policy (Tameny Claims)*, ¶¶ ~~5:2,~~ 5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170, 5:195, 5:220, 5:235 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, § 5.45

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.50–249.52 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.52–100.61B (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:23–6:25 (Thomson Reuters)

2431. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy

[*Name of plaintiff***] claims that [he/she/*nonbinary pronoun*] was forced to resign rather than commit a violation of public policy. It is a violation of public policy [***specify claim in case, e.g. , for an employer to require that an employee engage in price fixing***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**

2. **That [***name of defendant***] required [***name of plaintiff***] to [***specify alleged conduct in violation of public policy, e.g., "engage in price fixing"***];**

3. **That this requirement was so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign;**

4. **That [***name of plaintiff***] resigned because of this requirement;**

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

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

New September 2003; Revised June 2014, December 2014, May 2020

Directions for Use

This instruction should be given if a plaintiff claims that ~~his or her~~the plaintiff's constructive termination was wrongful because the defendant required the plaintiff to commit an act in violation of public policy. If the plaintiff alleges ~~he or she~~the plaintiff was subjected to intolerable working conditions that violate public policy, see CACI No. 2432, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy*.

This instruction must be supplemented with CACI No. 3903P, *Damages From Employer for Wrongful Discharge (Economic Damage).* See also CACI No. 2510, *"Constructive Discharge" Explained*.

The judge should determine whether the purported reason for plaintiff's resignation would amount to a violation of public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1092 [4 Cal.Rptr.2d 874, 824 P.2d 680]~~.~~; overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80 fn. 6 [78 Cal.Rptr.2d 16, 960 P.2d 1046].) The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Sources and Authority

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy,

the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330].)

- "[A]n employer's authority over its employees does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. An employer engaging in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer." (*Tameny, supra,* 27 Cal.3d at p. 178.)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889–890 [66 Cal.Rptr.2d 888, 941 P.2d 1157], footnote omitted.)

- "[T]he cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute; (2) performing a statutory obligation (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance." (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090–1091 [4 Cal.Rptr.2d 874, 824 P.2d 680], internal citations and fn. omitted, overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6 [78 Cal.Rptr.2d 16, 960 P.2d 1046]; accord *Stevenson, supra,* 16 Cal.4th at p. 889.)

- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes." (*D'sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244–1245 [32 Cal.Rptr.2d 223, 876 P.2d 1022], internal citation omitted.)

- "Although situations may exist where the employee's decision to resign is unreasonable as a matter of law, '[w]hether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact. [Citation.]' " (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827 [166 Cal.Rptr.3d 242].)

- "In order to establish a constructive discharge, an employee must plead and prove ... that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra,* 7 Cal.4th at p. 1246.)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)

- "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "[T]he standard by which a constructive discharge is determined is an objective one-the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "[U]nder *Turner,* the proper focus is on the working conditions themselves, not on the plaintiff's *subjective* reaction to those conditions." (*Simers v. Los Angeles Times Communications, LLC* (2018) 18 Cal.App.5th 1248, 1272 [227 Cal.Rptr.3d 695], original italics.)

- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "[T]here was, as the trial court found, substantial evidence that plaintiff's age and disability were 'substantial motivating reason[s]' for the adverse employment action or actions to which plaintiff was subjected. But the discriminatory motive for plaintiff's working conditions has no bearing on whether the evidence was sufficient to establish constructive discharge." (*Simers, supra,* 18 Cal.App.5th at p. 1271.)

Secondary Sources

~~8~~ 3 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Agency and Employment, § ~~222~~235

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-G, *Constructive Discharge*, ¶¶ 4:405–4:406, 4:409–4:410, 4:421–4:422 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-A, *Wrongful Discharge In Violation Of Public Policy (Tameny Claims)*, ¶¶ 5~~:2,~~ 5:45–5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170, 5:195, 5:220 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.45–

5.46

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.31, 100.35–100.38 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:23–6:25 (Thomson Reuters)

2432. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions That Violate Public Policy

[*Name of plaintiff***] claims that [***name of defendant***] forced [him/her/nonbinary pronoun] to resign for reasons that violate public policy. It is a violation of public policy [***specify claim in case, e.g., for an employer to require an employee to work more than forty hours a week for less than minimum wage***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**

2. **That [***name of plaintiff***] was subjected to working conditions that violated public policy, in that [***describe conditions imposed on the employee that constitute the violation, e.g., "[name of plaintiff] was required to work more than forty hours a week for less than minimum wage"***];**

3. **That [***name of defendant***] intentionally created or knowingly permitted these working conditions;**

4. **That these working conditions were so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign;**

5. **That [***name of plaintiff***] resigned because of these working conditions;**

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

7. **That the working conditions were a substantial factor in causing [***name of plaintiff***]'s harm.**

To be intolerable, the adverse working conditions must be unusually aggravated or involve a continuous pattern of mistreatment. Trivial acts are insufficient.

New September 2003; Revised December 2014, June 2015, May 2020

Directions for Use

This instruction should be given if the plaintiff claims that ~~his or her~~the plaintiff's constructive termination was wrongful because defendant subjected plaintiff to intolerable working conditions in violation of public policy. The instruction must be supplemented with CACI No. 2433, *Wrongful Discharge in Violation of Public Policy—Damages.* See also CACI No. 2510, *"Constructive Discharge" Explained*.

The judge should determine whether the purported reason for plaintiff's resignation would amount to a violation of public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1092 [4 Cal.Rptr.2d 874, 824 P.2d 680],~~;~~ overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66,

80 fn. 6 [78 Cal.Rptr.2d 16, 960 P.2d 1046].) The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Whether conditions are so intolerable as to justify the employee's decision to quit rather than endure them is to be judged by an objective reasonable-employee standard. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1247 [32 Cal.Rptr.2d 223, 876 P.2d 1022].) This standard is captured in element 4. The paragraph at the end of the instruction gives the jury additional guidance as to what makes conditions intolerable. (See *id.* at p. 1247.) Note that in some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. (*Id.* at p. 1247, fn. 3.)

Sources and Authority

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330].)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889–890 [66 Cal.Rptr.2d 888, 941 P.2d 1157], footnote~~n.~~ omitted.)

- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes." (*D'sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)

- "Plaintiffs assert, in essence, that they were terminated for refusing to engage in conduct that violated fundamental public policy, to wit, nonconsensual sexual acts. They also assert, in effect, that they were discharged in retaliation for attempting to exercise a fundamental right -- the right to be free from sexual assault and harassment. Under either theory, plaintiffs, in short, should have been granted leave to amend to plead a cause of action for wrongful discharge in violation of public policy." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 91 [276 Cal.Rptr. 130, 801 P.2d 373].)

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner,supra,* 7 Cal.4th at pp. 1244–1245, internal citation omitted.)

- "Although situations may exist where the employee's decision to resign is unreasonable as a matter of law, '[w]hether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact. [Citation.]' " (*Vasquez v. Franklin Management Real Estate Fund, Inc.*

(2013) 222 Cal.App.4th 819, 827 [166 Cal.Rptr.3d 242].)

- "In order to establish a constructive discharge, an employee must plead and prove ... that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra,* 7 Cal.4th at p. 1246.)

- "In order to amount to a constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge" (*Turner, supra,* 7 Cal.4th at p. 1247, footnote and internal citation omitted.)

- "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "[T]he standard by which a constructive discharge is determined is an objective one-the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "[U]nder *Turner,* the proper focus is on the working conditions themselves, not on the plaintiff's *subjective* reaction to those conditions." (*Simers v. Los Angeles Times Communications, LLC* (2018) 18 Cal.App.5th 1248, 1272 [227 Cal.Rptr.3d 695], original italics.)

- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "[T]here was, as the trial court found, substantial evidence that plaintiff's age and disability were 'substantial motivating reason[s]' for the adverse employment action or actions to which plaintiff was subjected. But the discriminatory motive for plaintiff's working conditions has no bearing on whether the evidence was sufficient to establish constructive discharge." (*Simers, supra,* 18 Cal.App.5th at p. 1271.)

Secondary Sources

~~8~~ 3 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Agency and Employment, § ~~222~~235

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-G, Constructive Discharge, ¶¶ 4:405–4:406, 4:409–4:411, 4:421–4:422 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-(I)BA, Wrongful Discharge In Violation Of Public Policy (Tameny Claims), ¶¶ 5:42, 5:45–5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170, 5:195, 5:220 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.45–5.46

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.15, 249.50 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.31, 100.32, 100.36–100.38 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:23–6:25 (Thomson Reuters)

VF-2404. Employment—Breach of the Implied Covenant of Good Faith and Fair Dealing

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] and [*name of defendant*] enter into an employment relationship?**
   ____ Yes ____ No

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

2. **Did [*name of plaintiff*] substantially perform [his/her*/nonbinary pronoun*] job duties?**
   ____ Yes ____ No

   If your answer to question 2 is yes, skip question 3 and answer question 4. If you answered no, answer question 3.

3. **Was [*name of plaintiff*]'s performance excused or prevented?**
   ____ Yes ____ No

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

4. **Did [*name of defendant*] [*specify conduct that plaintiff claims prevented ~~him/her~~ plaintiff from receiving the benefits ~~that he/she was entitled to have received~~ under the contract*]?**
   ____ Yes ____ No

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

5. **Did [*name of defendant*] fail to act fairly and in good faith?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [*name of plaintiff*] harmed by [*name of defendant*]'s failure to act fairly and in good faith?**
   ____ Yes ____ No

   If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this

form.

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

[a. Past economic loss:

$ _____]

[b. Future economic loss:

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised December 2010, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 2423, *Breach of the Implied Covenant of Good Faith and Fair Dealing—Employment Contract—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.

Questions 2 and 3 should be deleted if substantial performance is not at issue.

The breakdown of damages in question 7 is optional; depending on the circumstances, users may wish to break down the damages even further.

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

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

any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2405. Breach of the Implied Covenant of Good Faith and Fair Dealing—Affirmative Defense—Good Faith Mistaken Belief

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We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] and [***name of defendant***] enter into an employment agreement?**
   ____ Yes ____ No

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

2. **Did [***name of plaintiff***] substantially perform [his/her/*nonbinary pronoun*] job duties?**
   ____ Yes ____ No

   If your answer to question 2 is yes, skip question 3 and answer question 4. If you answered no, answer question 3.

3. **Was [***name of plaintiff***]'s performance excused or prevented?**
   ____ Yes ____ No

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

4. **Did [***name of defendant***] [***specify conduct that plaintiff claims prevented ~~him/her~~ plaintiff from receiving the benefits ~~that he/she was entitled to have received~~ under the contract***]?**
   ____ Yes ____ No

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

5. **Was [***name of defendant***]'s conduct based on an honest belief that [***insert alleged mistake***]?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, skip question 6 and answer question 7.

6. **If true, would [***insert alleged mistake***] have been a legitimate and reasonable business purpose for the conduct?**
   ____ Yes ____ No

   If your answer to question 6 is no, then answer question 7. If you answered yes, stop

here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [*name of defendant*] fail to act fairly and in good faith?
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was [*name of plaintiff*] harmed by [*name of defendant*]'s failure to act in good faith?
____ Yes ____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

[a. Past economic loss:

$ _____]

[b. Future economic loss:

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised December 2010, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 2423, *Breach of the Implied Covenant of Good Faith and Fair Dealing—Employment Contract—Essential Factual Elements*, and CACI No. 2424, *Affirmative Defense—Breach of the Implied Covenant of Good Faith and Fair Dealing—Good Faith Though*

Mistaken Belief.

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.

Questions 2 and 3 should be deleted if substantial performance is not at issue.

The breakdown of damages in question 9 is optional; depending on the circumstances, users may wish to break down the damages even further.

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.

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

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her/*nonbinary pronoun*]. 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, May 2020

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~~the plaintiff 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).

- "Race" and "Protective Hairstyles." Government Code section 12926(w), (x).

- "[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~~1143–~~1021~~1147

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)

2508. Failure to File Timely Administrative Complaint (Gov. Code, § 12960(ed))—Plaintiff Alleges Continuing Violation

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[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit may not proceed because [***name of plaintiff***] did not timely file a complaint with the Department of Fair Employment and Housing (DFEH). A complaint is timely if it was filed within ~~one~~ three years of the date on which [***name of defendant***]'s alleged unlawful practice occurred.**

[*Name of plaintiff***] filed a complaint with the DFEH on [***date***]. [***Name of plaintiff***] may recover for acts of alleged [***specify the unlawful practice, e.g., harassment***] that occurred before [***insert date ~~one~~ three years before the DFEH complaint was filed***], only if [he/she/nonbinary pronoun] proves all of the following:**

1. **That [***name of defendant***]'s [***e.g., harassment***] that occurred before [***insert date ~~one~~ three years before the DFEH complaint was filed***] was similar or related to the conduct that occurred on or after that date;**

2. **That the conduct was reasonably frequent; and**

3. **That the conduct had not yet become permanent before that date.**

"Permanent" in this context means that the conduct has stopped, [*name of plaintiff***] has resigned, or [***name of defendant***]'s statements and actions would make it clear to a reasonable employee that any further efforts to resolve the issue internally would be futile.**

New June 2010; Revised December 2011, June 2015, May 2019; May 2020

Directions for Use

Give this instruction if the plaintiff relies on the continuing-violation doctrine in order to avoid the bar of the limitation period of ~~one~~ three years within which to file an administrative complaint. (See Gov. Code, § 12960(ed).) Although the continuing-violation doctrine is labeled an equitable exception ~~to the one-year deadline~~, it may involve triable issues of fact. (See *Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 723–724 [85 Cal.Rptr.3d 705].)

If the case involves multiple claims of FEHA violations, replace "lawsuit" in the opening sentence with reference to the particular claim or claims to which the continuing-violation rule may apply.

In the second paragraph, insert the date on which the administrative complaint was filed and the dates on which both sides allege that the complaint requirement was triggered. The verdict form should ask the jury to specify the date that it finds that the requirement accrued. If there are multiple claims with different continuing-violation dates, repeat this paragraph for each claim.

The plaintiff has the burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with the DFEH. (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1345 [172 Cal.Rptr.3d 686].) This burden of proof extends to any excuse or justification for the failure to timely file, such as the continuing--violation exception. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1402 [194 Cal.Rptr.3d 689].)

Sources and Authority

- Administrative Complaint for FEHA Violation. Government Code section 12960.

- "At a jury trial, the facts are presented and the jury must decide whether there was a continuing course of unlawful conduct based on the law as stated in CACI No. 2508." (*Jumaane, supra,* 241 Cal.App.4th at p. 1401.)

- "Under the FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a complaint with the Department of Fair Employment and Housing (Department) and must obtain from the Department a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA. The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA. As for the applicable limitation period, the FEHA provides that no complaint for any violation of its provisions may be filed with the Department 'after the expiration of one year from the date upon which the alleged *unlawful practice* or refusal to cooperate *occurred*,' with an exception for delayed discovery not relevant here." (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 63 [105 Cal.Rptr.2d 652], original italics, internal citations omitted.)

- "[I]t is 'plaintiff's burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with [DFEH] and obtaining a right-to-sue letter.' " (*Kim, supra,* 226 Cal.App.4th at p. 1345.)

- "[W]hen defendant has asserted the statute of limitation defense, plaintiff has the burden of proof to show his or her claims are timely under the continuing violation doctrine." (*Jumaane, supra,* 241 Cal.App.4th at p. 1402.)

- "Under the continuing violation doctrine, a plaintiff may recover for unlawful acts occurring outside the limitations period if they continued into that period. The continuing violation doctrine requires proof that (1) the defendant's actions inside and outside the limitations period are sufficiently similar in kind; (2) those actions occurred with sufficient frequency; and (3) those actions have not acquired a degree of permanence." (*Wassmann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, 850–851 [234 Cal.Rptr.3d 712] , internal citations omitted.)

- " '[P]ermanence' in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile. [¶] Thus, when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability harassment, and this course of

conduct does not constitute a constructive discharge, the statute of limitations begins to run, not necessarily when the employee first believes that his or her rights may have been violated, but rather, either when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, or when the employee is on notice that further efforts to end the unlawful conduct will be in vain. Accordingly, an employer who is confronted with an employee seeking accommodation of disability or relief from disability harassment may assert control over its legal relationship with the employee either by accommodating the employee's requests, or by making clear to the employee in a definitive manner that it will not be granting any such requests, thereby commencing the running of the statute of limitations." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823–824 [111 Cal.Rptr.2d 87, 29 P.3d 175], internal citations omitted.)

- "[T]he *Richards* court interpreted section 12960 to mean that when a continuing pattern of wrongful conduct occurs partly in the statutory period and partly outside the statutory period, the limitations period begins to accrue once an employee is on notice of the violation of his or her rights and on notice that 'litigation, not informal conciliation, is the only alternative for the vindication of his or her rights.' " (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1412 [159 Cal.Rptr.3d 749].)

- "A continuing violation may be established by demonstrating 'a company wide policy or practice' or 'a series of related acts against a single individual.' 'The continuing violation theory generally has been applied in the context of a continuing policy and practice of discrimination on a company-wide basis; a plaintiff who shows that a policy and practice operated at least in part within the limitation period satisfies the filing requirements. "[A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions." ' The plaintiff must demonstrate that at least one act occurred within the filing period and that 'the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." … The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern.' " (*Morgan, supra,* 88 Cal.App.4th at p. 64, internal citations omitted.)

- "[A] continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence would have known, [~~he~~the plaintiff] was being discriminated against at the time the earlier events occurred." (*Morgan, supra,* 88 Cal.App.4th at p. 65.)

- "The Supreme Court has extended the continuing violation doctrine to retaliation claims. And the doctrine also applies to racial harassment claims. Indeed, as we observed in *Morgan v. Regents of University of California, supra,* 88 Cal.App.4th 52, 65: 'Cases alleging a hostile work environment due to racial or sexual harassment are often found to come within the continuing violations framework.' " (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 270 [100 Cal.Rptr.3d 296], internal citations omitted.)

Secondary Sources

~~7~~ 8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1065

3 Witkin, California Procedure (5th ed. 2008) Actions, § 564

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:561.1, 7:975 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 16-A, *Failure To Exhaust Administrative Remedies*, ¶ 16:85 (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.51[1] (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.59 (Matthew Bender)

2510. "Constructive Discharge" Explained

[*Name of plaintiff*] must prove that [he/she/*nonbinary pronoun*] was constructively discharged. To establish constructive discharge, [*name of plaintiff*] must prove the following:

1. **That [*name of defendant*] [through** [*name of defendant*]**'s officers, directors, managing agents, or supervisory employees] intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in [*name of plaintiff*]'s position would have had no reasonable alternative except to resign; and**

2. **That [*name of plaintiff*] resigned because of these working conditions.**

In order to be sufficiently intolerable, adverse working conditions must be unusually aggravated or amount to a continuous pattern. In general, single, trivial, or isolated acts of misconduct are insufficient to support a constructive discharge claim. But in some circumstances, a single intolerable incident may constitute a constructive discharge.

New June 2012; Revised May 2019, May 2020

Directions for Use

Give this instruction with CACI No. 2401, *Breach of Employment Contract—Unspecified Term—Actual or Constructive Discharge—Essential Factual Elements*, CACI No. 2500, *Disparate Treatment—Essential Factual Elements*, CACI No. 2505, *Retaliation,* CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements*, CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements*, or CACI No. 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements*, if the employee alleges that because of the employer's actions, ~~he or she~~the employee had no reasonable alternative other than to leave the employment. Constructive discharge can constitute the adverse employment action required to establish a FEHA violation for discrimination or retaliation. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 [76 Cal.Rptr.3d 632].)

Sources and Authority

- "[C]onstructive discharge occurs only when an employer terminates employment by forcing the employee to resign. A constructive discharge is equivalent to a dismissal, although it is accomplished indirectly. Constructive discharge occurs only when the employer coerces the employee's resignation, either by creating working conditions that are intolerable under an objective standard, or by failing to remedy objectively intolerable working conditions that actually are known to the employer. We have said 'a constructive discharge is legally regarded as a firing rather than a resignation.' " (*Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal.4th 731, 737 [63 Cal.Rptr.2d 636, 936 P.2d 1246], internal citations omitted.)

- "Actual discharge carries significant legal consequences for employers, including possible liability for wrongful discharge. In an attempt to avoid liability, an employer may refrain from actually firing

an employee, preferring instead to engage in conduct causing him or her to quit. The doctrine of constructive discharge addresses such employer-attempted 'end runs' around wrongful discharge and other claims requiring employer-initiated terminations of employment." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244 [32 Cal.Rptr.2d 223, 876 P.2d 1022].)

- "Standing alone, constructive discharge is neither a tort nor a breach of contract, but a doctrine that transforms what is ostensibly a resignation into a firing." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "In order to amount to constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner, supra,* 7 Cal.4th at p. 1247, internal citation and footnotes omitted.)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)

- "Although situations may exist where the employee's decision to resign is unreasonable as a matter of law, '[w]hether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact. [Citation.]' " (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827 [166 Cal.Rptr.3d 242].)

- "[T]he standard by which a constructive discharge is determined is an objective one—the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "[U]nder *Turner,* the proper focus is on the working conditions themselves, not on the plaintiff's subjective reaction to those conditions." (*Simers v. Los Angeles Times Communications, LLC* (2018) 18 Cal.App.5th 1248, 1272 [227 Cal.Rptr.3d 695].)

- "The length of time the plaintiff remained on the job may be *one* relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner, supra,* 7 Cal.4th at p. 1254, original italics.)

- "[T]here was, as the trial court found, substantial evidence that plaintiff's age and disability were 'substantial motivating reason[s]' for the adverse employment action or actions to which plaintiff was subjected. But the discriminatory motive for plaintiff's working conditions has no bearing on whether the evidence was sufficient to establish constructive discharge." (*Simers, supra,* 18 Cal.App.5th at p. 1271.)

- "In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly

permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. [¶] For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees." (*Turner, supra,* 7 Cal.4th at p. 1251.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 238

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-G, *Constructive Discharge*, ¶ 4:405 et seq. (The Rutter Group)

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.34 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.31 et seq. (Matthew Bender)

2521A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff***] claims that [he/she/*nonbinary pronoun*] was subjected to harassment based on [his/her/*nonbinary pronoun*] [***describe protected status, e.g., race, gender, or age***] at [***name of defendant***] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive.**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

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

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

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

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

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

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

   [That a supervisor engaged in the conduct;]

   [*or***]**

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

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

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

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018, July 2019, May 2020

Directions for Use

This instruction is for use in a hostile work environment case when the defendant is an employer or other

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

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

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

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).

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

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- "[A]n employer is strictly liable for all acts of sexual harassment by a supervisor." (*State Dep't of Health Servs., supra,* 31 Cal.4th at p. 1042.)

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

- "When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action)." (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 952 [139 Cal.Rptr.3d 464].)

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

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the

supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

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

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

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

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

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

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

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not

perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "The stray remarks doctrine … 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." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540–541 [113 Cal.Rptr.3d 327, 235 P.3d 988], internal citations omitted.)

- "[I]n reviewing the trial court's grant of [defendant]'s summary judgment motion, the Court of Appeal properly considered evidence of alleged discriminatory comments made by decision makers and coworkers along with all other evidence in the record." (*Reid, supra,* 50 Cal.4th at p. 545.)

- "[M]any employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment, however liberalized it be." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 286 [100 Cal.Rptr.3d 296].)

- "In contending that the 'subjectively offensive' element was not proven, a defendant 'will assert that a plaintiff consented to the conduct through active participation in it, or was not injured because the plaintiff did not subjectively find it abusive.' [¶] [Evidence Code] Section 1106 limits the evidence the defendant may use to support this assertion. It provides that '[i]n any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff … .' This general rule is, however, subject to the exception that it 'does not apply to evidence of the plaintiff's sexual conduct with the alleged perpetrator.' The term 'sexual conduct' within the meaning of section 1106 has been broadly construed to include 'all active or passive behavior (whether statements or actions), that either directly or through reasonable inference establishes a plaintiff's willingness to engage in sexual activity,' including 'racy banter, sexual horseplay, and statements concerning prior, proposed, or planned sexual exploits.' " (*Meeks v. AutoZone, Inc.* (2018) 24 Cal.App.5th 855, 874 [235 Cal.Rptr.3d 161], internal citations omitted.)

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

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

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

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

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

- "[A] heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the attacks are motivated by sexual desire or interest." (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1239–1240 [166 Cal.Rptr.3d 676].)

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

- "California courts have held so-called 'me too' evidence, that is, evidence of gender bias against employees other than the plaintiff, may be admissible evidence in discrimination and harassment cases." (*Meeks, supra,* 24 Cal.App.5th at p. 871.)

Secondary Sources

~~4~~ 3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

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

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

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

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

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

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

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

2522A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her/*nonbinary pronoun*] to harassment based on [***describe protected status, e.g., race, gender, or age***] at [***name of employer***] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive.**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

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

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

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

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

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

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

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

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

Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018, July 2019, May 2020

Directions for Use

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

2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

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

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

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment;

and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

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

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

Secondary Sources

~~4~~ 3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

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

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

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

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

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

California Civil Practice: Employment Litigation §§ 2:56–2:56.50~~1~~ (Thomson Reuters)

2526. Affirmative Defense—Avoidable Consequences Doctrine (Sexual Harassment by a Supervisor)

If [*name of plaintiff*] proves that [*name of supervisor*] sexually harassed [him/her/*nonbinary pronoun*], [*name of employer defendant*] is responsible for [*name of plaintiff*]'s harm caused by the harassment. However, [*name of employer defendant*] claims that [*name of plaintiff*] could have avoided some or all of the harm with reasonable effort. To succeed, [*name of employer defendant*] must prove all of the following:

1. **That [*name of employer defendant*] took reasonable steps to prevent and correct workplace sexual harassment;**

2. **That [*name of plaintiff*] unreasonably failed to use the preventive and corrective measures for sexual harassment that [*name of employer defendant*] provided; and**

3. **That the reasonable use of [*name of employer defendant*]'s procedures would have prevented some or all of [*name of plaintiff*]'s harm.**

You should consider the reasonableness of [*name of plaintiff*]'s actions in light of the circumstances facing [him/her/*nonbinary pronoun*] at the time, including [his/her/*nonbinary pronoun*] ability to report the conduct without facing undue risk, expense, or humiliation.

If you decide that [*name of employer defendant*] has proved this claim, you should not include in your award of damages the amount of damages that [*name of plaintiff*] could have reasonably avoided.

New April 2004; Revised December 2011, December 2015, May 2020

Directions for Use

Give this instruction if the employer asserts the affirmative defense of "avoidable consequences." The essence of the defense is that the employee could have avoided part or most of the harm had ~~he or she~~the employee taken advantage of procedures that the employer had in place to address sexual harassment in the workplace. The avoidable-consequences doctrine is a defense only to damages, not to liability. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1045 [6 Cal.Rptr.3d 441, 79 P.3d 556].) For other instructions that may also be given on failure to mitigate damages generally, see CACI No. 3963, *Affirmative Defense—Employee's Duty to Mitigate Damages*, and CACI No. 3930, *Mitigation of Damages (Personal Injury)*.

Whether this defense may apply to claims other than for supervisor sexual harassment has not been clearly addressed by the courts. It has been allowed against a claim for age discrimination in a constructive discharge case. (See *Rosenfeld v. Abraham Joshua Heschel Day School, Inc.* (2014) 226 Cal.App.4th 886, 900−901 [172 Cal.Rptr.3d 465].)

Sources and Authority

- "[W]e conclude that under the FEHA, an employer is strictly liable for all acts of sexual harassment by a supervisor. But strict liability is not absolute liability in the sense that it precludes all defenses. Even under a strict liability standard, a plaintiff's own conduct may limit the amount of damages recoverable or bar recovery entirely." (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1042, internal citations omitted.)

- "We emphasize that the defense affects damages, not liability. An employer that has exercised reasonable care nonetheless remains strictly liable for harm a sexually harassed employee could not have avoided through reasonable care. The avoidable consequences doctrine is part of the law of damages; thus, it affects only the remedy available. If the employer establishes that the employee, by taking reasonable steps to utilize employer-provided complaint procedures, could have caused the harassing conduct to cease, the employer will nonetheless remain liable for any compensable harm the employee suffered before the time at which the harassment would have ceased, and the employer avoids liability only for the harm the employee incurred thereafter." (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1045, internal citation omitted.)

- "Under the avoidable consequences doctrine as recognized in California, a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure. The reasonableness of the injured party's efforts must be judged in light of the situation existing at the time and not with the benefit of hindsight. 'The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law.' The defendant bears the burden of pleading and proving a defense based on the avoidable consequences doctrine." (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1043, internal citations omitted.)

- "Although courts explaining the avoidable consequences doctrine have sometimes written that a party has a 'duty' to mitigate damages, commentators have criticized the use of the term 'duty' in this context, arguing that it is more accurate to state simply that a plaintiff may not recover damages that the plaintiff could easily have avoided." (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1043, internal citations omitted.)

- "We hold ... that in a FEHA action against an employer for hostile environment sexual harassment by a supervisor, an employer may plead and prove a defense based on the avoidable consequences doctrine. In this particular context, the defense has three elements: (1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered." (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1044.)

- "This defense will allow the employer to escape liability for those damages, and only those damages, that the employee more likely than not could have prevented with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment." (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1044, internal citations omitted.)

- "If the employer establishes that the employee, by taking reasonable steps to utilize employer-provided complaint procedures, could have caused the harassing conduct to cease, the employer will nonetheless remain liable for any compensable harm the employee suffered before the time at which the harassment would have ceased, and the employer avoids liability only for the harm the employee incurred thereafter." (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1045, internal citations omitted.)

- "We stress also that the holding we adopt does not demand or expect that employees victimized by a supervisor's sexual harassment must always report such conduct immediately to the employer through internal grievance mechanisms. The employer may lack an adequate antiharassment policy or adequate procedures to enforce it, the employer may not have communicated the policy or procedures to the victimized employee, or the employee may reasonably fear reprisal by the harassing supervisor or other employees. Moreover, in some cases an employee's natural feelings of embarrassment, humiliation, and shame may provide a sufficient excuse for delay in reporting acts of sexual harassment by a supervisor." (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1045.)

Secondary Sources

6 Witkin, Summary of California Law (~~10~~11th ed. ~~2010~~2017) Torts, § ~~1624~~1798

Chin et al., Cal~~ifornia.~~ Practice Guide: Employment Litigation, Ch. 10-D, *Employer Liability For Workplace Harassment*, ¶¶ 10:360, 10:361, 10:365–10:367, 10:371, 10:375 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.81[7][c], 41.92A (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.36[2][a], 115.54[3] (Matthew Bender)

2543. Disability Discrimination—"Essential Job Duties" Explained (Gov. Code, §§ 12926(f), 12940(a)(1))

In deciding whether a job duty is essential, you may consider, among other factors, the following:

a. Whether the reason the job exists is to perform that duty;

b. Whether there is a limited number of employees available who can perform that duty;

c. Whether the job duty is highly specialized so that the person currently holding the position was hired for ~~his or her~~the person's expertise or ability to perform the particular duty.

Evidence of whether a particular duty is essential includes, but is not limited to, the following:

a. [*Name of defendant*]**'s judgment as to which functions are essential;**

b. Written job descriptions prepared before advertising or interviewing applicants for the job;

c. The amount of time spent on the job performing the duty;

d. The consequences of not requiring the person currently holding the position to perform the duty;

e. The terms of a collective bargaining agreement;

f. The work experiences of past persons holding the job;

g. The current work experience of persons holding similar jobs;

h. Reference to the importance of the job in prior performance reviews.

"Essential job duties" do not include the marginal duties of the position. "Marginal duties" are those that, if not performed would not eliminate the need for the job, or those that could be readily performed by another employee, or those that could be performed in another way.

New September 2003; Revoked June 2013; Restored and Revised December 2013; Revised May 2020

Directions for Use

Give this instruction with CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements*, or CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—*

Essential Factual Elements, or both, if it is necessary to explain what is an "essential job duty." (See Gov. Code, §§ 12926(f), 12940(a)(1); see also *Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 743−744 [151 Cal.Rptr.3d 292].) While the employee has the burden to prove that ~~he or she~~the employee can perform essential job duties, with or without reasonable accommodation, it is unresolved which party has the burden of proving that a job duty is essential. (See *Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 972−973 [150 Cal.Rptr.3d 385].)

Sources and Authority

- Ability to Perform Essential Duties. Government Code section 12940(a)(1).
- "Essential Functions" Defined. Government Code section 12926(f).
- Evidence of Essential Functions. 2 California Code of Regulations section 11065(e)(2).
- Marginal Functions. 2 California Code of Regulations section 11065(e)(3).
- " ' "Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. "Essential functions" does not include the marginal functions of the position.' ' "Marginal functions" of an employment position are those that, if not performed, would not eliminate the need for the job or that could be readily performed by another employee or that could be performed in an alternative way.' 'A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following: [¶] (A) … [T]he reason the position exists is to perform that function. [¶] (B) … [T]he limited number of employees available among whom the performance of that job function can be distributed. [¶] [And] (C) … the incumbent in the position is hired for his or her expertise or ability to perform the particular [highly specialized] function.' " (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 373 [184 Cal.Rptr.3d 9], internal citations omitted.)
- "Evidence of 'essential functions' may include the employer's judgment, written job descriptions, the amount of time spent on the job performing the function, the consequences of not requiring employees to perform the function, the terms of a collective bargaining agreement, the work experiences of past incumbents in the job, and the current work experience of incumbents in similar jobs." (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 717–718 [214 Cal.Rptr.3d 113].)
- "The trial court's essential functions finding is also supported by the evidence presented by defendant corresponding to the seven categories of evidence listed in [Government Code] section 12926(f)(2). 'Usually no one listed factor will be dispositive … .' " (*Lui, supra,* 211 Cal.App.4th at p. 977.)
- "The question whether plaintiffs could perform the essential functions of a position to which they sought reassignment is relevant to a claim for failure to accommodate under section 12940, subdivision (m), and to a claim for failure to engage in the interactive process under section 12940, subdivision (n)." (*Atkins, supra,* 8 Cal.App.5th at p. 717.)
- "The identification of essential job functions is a 'highly fact-specific inquiry.' " (*Lui, supra,* 211 Cal.App.4th at p. 971.)

- "It is clear that plaintiff bore the burden of proving 'that he or she is a qualified individual under the FEHA (i.e., that he or she can perform the essential functions of the job with or without reasonable accommodation).' It is less clear whether that burden included the burden of proving what the essential functions of the position are, rather than just plaintiff's ability to perform the essential functions. Under the ADA, a number of federal decisions have held that '[a]lthough the plaintiff bears the ultimate burden of persuading the fact finder that he can perform the job's essential functions, … "an employer who disputes the plaintiff's claim that he can perform the essential functions must put forth evidence establishing those functions." [Citation.]' … Arguably, plaintiff's burden of proving he is a qualified individual includes the burden of proving which duties are essential functions of the positions he seeks. Ultimately, we need not and do not decide in the present case which party bore the burden of proof on the issue at trial … ." (*Lui, supra,* 211 Cal.App.4th at pp. 972−973, internal citations omitted.)

- " [R]equiring employers to eliminate an essential function of a job to accommodate a disabled employee 'would be at odds with the definition of the employee's prima facie case' under FEHA. The employee's burden includes 'showing he or she can perform the essential functions of the job with accommodation, not that an essential function can be eliminated altogether to suit his or her restrictions.' " (*Atkins, supra,* 8 Cal.App.5th at p. 720.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1045–1049

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment and Housing Act (FEHA),* ¶¶ 9:2247, 9:2247.1, 9:2247.2, 9:2402–9:2402.1 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.97[1] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.54, 115.104 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:86 (Thomson Reuters)

2547. Disability-Based Associational Discrimination—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her/*nonbinary pronoun*] based on [his/her/*nonbinary pronoun*] association with a disabled person. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That [***name of plaintiff***] was [***specify basis of association or relationship, e.g., the brother of [name of disabled person]***], who had [a] [***e.g., physical condition***];**

4. [**That [***name of disabled person***]'s [***e.g., physical condition***] was costly to [***name of defendant***] because [***specify reason, e.g., [name of disabled person] was covered under [plaintiff]'s employer-provided health care plan***];]**

   [or]

   [That [*name of defendant***] feared [***name of plaintiff***]'s association with [***name of disabled person***] because [***specify, e.g., [name of disabled person] has a disability with a genetic component and [name of plaintiff] may develop the disability as well***];]**

   [or]

   [That [*name of plaintiff***] was somewhat inattentive at work because [***name of disabled person***]'s [***e.g., physical condition***] requires [***name of plaintiff***]'s attention, but not so inattentive that to perform to [***name of defendant***]'s satisfaction [***name of plaintiff***] would need an accommodation;]**

   [or]

   [[*Specify other basis for associational discrimination***];]**

5. **That [***name of plaintiff***] was able to perform the essential job duties;**

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

   [*or***]**

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

   [*or***]**

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

7. **That [*name of plaintiff*]'s association with [*name of disabled person*] was a substantial motivating reason for [*name of defendant*]'s [decision to [discharge/refuse to hire/[*other adverse employment action*]] [*name of plaintiff*]/conduct];**

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

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

New December 2014; Revised May 2017, May 2020

Directions for Use

Give this instruction if plaintiff claims that ~~he or she~~the plaintiff was subjected to an adverse employment action because of ~~his or her~~the plaintiff's association with a disabled person. Discrimination based on an employee's association with a person who is (or is perceived to be) disabled is an unlawful employment practice under the FEHA. (See Gov. Code, § 12926(o).)

Select a term to use throughout to describe the source of the disabled person's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Three versions of disability-based associational discrimination have been recognized, called "expense," "disability by association," and "distraction." (See *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655–660 [163 Cal.Rptr.3d 392] [claim for "disability-based associational discrimination" adequately pled].) Element 4 sets forth options for the three versions. But the versions are illustrative rather than exhaustive; therefore, an "other" option is provided. (See *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1042 [207 Cal.Rptr.3d 120].)

An element of a disability discrimination case is that the plaintiff must be otherwise qualified to do the job, with or without reasonable accommodation. (*Green v. State of California* (2007) 42 Cal.4th 254, 262 [64 Cal.Rptr.3d 390, 165 P.3d 118] (see element 5).) However, the FEHA does not expressly require reasonable accommodation for association with a disabled person. (Gov. Code, § 12940(m) [employer must reasonably accommodate applicant or employee].) Nevertheless, one court has suggested that such a requirement may exist, without expressly deciding the issue. (See *Castro-Ramirez, supra,* 2 Cal.App.5th at pp. 1038−1039.) A reference to reasonable accommodation may be added to element 5 if the court decides to impose this requirement.

Read the first option for element 6 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained*, if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 6 and also give CACI

No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 7 if either the second or third option is included for element 4.

Element 7 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; *Castro-Ramirez, supra,* 2 Cal.App.5th at p. 1037; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

If the existence of the associate's disability is disputed, additional instructions defining "medical condition," "mental disability," and "physical disability," may be required. (See Gov. Code, § 12926(i), (j), (m).)

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Association With Disabled Person Protected. Government Code section 12926(o).
- " 'Three types of situation are, we believe, within the intended scope of the rarely litigated … association section. We'll call them "expense," "disability by association," and "distraction." They can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) ("expense") his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) ("disability by association") the employee's homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ("distraction") the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours.' " (*Rope, supra,* 220 Cal.App.4th at p. 657.)
- "We agree with *Rope* [*supra*] that *Larimer* [*Larimer v. International Business Machines Corp.* (7th Cir. 2004) 370 F.3d 698] provides an illustrative, rather than an exhaustive, list of the kinds of circumstances in which we might find associational disability discrimination. The common thread among the *Larimer* categories is simply that they are instances in which the 'employer has a motive to discriminate against a nondisabled employee who is merely associated with a disabled person.' As we discuss above, this is an element of a plaintiff's prima facie case—that the plaintiff's association with a disabled person was a substantial motivating factor for the employer's adverse employment action.

Rope held the alleged facts in that case could give rise to an inference of such discriminatory motive. Our facts do not fit neatly within one of the *Larimer* categories either, but a jury could reasonably infer the requisite discriminatory motive." (*Castro-Ramirez, supra,* 2 Cal.App.5th at p. 1042, internal citation omitted.)

- " '[A]n employer who discriminates against an employee because of the latter's association with a disabled person is liable even if the motivation is purely monetary. But if the disability plays no role in the employer's decision … then there is no *disability* discrimination.' " (*Rope, supra,* 220 Cal.App.4th at p. 658, original italics.)

- "A prima facie case of disability discrimination under FEHA requires a showing that (1) the plaintiff suffered from a disability, (2) the plaintiff was otherwise qualified to do his or her job, with or without reasonable accommodation, and (3) the plaintiff was subjected to adverse employment action because of the disability. Adapting this [disability discrimination] framework to the associational discrimination context, the 'disability' from which the plaintiff suffers is his or her association with a disabled person. … [T]he disability must be a substantial factor motivating the employer's adverse employment action." (*Castro-Ramirez, supra,* 2 Cal.App.5th at p. 1037.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra,* 56 Cal.4th at p. 232, original italics.)

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

- "[W]hen section 12940, subdivision (m) requires employers to reasonably accommodate 'the known physical … disability of an applicant or employee,' read in conjunction with other relevant provisions, subdivision (m) may reasonably be interpreted to require accommodation based on the employee's association with a physically disabled person." (*Castro-Ramirez, supra,* 2 Cal.App.5th at pp. 1038–1039.)

Secondary Sources

8 Witkin, Summary of California Law (10~~th~~11th ed. ~~2005~~2017) Constitutional Law, §§ ~~936~~1045, 1046, 1049

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, ~~Disability Discrimination — California Fair Employment And Housing Act (FEHA)~~, ¶¶ 9:2213–9:2215 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment*

Opportunity Laws, § 41.32[2] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.14, 115.23, 115.34 (Matthew Bender)

2548. Disability Discrimination—Refusal to Make Reasonable Accommodation in Housing (Gov. Code, § 12927(c)(1))

[*Name of plaintiff***] claims that [***name of defendant***] refused to reasonably accommodate [his/her/*nonbinary pronoun*] [***select term to describe basis of limitations, e.g., physical disability***] as necessary to afford [him/her/*nonbinary pronoun*] an equal opportunity to use and enjoy a dwelling. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [***specify defendant's source of authority to provide housing, e.g., owner***] of [a/an] [***specify nature of housing at issue, e.g., apartment building***];**

2. **That [***name of plaintiff***] [sought to rent/was living in/[***specify other efforts to obtain housing***]] the [***e.g., apartment***];**

3. **That [***name of plaintiff***] had [a history of having] [a] [***e.g., physical disability***] [that limited [***insert major life activity***]];**

4. **That [***name of defendant***] knew of, or should have known of, [***name of plaintiff***]'s disability;**

5. **That in order to afford [***name of plaintiff***] an equal opportunity to use and enjoy the [***e.g., apartment***], it was necessary to [***specify accommodation required***];**

6. **That it was reasonable to [***specify accommodation***];**

7. **That [***name of defendant***] refused to make this accommodation.**

New May 2017; Revised May 2020

Directions for Use

This instruction is for use in a case alleging discrimination in housing based on a failure to reasonably accommodate a disability. Under the Fair Employment and Housing Act, "discrimination" includes the refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling. (Gov. Code, § 12927(c)(1).)

In the introductory paragraph, select a term to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes." Use the term in element 3.

In element 2, if the plaintiff encountered a barrier before actually submitting an application, such as discovering a policy that would make it impossible to live in the unit, specify what ~~he or she~~the plaintiff did to obtain the housing.

In element 3, select the bracketed language on "history" of disability if the claim of discrimination is based on a history of disability rather than a current actual disability.

Modify element 3 if the plaintiff was not actually disabled or had a history of disability, but alleges denial of accommodation because ~~he or she~~the plaintiff was perceived to be disabled or associated with someone who has, or is perceived to have, a disability. (See Gov. Code, § 12926(o); see also Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].)

In element 5, explain the accommodation in rules, policies, practices that is alleged to be needed.

Sources and Authority

- Discrimination Defined Regarding Housing Disability Accommodations. Government Code section 12927(c)(1).

- "Disability" Defined for Housing Discrimination. Government Code section 12955.3.

- "Housing" Defined. Government Code section 12927(d).

- " 'FEHA in the housing area is thus intended to conform to the general requirements of federal law in the area and may provide greater protection against discrimination.' In other words, the FHA provides a minimum level of protection that FEHA may exceed. Courts often look to cases construing the FHA, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 when interpreting FEHA." (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 [18 Cal.Rptr.3d 669], internal citations omitted.)

- "[T]he basic principles applicable in employment cases should also apply in the housing context." (*Brown v. Smith* (1997) 55 Cal.App.4th 767, 782 [64 Cal.Rptr.2d 301].)

- "In order to establish discrimination based on a refusal to provide reasonable accommodations, a party must establish that he or she (1) suffers from a disability as defined in FEHA, (2) the discriminating party knew of, or should have known of, the disability, (3) accommodation is necessary to afford an equal opportunity to use and enjoy the dwelling, and (4) the discriminating party refused to make this accommodation." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p.1592.)

- "FEHA prohibits, as unlawful discrimination, a 'refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.' 'In order to establish discrimination based on a refusal to provide reasonable accommodations, a party must establish that he or she (1) suffers from a disability as defined in FEHA, (2) the discriminating party knew of, or should have known of, the disability, (3) accommodation is necessary to afford an equal opportunity to use and enjoy the dwelling, and (4) the discriminating party refused to make this

accommodation.' " (*Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1051 [188 Cal.Rptr.3d 537], internal citation omitted.)

- "We note that, currently, section 12955.3 explicitly states that 'disability' includes 'any physical or mental disability as defined in Section 12926.' That statute in turn defines 'mental disability' to include "any mental or psychological disorder or condition … that limits a major life activity', that is, 'makes the achievement of the major life activity difficult.' 'Major life activities' is to be broadly construed, and includes 'physical, mental, and social activities and working.' " (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1592, internal citations omitted.)

- " 'If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.' This obligation to 'open a dialogue' with a party requesting a reasonable accommodation is part of an interactive process in which each party seeks and shares information." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1598, internal citation omitted.)

- "This evidence established the requisite causal link between the [defendant]'s no-pets policy and the interference with the [plaintiffs]' use and enjoyment of their condominium." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1593.)

- "When the reasons for a delay in offering a reasonable accommodation are subject to dispute, the matter is left for the trier of fact to resolve. The administrative law judge properly characterized this lengthy delay as a refusal to provide reasonable accommodation." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1599, internal citation omitted.)

- "We reiterate that the FEHC did not rule that companion pets are always a reasonable accommodation for individuals with mental disabilities. Each inquiry is fact specific and requires a case-by-case determination." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1593.)

Secondary Sources

Joint Statement of the Department of Housing and Urban Development and the Department of Justice, ~~*on*~~ *Reasonable Accommodations U~~u~~nder the Fair Housing Act* (May 17, 2004), www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf~~https://www.hud.gov/offices/fheo/library/huddojstatement.pdf~~

8 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Constitutional Law, § ~~946~~1063

7 California Real Estate Law and Practice, Ch. 214, *Government Regulation and Enforcement*, § 214.41 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.14 (Matthew Bender)

2549. Disability Discrimination—Refusal to Permit Reasonable Modification to Housing Unit (Gov. Code, § 12927(c)(1))

[*Name of plaintiff***] claims that [***name of defendant***] refused to permit reasonable modifications of [***name of plaintiff***]'s [***specify type of housing, e.g., apartment***] necessary to afford [***name of plaintiff***] full enjoyment of the premises. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [***specify defendant's source of authority to provide housing, e.g., owner***] of [a/an] [***e.g., apartment building***];**

2. **That [***name of plaintiff***] [sought to rent/was living in/[***specify other efforts to obtain housing***]] the [***e.g., apartment***];**

3. **That [***name of plaintiff***] had [a history of having] [a] [***select term to describe basis of limitations, e.g., physical disability***] [that limited [***insert major life activity***]];**

4. **That [***name of defendant***] knew of, or should have known of, [***name of plaintiff***]'s disability;**

5. **That in order to afford [***name of plaintiff***] an equal opportunity to use and enjoy the [***e.g., apartment***], it was necessary to [***specify modification(s) required***];**

6. **That it was reasonable to expect [***name of defendant***] to [***specify modification(s) required***];**

7. **That [***name of plaintiff***] agreed to pay for [this/these] modification[s]; [and]**

8. **[That [***name of plaintiff***] agreed that [he/she/*nonbinary pronoun*] would restore the interior of the unit to the condition that existed before the modifications, other than for reasonable wear and tear; and]**

9. **That [***name of defendant***] refused to permit [this/these] modification[s].**

New May 2017; Revised May 2020

Directions for Use

This instruction is for use in a case alleging discrimination in housing based on a failure to permit reasonable modifications to a living unit to accommodate a disability. Under the Fair Employment and Housing Act, "discrimination" includes the refusal to permit, at the expense of the disabled person, reasonable modifications of existing premises occupied or to be occupied by the disabled person, if the modifications may be necessary to afford the disabled person full enjoyment of the premises. (Gov. Code, § 12927(c)(1).)

In element 2, if the plaintiff encountered a barrier before actually submitting an application, such as discovering a policy that would make it impossible to live in the unit, specify what ~~he or she~~the plaintiff

did to obtain the housing.

In element 3, select a term to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

In element 3, select the bracketed language on "history" of disability if the claim of discrimination is based on a history of disability rather than a current actual disability.

Modify element 3 if the plaintiff was not actually disabled or had a history of disability, but alleges denial of accommodation because ~~he or she~~the plaintiff was perceived to be disabled or associated with someone who has, or is perceived to have, a disability. (See Gov. Code, § 12926(o); see also Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].)

In element 5, specify the modifications that are alleged to be needed.

Element 7 may not apply if section 504 of the Rehabilitation Act of 1973 (applicable to federal subsidized housing) or Title II of the Americans With Disabilities Act requires the landlord to incur the cost of reasonable modifications.

In the case of a rental, the landlord may, if it is reasonable to do so, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification (other than for reasonable wear and tear). (Gov. Code, § 12927(c)(1).) Include element 8 if the premises to be physically altered is a rental unit, and the plaintiff agreed to restoration. If the parties dispute whether restoration is reasonable, presumably the defendant would have to prove reasonableness. (See Evid. Code, § 500 [party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that s/he is asserting].)

Sources and Authority

- Discrimination Defined Regarding Housing Disability Accommodations. Government Code section 12927(c)(1).
- "Disability" Defined for Housing Discrimination. Government Code section 12955.3.
- "Housing" Defined. Government Code section 12927(d).
- " 'FEHA in the housing area is thus intended to conform to the general requirements of federal law in the area and may provide greater protection against discrimination.' In other words, the FHA provides a minimum level of protection that FEHA may exceed. Courts often look to cases construing the FHA, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 when interpreting FEHA." (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 [18 Cal.Rptr.3d 669], internal citations omitted.)

- "[T]he basic principles applicable in employment cases should also apply in the housing context." (*Brown v. Smith* (1997) 55 Cal.App.4th 767, 782 [64 Cal.Rptr.2d 301].)

- "We note that, currently, section 12955.3 explicitly states that 'disability' includes 'any physical or mental disability as defined in Section 12926.' That statute in turn defines 'mental disability' to include "any mental or psychological disorder or condition … that limits a major life activity', that is, 'makes the achievement of the major life activity difficult.' 'Major life activities' is to be broadly construed, and includes 'physical, mental, and social activities and working.' " (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1592, internal citations omitted.)

- " 'If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.' This obligation to 'open a dialogue' with a party requesting a reasonable accommodation is part of an interactive process in which each party seeks and shares information." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1598, internal citation omitted.)

Secondary Sources

Joint Statement of the Department of Housing and Urban Development and the Department of Justice, ~~on~~ *Reasonable Modifications U~~n~~nder the Fair Housing Act* (March 5~~3~~, 2008), ~~https://www.hud.gov/offices/fheo/disabilities/reasonable_modifications_mar08.pdf~~ www.hud.gov/sites/documents/reasonable_modifications_mar08.pdf

8 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Constitutional Law, § ~~946~~1063

7 California Real Estate Law and Practice, Ch. 214, *Government Regulation and Enforcement*, § 214.41 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.14 (Matthew Bender)

2570. Age Discrimination—Disparate Treatment—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her/*nonbinary pronoun*] because of [his/her/*nonbinary pronoun*] age. 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***] was age 40 or older at the time of the [discharge/[***other adverse employment action***]];**

5. **That [***name of plaintiff***]'s 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];**

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

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

New June 2011; Revised June 2012, June 2013, May 2020

Directions for Use

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 5 if the 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 based on age and the adverse action (see element 5), and there must be a causal link between the adverse action and the damage (see element 7). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Element 5 requires that age discrimination 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*.)

Under the *McDonnell Douglas* (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668]) process for allocating burdens of proof and producing evidence, which is used in California for disparate-treatment cases under FEHA, the employee must first present a prima facie case of discrimination. The burden then shifts to the employer to produce evidence of a nondiscriminatory reason for the adverse action. At that point, the burden shifts back to the employee to show that the employer's stated reason was in fact a pretext for a discriminatory act.

Whether or not the employee has met ~~his or her~~the employee's prima facie burden, and whether or not the employer has rebutted the employee's prima facie showing, are questions of law for the trial court, not questions of fact for the jury. (See *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201 [48 Cal.Rptr.2d 448].) In other words, by the time that the case is submitted to the jury, the plaintiff has already established ~~his or her~~ a prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision. The *McDonnell Douglas* shifting burden drops from the case. The jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent or that of the employer's age-neutral reasons for the employment decision. (See *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1118, fn. 5 [94 Cal.Rptr.2d 579]).

Under FEHA, age-discrimination cases require the employee to show that ~~his or her~~the employee's job performance was satisfactory at the time of the adverse employment action as a part of ~~his or her~~the employee's prima facie case (see *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 321 [115 Cal.Rptr.3d 453]), even though it is the employer's burden to produce evidence of a nondiscriminatory reason for the action. Poor job performance is the most common nondiscriminatory reason that an employer advances for the action. Even though satisfactory job performance may be an element of the employee's prima facie case, it is not an element that the employee must prove to the trier of fact. Under element 5 and CACI No. 2507, the burden remains with the employee to ultimately prove that age discrimination was a substantial motivating reason for the action. (See *Muzquiz, supra,* 79 Cal.App.4th at p. 1119.)

See also the Sources and Authority to CACI No. 2500, *Disparate Treatment—Essential Factual Elements*.

Sources and Authority

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

- "Age" Defined. Government Code section 12926(b).

- Disparate Treatment; Layoffs Based on Salary. Government Code section 12941.

- "In order to make out a prima facie case of age discrimination under FEHA, a plaintiff must present evidence that the plaintiff (1) is over the age of 40; (2) suffered an adverse employment action; (3) was performing satisfactorily at the time of the adverse action; and (4) suffered the adverse action under circumstances that give rise to an inference of unlawful discrimination, i.e., evidence that the plaintiff was replaced by someone significantly younger than the plaintiff." (*Sandell, supra,* 188 Cal.App.4th at p. 321.)

- "In other words, '[b]y the time that the case is submitted to the jury, . . . the plaintiff has already established his or her prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision, leaving only the issue of the employer's discriminatory intent for resolution by the trier of fact. Otherwise, the case would have been disposed of as a matter of law for the trial court. That is to say, if the plaintiff cannot make out a prima facie case, the employer wins as a matter of law. If the employer cannot articulate a nondiscriminatory reason for the adverse employment decision, the plaintiff wins as a matter of law. In those instances, no fact-finding is required, and the case will never reach a jury. [¶] In short, if and when the case is submitted to the jury, the construct of the shifting burden "drops from the case," and the jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent, or that of the employer's race or age-neutral reasons for the employment decision.' " (*Muzquiz, supra,* 79 Cal.App.4th at p. 1118, fn. 5.)

- "Because the only issue properly before the trier of fact was whether the [defendant]'s adverse employment decision was motivated by discrimination on the basis of age, the shifting burdens of proof regarding appellant's prima facie case and the issue of legitimate nondiscriminatory grounds were actually irrelevant." (*Muzquiz, supra,* 79 Cal.App.4th at p. 1119.)

- "An employee alleging age discrimination must ultimately prove that the adverse employment action taken was based on his or her age. Since direct evidence of such motivation is seldom available, the courts use a system of shifting burdens as an aid to the presentation and resolution of age discrimination cases. That system necessarily establishes the basic framework for reviewing motions for summary judgment in such cases." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1002 [67 Cal.Rptr.2d 483], internal citations omitted.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the

time." (*Harris, supra,* 56 Cal.4th at p. 232, original italics.)

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

- "While we agree that a plaintiff must demonstrate some basic level of competence at his or her job in order to meet the requirements of a prima facie showing, the burden-shifting framework established in *McDonnell Douglas* compels the conclusion that any measurement of such competency should, to the extent possible, be based on objective, rather than subjective, criteria. A plaintiff's burden in making a prima facie case of discrimination is not intended to be 'onerous.' Rather, the prima facie burden exists in order to weed out patently unmeritorious claims." (*Sandell, supra,* 188 Cal.App.4th at p. 322, internal citations omitted.)

- "A discharge is not 'on the ground of age' within the meaning of this prohibition unless age is a 'motivating factor' in the decision. Thus, ' "an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision." ' '[A]n employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.' " (*West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 978 [117 Cal.Rptr.2d 647].)

- "[D]ownsizing alone is not necessarily a sufficient explanation, under the FEHA, for the consequent dismissal of an age-protected worker. An employer's freedom to consolidate or reduce its work force, and to eliminate positions in the process, does not mean it may 'use the occasion as a convenient opportunity to get rid of its [older] workers.' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 358 [100 Cal.Rptr.2d 352, 8 P.3d 1089].)

Secondary Sources

8 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Constitutional Law, §§ ~~932~~1041–~~935~~1044

Chin et al., California Practice Guide: Employment Litigation, Ch. 8-B, *California Fair Employment and Housing Act*, ¶¶ 8:740, 8:800 et seq. (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.31 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.43 (Matthew Bender)

VF-2501. Disparate Treatment—Affirmative Defense—Bona fide Occupational Qualification (Gov. Code, § 12940(a))

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] an [employer/[***other covered entity***]]?**
   ____ Yes ____ No

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

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**
   ____ Yes ____ No

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

3. **Did [***name of defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***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. **Was [***name of plaintiff***]'s [***protected status***] a substantial motivating reason for [***name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]]?**
   ____ Yes ____ No

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

5. **Was the job requirement regarding [***protected status***] reasonably necessary for the operation of [***name of defendant***]'s business?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, skip questions 6, 7, and 8, and answer question 9.

6. **Did [***name of defendant***] have a reasonable basis for believing that substantially all [***members of protected group***] are unable to safely and efficiently perform that job?**

____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip questions 7 and 8, and answer question 9.

7. Was it impossible or highly impractical for [*name of defendant***] to consider whether each [applicant/employee] was able to safely and efficiently perform the job?**
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, skip question 8 and answer question 9.

8. Was it impossible or highly impractical for [*name of defendant***] to rearrange job responsibilities to avoid using [***protected status***] as a job requirement?**
____ Yes ____ No

If your answer to question 8 is no, then answer question 9. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. Was [*name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]] a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

[a. Past economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other past economic loss	**$ _____]**

Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other future economic loss	**$ _____]**

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, June 2013, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 2500, *Disparate Treatment—Essential Factual Elements*, and CACI No. 2501, *Affirmative Defense—Bona fide Occupational Qualification*.

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.

Relationships other than employer/employee can be substituted in question 2, as in element 2 in CACI No. 2500.

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

If specificity is not required, users do not have to itemize all the damages listed in question 10 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.

VF-2515. Limitation on Remedies—Same Decision

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] an [employer/[***other covered entity***]]?**
____ Yes ____ No

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

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**
____ Yes ____ No

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

3. **Did [***name of defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***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. **Was [***name of plaintiff***]'s [***protected status or activity***] a substantial motivating reason for [***name of defendant***]'s [discharge of/refusal to hire/[***other adverse employment action***]] [***name of plaintiff***]?**
____ Yes ____ No

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

5. **Was [***specify employer's stated legitimate reason, e.g., plaintiff's poor job performance***] also a substantial motivating reason for [***name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]]?**
____ Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, skip question 6 and answer question 7.

6. **Would [***name of defendant***] have [discharged/refused to hire/[***other adverse employment***]**

action]] [*name of plaintiff*] **anyway at that time based on [***e.g., plaintiff's poor job performance***] had [***name of defendant***] not also been substantially motivated by [discrimination/retaliation]?**
____ Yes ____ No

If your answer to question 6 is no, then answer question 7. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]] a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

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

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

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

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

TOTAL $ _____

Signed: _____

Presiding Juror

Dated: _____

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

New December 2013; Revised December 2015, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 2512, *Limitation of Damages—Same Decision*. It incorporates questions from VF-2500, *Disparate Treatment*, and VF-2504, *Retaliation*, to guide the jury through the evaluation of the employer's purported legitimate reason for the adverse employment action.

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

Question 5 asks the jury to determine whether the employer's stated legitimate reason actually was a motivating reason for the adverse action. In this way, the jury evaluates the employer's reason once. If it finds that it was an actual motivating reason, it then proceeds to question 6 to consider whether the employer has proved "same decision," that is, that it would have taken the adverse employment action anyway for the legitimate reason, even though it may have also had a discriminatory or retaliatory motivation. If the jury answers "no" to question 5 it then proceeds to consider substantial-factor causation of harm and damages in questions 7 and 8.

Relationships other than employer/employee can be substituted in question 2, as in element 2 in CACI No. 2500.

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

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

2612. Affirmative Defense—Employment Would Have Ceased

[*Name of defendant*] claims that [he/she/*nonbinary pronoun*/it] was not required to allow [*name of plaintiff*] to return to work when [his/her/*nonbinary pronoun*] [family care/medical] leave was over because [his/her/*nonbinary pronoun*] employment would have ended for other reasons. To succeed, [*name of defendant*] must prove both of the following:

1. **That [*name of defendant*] would have [discharged/laid off] [*name of plaintiff*] if [he/she/*nonbinary pronoun*] had continued to work during the leave period; and**

2. **That [*name of plaintiff*]'s [family care/medical] leave was not a reason for [discharging [him/her/*nonbinary pronoun*]/laying [him/her/*nonbinary pronoun*] off].**

An employee on [family care/medical] leave has no greater right to ~~his or her~~the employee's job or to other employment benefits than if ~~he or she~~that employee had continued working during the leave.

New September 2003; Revised May 2020

Sources and Authority

- Limitations of Right to Reinstatement. Cal. Code Regs., tit. 2, § 11089(c)(1).

- "Section 11089, subdivision (c)(1) states in part: 'An employee has no greater right to reinstatement or to other benefits … of employment than if the employee had been continuously employed during the CFRA leave period.' This defense is qualified, however, by the requirement that '[a]n employer has the burden of proving, by a preponderance of the evidence, that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny reinstatement' ." (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 919 [182 Cal. Rptr. 3d 644, 341 P.3d 438].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:1189, 12:1191 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.30[4] (Matthew Bender)

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

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

1. **That [*name of plaintiff*] performed work for [*name of defendant*];**

2. **That [*name of plaintiff*] was paid less than the minimum wage by [*name of defendant*] for some or all hours worked; and**

3. **The amount of wages owed.**

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

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

New September 2003; Revised June 2005, June 2014, June 2015, May 2020

Directions for Use

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

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

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

Sources and Authority

- Employee Right to Recover Minimum Wage or Overtime Compensation. Labor Code section 1194(a).

- Recovery of Liquidated Damages. Labor Code section 1194.2.

- Civil Penalties, Restitution and Liquidated Damages. Labor Code section 1197.1(a).

- "Wages" Defined. Labor Code section 200.

- Payment of Uncontested Wages Required. Labor Code section 206(a).

- Action by Department to Recover Unpaid Minimum Wage or Overtime Compensation. Labor Code section 1193.6(a).

- Duties of Industrial Welfare Commission. Labor Code section 1173.

- "Labor Code section 1194 accords an employee a statutory right to recover unpaid wages from an employer who fails to pay the minimum wage." (*Flowers v. Los Angeles County Metropolitan Transportation Authority* (2015) 243 Cal.App.4th 66, 74 [196 Cal.Rptr.3d 352].)

- "Labor Code section 1194 does not define the employment relationship nor does it specify who may be liable for unpaid wages. Specific employers and employees become subject to the minimum wage requirements only through and under the terms of wage orders promulgated by the IWC, the agency formerly authorized to regulate working conditions in California." (*Flowers, supra,* 243 Cal.App.4th at p. 74.)

- "The provision of board, lodging or other facilities *may* sometimes be considered in determining whether an employer has met minimum wage requirements for nonexempt employees." (*Kao v. Holiday* (2017) 12 Cal.App.5th 947, 958 [219 Cal.Rptr.3d 580], original italics.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 417–421, 437–439

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

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

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-F, *Payment of Overtime Compensation*, ¶ 11:730 et seq. (The Rutter Group)

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

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

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

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

2702. Nonpayment of Overtime Compensation—Essential Factual Elements (Lab. Code, § 1194)

[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her/*nonbinary pronoun*] overtime pay as required by state law. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] performed work for [*name of defendant*];**

2. **That [*name of plaintiff*] worked overtime hours;**

3. **That [*name of defendant*] knew or should have known that [*name of plaintiff*] had worked overtime hours;**

4. **That [*name of plaintiff*] was [not paid/paid less than the overtime rate] for some or all of the overtime hours worked; and**

5. **The amount of overtime pay owed.**

Overtime hours are the hours worked longer than [*insert applicable definition(s) of overtime hours*].

Overtime pay is [*insert applicable formula*].

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

New September 2003; Revised June 2005, June 2014, June 2015, May 2020

Directions for Use

The court must determine the overtime compensation rate under applicable state or federal law. (See, e.g., Lab. Code, §§ 1173, 1182; Cal. Code Regs., tit. 8, § 11000, subd. 2, § 11010, subd. 4(A), and § 11150, subd. 4(A).) The jury must be instructed accordingly. It is possible that the overtime rate will be different over different periods of time.

Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code, and a series of 18 wage orders adopted by the Industrial Welfare Commission. (See *Mendiola v. CPS Security Solutions, Inc.* (2014) 60 Cal.4th 833, 838 [182 Cal.Rptr.3d 124, 340 P.3d 355].) Both the Labor Code and the IWC wage orders provide for certain exemptions from overtime laws. (See, e.g., Lab. Code, § 1171 [outside salespersons are exempt from overtime requirements]).The assertion of an employee's exemption is an affirmative defense, which presents a mixed question of law and fact. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2].) For instructions on exemptions, see CACI No. 2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption*, and CACI No. 2721, *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption*.

Sources and Authority

- Employee Right to Recover Minimum Wage or Overtime Compensation. Labor Code section 1194(a).

- Recovery of Liquidated Damages. Labor Code section 1194.2.

- "Wages" Defined. Labor Code section 200.

- Payment of Uncontested Wages Required. Labor Code section 206(a).

- What Hours Worked Are Overtime. Labor Code section 510.

- Rate of Compensation. Labor Code section 515(d).

- Action by Department to Recover Unpaid Minimum Wage or Overtime Compensation. Labor Code section 1193.6(a).

- "[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." (*Ramirez, supra,* 20 Cal.4th at pp. 794–795.)

- "[W]here an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation … ." (*Jong v. Kaiser Foundation Health Plan, Inc.* (2014) 226 Cal.App.4th 391, 395 [171 Cal.Rptr.3d 874] [applying rule under federal Fair Labor Standards Act to claims under California Labor Code].)

- "[A]n employer's actual or constructive knowledge of the hours its employees work is an issue of fact … ." (*Jong, supra,* 226 Cal.App.4th at p. 399.)

- "The question whether [plaintiff] was an outside salesperson within the meaning of applicable statutes and regulations is … a mixed question of law and fact." (*Ramirez, supra,* 20 Cal.4th at p. 794.)

- "The FLSA [federal Fair Labor Standards Act] requires overtime pay only if an employee works more than 40 hours per week, regardless of the number of hours worked during any one day. California law, codified at Labor Code section 510, is more stringent and requires overtime compensation for '[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek.' " (*Flowers v. Los Angeles County Metropolitan Transportation Authority* (2015) 243 Cal.App.4th 66, 83 [196 Cal.Rptr.3d 352], internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Agency and Employment, §§ 417, 420, 421, 437, 438, 439~~-382–384, 398, 399~~

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Payment Of Wages*, ¶¶ 11:456, 11:470.1~~, 11:499~~ (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-F, *Payment Of Overtime Compensation*, ¶¶ 11:730, 11:955~~.2~~ (The Rutter Group)

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

1 Wilcox, California Employment Law, Ch. 3, *Overtime Compensation and Regulation of Hours Worked*, §§ 3.03[1], 3.04[1], 3.07[1], 3.08[1], 3.09[1]; Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.72 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.40 (Matthew Bender)

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

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

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

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

1. **That [*name of plaintiff*]'s employment with [*name of defendant*] ended;**

2. **That [*name of defendant*] failed to pay [*name of plaintiff*] all wages when due; and**

3. **That [*name of defendant*] willfully failed to pay these wages.**

The term "willfully" means only that the employer intentionally failed or refused to pay the wages. It does not imply a need for any additional bad motive.

[*Name of plaintiff*] must also prove the following:

1. **The date on which [*name of plaintiff*]'s wages were due;**

2. **[*Name of plaintiff*]'s daily wage rate at the time [his/her/*nonbinary pronoun*] employment with [*name of defendant*] ended[; and/.]**

[3. The date on which [*name of defendant*] finally paid [*name of plaintiff*] all wages due.]

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

New September 2003; Revised June 2005, May 2019, May 2020

Directions for Use

The first part of this instruction sets forth the elements required to obtain a waiting time penalty under Labor Code section 203. The second part is intended to instruct the jury on the facts required to assist the court in calculating the amount of waiting time penalties. Some or all of these facts may be stipulated, in which case they may be omitted from the instruction. Give the third optional fact if the employer eventually paid all wages due, but after their due date.

The court must determine when final wages are due based on the circumstances of the case and applicable law. (See Lab. Code, §§ 201, 202.) Final wages are generally due on the day an employee is discharged by the employer (Lab. Code, § 201(a)), but are not due for 72 hours if an employee quits without notice. (Lab. Code, § 202(a).)

If there is a factual dispute, for example, whether plaintiff gave advance notice of ~~his or her~~ the intention to quit, or whether payment of final wages by mail was authorized by plaintiff, the court may be required to give further instruction to the jury.

The definition of "wages" may be deleted if it is included in other instructions.

Sources and Authority

- Wages of Discharged Employee Due Immediately. Labor Code section 201.
- Wages of Employee on Quitting. Labor Code section 202.
- Willful Failure to Pay Wages of Discharged Employee. Labor Code section 203.
- Right of Action for Unpaid Wages. Labor Code section 218.
- "Wages" Defined. Labor Code section 200.
- Payment for Accrued Vacation of Terminated Employee. Labor Code section 227.3.
- Wages Partially in Dispute. Labor Code section 206(a).
- Exemption for Certain Governmental Employers. Labor Code section 220(b).
- "Labor Code section 203 empowers a court to award 'an employee who is discharged or who quits' a penalty equal to up to 30 days' worth of the employee's wages '[i]f an employer *willfully* fails to pay' the employee his full wages immediately (if discharged) or within 72 hours (if he or she quits). It is called a waiting time penalty because it is awarded for effectively making the employee wait for his or her final paycheck. A waiting time penalty may be awarded when the final paycheck is for less than the applicable wage—whether it be the minimum wage, a prevailing wage, or a living wage." (*Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 867 [233 Cal.Rptr.3d 524], original italics, internal citations omitted.)
- " '[T]he public policy in favor of full and prompt payment of an employee's earned wages is fundamental and well established …' and the failure to timely pay wages injures not only the employee, but the public at large as well. We have also recognized that sections 201, 202, and 203 play an important role in vindicating this public policy. To that end, the Legislature adopted the penalty provision as a disincentive for employers to pay final wages late. It goes without saying that a longer statute of limitations for section 203 penalties provides additional incentive to encourage employers to pay final wages in a prompt manner, thus furthering the public policy." (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1400 [117 Cal.Rptr.3d 377, 241 P.3d 870], internal citations omitted.)
- " 'The plain purpose of [Labor Code] sections 201 and 203 is to compel the immediate payment of earned wages upon a discharge.' The prompt payment of an employee's earned wages is a

fundamental public policy of this state." (*Kao v. Holiday* (2017) 12 Cal.App.5th 947, 962 [219 Cal.Rptr.3d 580], internal citation omitted.)

- "The statutory policy favoring prompt payment of wages applies to employees who retire, as well as those who quit for other reasons." (*McLean v. State* (2016) 1 Cal.5th 615, 626 [206 Cal.Rptr.3d 545, 377 P.3d 796].)

- "[A]n employer may not delay payment for several days until the next regular pay period. Unpaid wages are due *immediately* upon discharge. This requirement is strictly applied and may not be 'undercut' by company payroll practices or 'any industry habit or custom to the contrary.' " (*Kao, supra,* 12 Cal.App.5th at p. 962, original italics, internal citation omitted.)

- " ' "[T]o be at fault within the meaning of [section 203], the employer's refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due. As used in section 203, 'willful' merely means that the employer intentionally failed or refused to perform an act which was required to be done." …' " (*Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 54 [155 Cal.Rptr.3d 18].)

- "In civil cases the word 'willful' as ordinarily used in courts of law, does not necessarily imply anything blameable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done, was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent." (*Nishiki v. Danko Meredith, P.C.* (2018) 25 Cal.App.5th 883, 891 [236 Cal.Rptr.3d 626].)

- "[A]n employer's reasonable, good faith belief that wages are not owed may negate a finding of willfulness." (*Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1468 [155 Cal.Rptr.3d 915].)

- "A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recover[y] on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist." (*Kao, supra,* 12 Cal.App.5th at p. 963.)

- "A 'good faith dispute' excludes defenses that 'are unsupported by any evidence, are unreasonable, *or* are presented in bad faith.' Any of the three precludes a defense from being a good faith dispute. Thus, [defendant]'s good faith does not cure the objective unreasonableness of its challenge or the lack of evidence to support it." (*Diaz, supra,* 23 Cal.App.5th at pp. 873–874, original italics, internal citations omitted.)

- "A proper reading of section 203 mandates a penalty equivalent to the employee's daily wages for each day he or she remained unpaid up to a total of 30 days. … [¶] [T]he critical computation required by section 203 is the calculation of a daily wage rate, which can then be multiplied by the number of days of nonpayment, up to 30 days." (*Mamika v. Barca* (1998) 68 Cal.App.4th 487, 493 [80 Cal.Rptr.2d 175].)

- " 'A tender of the wages due at the time of the discharge, if properly made and in the proper amount,

terminates the further accumulation of penalty, but it does not preclude the employee from recovering the penalty already accrued.' " (*Oppenheimer v. Sunkist Growers, Inc.* (1957) 153 Cal.App.2d Supp. 897, 899 [315 P.2d 116], citation omitted.)

- "[Plaintiff] fails to distinguish between a request for statutory penalties provided by the Labor Code for employer wage-and-hour violations, which were recoverable directly by employees well before the Act became part of the Labor Code, and a demand for 'civil penalties,' previously enforceable only by the state's labor law enforcement agencies. An example of the former is section 203, which obligates an employer that willfully fails to pay wages due an employee who is discharged or quits to pay the employee, in addition to the unpaid wages, a penalty equal to the employee's daily wages for each day, not exceeding 30 days, that the wages are unpaid." (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 377–378 [36 Cal.Rptr.3d 31].)

- "In light of the unambiguous statutory language, as well as the practical difficulties that would arise under defendant's interpretation, we conclude there is but one reasonable construction: section 203(b) contains a single, three-year limitations period governing all actions for section 203 penalties irrespective of whether an employee's claim for penalties is accompanied by a claim for unpaid final wages." (*Pineda, supra,* 50 Cal.4th at p. 1398.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 437–439

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

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

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

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

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-B, *Remedies—Contract Damages*, ¶ 17:148 (The Rutter Group)

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

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

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

2732. Retaliatory Unfair Immigration-Related Practice—Essential Factual Elements (Lab. Code, § 1019)

[*Name of plaintiff***] claims that [***name of defendant***] [***specify unfair immigration-related practice, e.g., threatened to report [him/her/nonbinary pronoun] to immigration authorities***] in retaliation for [his/her/nonbinary pronoun] [***specify right, e.g., making a claim for minimum wage***]. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***]**

   [in good faith filed a complaint or informed someone about [*name of defendant***]'s alleged [***specify violation of Labor Code or local ordinance, e.g., failure to pay the minimum wage to its employees***];]**

   [or]

   [sought information regarding whether or not [*name of defendant***] was in compliance with [***specify requirement under Labor Code or local ordinance, e.g., minimum wage requirements***];]**

   [or]

   [informed someone of that person's potential rights and remedies for [*name of defendant***]'s alleged [***specify violation of Labor Code or local ordinance, e.g., failure to pay the minimum wage to its employees***] and assisted [him/her/nonbinary pronoun] in asserting those rights;]**

2. **That [***name of defendant***]**

   [requested more or different documents than those that are required by federal immigration law, or refused to honor documents that on their face reasonably appeared to be genuine;]

   [or]

   [used the federal E-Verify system to check the employment authorization status of [*name of plaintiff***] at a time or in a manner not required or authorized by federal immigration law;]**

   [or]

   [filed or threatened to file a false [police report/report or complaint with a state or local agency];]

   [or]

   [contacted or threatened to contact immigration authorities;]

3. **That [***name of defendant***]'s conduct was for the purpose of, or with the intent of, retaliating**

against [*name of plaintiff*] for exercising [his/her/*nonbinary pronoun*] legally protected rights;

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 you find that [*name of defendant*] acted as described in element 2 fewer than 90 days after [*name of plaintiff*] acted as described in element 1, you may but are not required to conclude, without further evidence, that [*name of defendant*] acted with a retaliatory purpose and intent.]

New December 2014; Revised May 2020

Directions for Use

One who is the victim of an "unfair immigration-related practice" as defined, or ~~his or her~~ that person's representative, may bring a civil action for equitable relief and any damages or penalties. (Lab. Code, § 1019(a).) While most commonly this claim would be brought by an employee against an employer, the statute prohibits unfair immigration-related practices by "an employer or any other person" against "an employee or other person." (Lab. Code, § 1019(d)(1).) Therefore, the statute does not require an employment relationship between the parties.

Engaging in an unfair immigration-related practice against a person within 90 days of the person's exercise of protected rights raises a rebuttable presumption that the defendant did so in retaliation for the plaintiff's exercise of those rights. (Lab. Code, § 1019(c).) The statute does not specify whether the presumption is one affecting only the burden of producing evidence (see Evid. Code, §§ 603, 604) or one affecting the burden of proof. (See Evid. Code, § 605.) If the statute implements a public policy against the use of immigration-related coercion to deter workers from exercising their rights under the Labor Code, its presumption would affect the burden of proof. (See Evid. Code, § 605.) The last optional paragraph of the instruction may then be given if applicable on its facts. If, however, the presumption affects only the burden of producing evidence, it ceases to exist when the defendant produces evidence rebutting the presumption, such as a reason for the action other than retaliation. (Evid. Code, § 604.) In that case, the last paragraph would not be given.

Sources and Authority

- Retaliatory Use of Immigration-Related Practices. Labor Code section 1019.
- Unlawful Employment of Aliens. 8 United States Code section 1324a.

Secondary Sources

3 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Agency and Employment, § ~~337~~359

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-E, ~~Employment Discrimination—~~ California Labor Code, ¶¶ 7:1510 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03 (Matthew Bender)

11 California Forms or Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37[3][b] (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 (Matthew Bender)

2740. Violation of Equal Pay Act—Essential Factual Elements (Lab. Code, § 1197.5)

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] 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 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 January 2019, November 2019, May 2020

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~~the employee 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 is no requirement that an employee show discriminatory intent as an element of the claim. (*Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 622–625, 629 [3 Cal.Rptr.3d 844].)

This instruction presents singular and plural options for the comparator, the employee or employees whose pay and work are being compared to the plaintiff's to establish a violation of the Equal Pay Act. The statute refers to *employees* of the opposite sex or different race or ethnicity. There is language in cases, however, that suggests that a single comparator (e.g., one woman to one man) is sufficient. (See *Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 324 [55 Cal.Rptr.3d 732] [plaintiff had to show that she is paid lower wages than *a male comparator*, italics added]; *Green, supra,* 111 Cal.App.4th at p. 628 [plaintiff in a section 1197.5 action must first show that the employer paid *a male employee* more than a female employee for equal work, italics added].) No California case has expressly so held, however.

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].)

- "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, supra,* 148 Cal.App.4th at pp. 324–325.)

- "[T]he plaintiff in a section 1197.5 action must first show that the employer paid a male employee more than a female employee ' "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." ' " *Green, supra,* 111 Cal.App.4th at p. 628.)

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)

2743. Equal Pay Act—Retaliation—Essential Factual Elements (Lab. Code, § 1197.5(k))

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her/*nonbinary pronoun*] for [pursuing/assisting another in the enforcement of] [his/her/*nonbinary pronoun*] right to equal pay regardless of [sex/race/ethnicity]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [***specify acts taken by plaintiff to enforce or assist in the enforcement of the right to equal pay***];**

2. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**

3. **That [***name of plaintiff***]'s [pursuit of/assisting in the enforcement of another's right to] equal pay was a substantial motivating reason for [***name of defendant***]'s [discharging/[***other adverse employment action***]] [***name of plaintiff***];**

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

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

New May 2018; Revised May 2020

Directions for Use

Use this instruction in cases of alleged retaliation against an employee under the Equal Pay Act. The act prohibits adverse employment actions against an employee who has taken steps to enforce the equal pay requirements of the act. Also, the employer cannot prohibit an employee from disclosing ~~his or her~~that employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise ~~his or her~~that employee's rights. (Lab. Code, § 1197.5(k)(1).) An employee who has been retaliated against may bring a civil action for reinstatement, reimbursement for lost wages and work benefits, interest, and equitable relief. (Lab. Code, § 1197.5(k)(2).)

Note that there are two causation elements. First, there must be a causal connection between the employee's pursuit of equal pay and the adverse employment action (element 3). Second, the employee must have suffered harm because of the employer's retaliatory acts (element 5).

Element 3 uses the term "substantial motivating reason" to express both intent and causation between the employee's pursuit of equal pay and the adverse employment action. "Substantial motivating reason" has been held to be the appropriate standard under the discrimination prohibitions of the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI

No. 2507, *"Substantial Motivating Reason" Explained*.) Whether this standard applies to the Equal Pay Act retaliation cases has not been addressed by the courts.

Sources and Authority

- Retaliation Prohibited Under Equal Pay Act. Labor Code section 1197.5(k).

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 430, 431

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination*, ¶ 11:1077.20 (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.02 (Matthew Bender)

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

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

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

New November 2017; Revised May 2020

Directions for Use

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

Sources and Authority

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

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

- "[CACI No. 2800] was correctly given, however, because the evidence was able to support a finding that the work was not a contributing cause of the injury. [¶] The jury could properly make this finding by applying special instruction No. 5, the instruction stating that an employer's conduct falls outside the workers' compensation scheme when an employer steps outside of its proper role or engages in conduct unrelated to the employment. This instruction stated the doctrine of *Fermino* correctly. If the jury found that carrying out the mock robbery was not within the employer's proper role, it could also find that unwittingly participating in the mock robbery as a victim was not part of the employee's work." (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 628–629 [210 Cal.Rptr.3d 362].)

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

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

- "[T]he exclusive remedy provisions are not applicable under certain circumstances, sometimes variously identified as 'conduct where the employer or insurer stepped out of their proper roles' [citations], or 'conduct of an employer having a "questionable" relationship to the employment' [citations], but which may be essentially defined as not stemming from a risk reasonably encompassed within the compensation bargain." (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 97 [221 Cal.Rptr.3d 668].)

Secondary Sources

~~3~~ 2 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Workers' Compensation, § ~~56~~62

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

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

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

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

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

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

2810. Coemployee's Affirmative Defense—Injury Covered by Workers' Compensation

[*Name of defendant*] claims that [he/she/*nonbinary pronoun*] is not responsible for any harm that [*name of plaintiff*] may have suffered because [he/she/*nonbinary pronoun*] was [*name of defendant*]'s coemployee and therefore can recover only under California's Workers' Compensation Act. To succeed, [*name of defendant*] must prove all of the following:

1. **That [*name of plaintiff*] and [*name of defendant*] were [*name of employer*]'s employees;**

2. **That [*name of employer*] [had workers' compensation insurance [covering [*name of plaintiff*] at the time of injury]/was self-insured for workers' compensation claims [at the time of [*name of plaintiff*]'s injury]]; and**

3. **That [*name of defendant*] was acting in the scope of [his/her/*nonbinary pronoun*] employment at the time [*name of plaintiff*] claims [he/she/*nonbinary pronoun*] was harmed.**

New September 2003; Revised October 2004, May 2020

Directions for Use

This instruction is intended for use if a coemployee is the defendant and ~~he or she~~that coemployee claims that the case falls within the workers' compensation exclusivity rule. For instructions on scope of employment see instructions in the Vicarious Liability series (CACI Nos. 3700–3726). Scope of employment in this instruction is the same as in the context of respondeat superior. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 740 [1 Cal.Rptr.2d 543, 819 P.2d 1].) See instructions in the Vicarious Responsibility series regarding the definition of "scope of employment."

Sources and Authority

- Exclusive Remedy. Labor Code section 3601.
- "Employee" Defined. Labor Code section 3351.
- Presumption of Employment Status. Labor Code section 3357.
- "CACI No. 2810, which the trial court gave to the jury, is intended for use when a coemployee defendant asserts the exclusivity rule as a defense. It has three elements: (1) the plaintiff and the coemployee were employees of the employer; (2) the employer had a workers' compensation insurance policy covering the plaintiff at the time of injury; and (3) the coemployee was acting in the scope of his or her employment at the time of injury." (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 633 [210 Cal.Rptr.3d 362].)
- "Labor Code section 3601 affords coemployees the benefit of the exclusivity rule only '[w]here the conditions of compensation set forth in Section 3600 concur … .' Those conditions, as has been

mentioned, include the requirement of industrial causation." (*Lee, supra,* 5 Cal.App.5th at p. 634, internal citation omitted.)

- "[A] coemployee's conduct is within the scope of his or her employment if it could be imputed to the employer under the doctrine of respondeat superior. If the coemployee was not 'engaged in any active service for the employer,' the coemployee was not acting within the scope of employment." (*Hendy, supra*, 54 Cal.3d at p. 740, internal citation omitted.)

- "[G]enerally speaking, a defendant in a civil action who claims to be one of that class of persons protected from an action at law by the provisions of the Workers' Compensation Act bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the statute which are necessary to its application." (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 96 [151 Cal.Rptr. 347, 587 P.2d 1160].)

- "In general, if an employer condones what courts have described as 'horseplay' among its employees, an employee who engages in it is within the scope of employment under section 3601, subdivision (a), and is thus immune from suit, unless exceptions apply." (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1006 [111 Cal.Rptr.2d 564, 30 P.3d 57], internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Workers' Compensation, §§ ~~67~~73, ~~68~~74

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-F, *Intentional Interference with Contract or Prospective Economic Advantage*, ¶ 5:624 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶ 12:192 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 13-I, *Collateral (Non-OSHA) Actions Relating to Occupational Safety and Health*, ¶ 13:951 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 15-F, *California Workers' Compensation Act Preemption*, ¶¶ 15:546, 15:569, 15:632 (The Rutter Group) ~~(The Rutter Group) ¶¶ 5:624, 12:192, 13:951, 15:546, 15:569, 15:632~~

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions—Subrogation*, § 12.22 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.43 (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.13 (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, § 577.316 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

3040. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her/*nonbinary pronoun*] to prison conditions that violated [his/her/*nonbinary pronoun*] constitutional rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That while imprisoned, [***describe violation that created risk, e.g., [name of plaintiff] was placed in a cell block with rival gang members***];**

2. **That [***name of defendant***]'s [conduct/failure to act] created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

3. **That [***name of defendant***] knew that [his/her/*nonbinary pronoun*] [conduct/failure to act] created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

4. **That [***name of defendant***] disregarded the risk by failing to take reasonable measures to address it;**

5. **That there was no reasonable justification for the [conduct/failure to act];**

6. **That [***name of defendant***] was performing [his/her/*nonbinary pronoun*] official duties when [he/she/*nonbinary pronoun*] [acted/purported to act/failed to act];**

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

8. **That [***name of defendant***]'s [conduct/failure to act] was a substantial factor in causing [***name of plaintiff***]'s harm.**

Whether the risk was obvious is a factor that you may consider in determining whether [*name of defendant***] knew of the risk.**

New September 2003; Revised December 2010, June 2011; Renumbered from CACI No. 3011 December 2012; Revised December 2014, June 2015, May 2017, May 2020

Directions for Use

Give this instruction in a case involving conduct that allegedly created a substantial risk of serious harm to an inmate. (See *Farmer v. Brennan* (1994) 511 U.S. 825 [114 S.Ct. 1970, 128 L.Ed.2d 811].) For an instruction on deprivation of medical care, see CACI No. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care*. For an instruction involving the deprivation of necessities, see CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eight Amendment—Deprivation of Necessities*.

In element 1, describe the act or omission that created the risk. In elements 2 and 3, choose "conduct" if the risk was created by affirmative action. Choose "failure to act" if the risk was created by an omission.

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to ~~his or her~~the inmate's health or safety. (*Farmer, supra,* 511 U.S. at p. 834.) "Deliberate indifference" involves a two part inquiry. First, the inmate must show that the prison officials were aware of a "substantial risk of serious harm" to the inmate's health or safety, but failed to act to address the danger. (See *Castro v. ~~Cnty.~~County of L.A.* (9th Cir. 2016) 833 F.3d 1060, 1073.) Second, the inmate must show that the prison officials had no "reasonable" justification for the conduct, in spite of that risk. (*Thomas v. Ponder* (9th Cir. 2010) 611 F.3d 1144, 1150.) Elements 3, 4, and 5 express the deliberate-indifference components.

The "official duties" referred to in element 6 must be duties created by any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 6.

Sources and Authority

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

- "It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." (*Helling v. McKinney* (1993) 509 U.S. 25, 31 [113 S.Ct. 2475, 125 L.Ed.2d 22].)

- "Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety ... ." (*Farmer, supra,* 511 U.S. at p. 834, internal citations omitted.)

- "[D]irect causation by affirmative action is not necessary: 'a prison official may be held liable under the Eighth Amendment if he knows that inmates face a substantial risk of serious harm and disregards that risk *by failing to take reasonable measures to abate it*.' " (*Castro, supra,* 833 F.3d at p. 1067, original italics.)

- "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." (*Farmer, supra,* 511 U.S. at p. 842, internal citation omitted.)

- "When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly." (*Farmer, supra,* 511 U.S. at p. 843 fn. 8.)

- "We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer, supra,* 511 U.S. at p. 837.)

- "The precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement. The Supreme Court has written that the test of *Turner v. Safley,* 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), which requires only a reasonable relationship to a legitimate penological interest to justify prison regulations, does not apply to Eighth Amendment claims. … The existence of a legitimate penological justification has, however, been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes." (*Grenning v. Miller-Stout* (9th Cir. 2014) 739 F.3d 1235, 1240.)

- "We recognize that prison officials have a 'better grasp' of the policies required to operate a correctional facility than either judges or juries. For this reason, in … conditions of confinement cases, we instruct juries to defer to prison officials' judgments in adopting and executing policies needed to preserve discipline and maintain security." (*Mendiola-Martinez v. Arpaio* (9th Cir. 2016) 836 F.3d 1239, 1254, internal citation omitted.)

- "However, our precedent should not be misread to suggest that jail officials are automatically entitled to deference instructions in conditions of confinement or excessive force cases brought by prisoners, or § 1983 actions brought by former inmates. We have long recognized that a jury need not defer to prison officials where the plaintiff produces substantial evidence showing that the jail's policy or practice is an unnecessary, unjustified, or exaggerated response to the need for prison security." (*Shorter v. Baca* (9th Cir. 2018) 895 F.3d 1176, 1183, internal citations omitted.)

- "Although claims by pretrial detainees arise under the Fourteenth Amendment and claims by convicted prisoners arise under the Eighth Amendment, our cases do not distinguish among pretrial and postconviction detainees for purposes of the excessive force, conditions of confinement, and medical care deference instructions." (*Shorter, supra,* 895 F.3d at p. 1182, fn. 4.)

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

Secondary Sources

8 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Constitutional Law, § ~~826~~901

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶¶ 11.02–11.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.28 (Matthew Bender)

3041. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] provided [him/her/*nonbinary pronoun*] with inadequate medical care in violation of [his/her/*nonbinary pronoun*] constitutional rights. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] had a serious medical need;**

2. **That [*name of defendant*] knew that [*name of plaintiff*] faced a substantial risk of serious harm if [his/her/*nonbinary pronoun*] medical need went untreated;**

3. **That [*name of defendant*] consciously disregarded that risk by not taking reasonable steps to treat [*name of plaintiff*]'s medical need;**

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

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

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

A serious medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and pointless infliction of pain.

Neither medical negligence alone, nor a difference of opinion between medical personnel or between doctor and patient, is enough to establish a violation of [*name of plaintiff*]'s constitutional rights.

[In determining whether [*name of defendant*] consciously disregarded a substantial risk, you should consider the personnel, financial, and other resources available to [him/her/*nonbinary pronoun*] or those that [he/she/*nonbinary pronoun*] could reasonably have obtained. [*Name of defendant*] is not responsible for services that [he/she/*nonbinary pronoun*] could not provide or cause to be provided because the necessary personnel, financial, and other resources were not available or could not be reasonably obtained.]

New September 2003; Revised December 2010; Renumbered from CACI No. 3012 December 2012; Revised June 2014, December 2014, June 2015, May 2020

Directions for Use

Give this instruction in a case involving the deprivation of medical care to a prisoner. For an instruction on the creation of a substantial risk of serious harm, see CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*. For an instruction involving the

deprivation of necessities, see CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Deprivation of Necessities*.

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to ~~his or her~~the inmate's health or safety. In a medical-needs case, deliberate indifference requires that the prison officials have known of and disregarded an excessive risk to the inmate's health or safety. Negligence is not enough. (*Farmer v. Brennan* (1994) 511 U.S. 825, 834−837 [114 S.Ct. 1970, 128 L.Ed.2d 811].) Elements 2 and 3 express deliberate indifference.

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

The Ninth Circuit has held that in considering whether an individual prison medical provider was deliberately indifferent, the jury should be instructed to consider the economic resources made available to the prison health care system. (See *Peralta v. Dillard* (9th Cir. 2014) 744 F.3d 1076, 1084 [*en banc*].) Although this holding is not binding on California courts, the last optional paragraph may be given if the defendant has presented evidence of lack of economic resources and the court decides that this defense should be presented to the jury.

Sources and Authority

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

- "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under section 1983." (*Estelle v. Gamble* (1976) 429 U.S. 97, 104–105 [97 S.Ct. 285, 50 L.Ed.2d 251], internal citation and footnotes omitted.)

- "Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety ... ." (*Farmer, supra,* 511 U.S. at p. 834, internal citations omitted.)

- " 'To set forth a constitutional claim under the Eighth Amendment predicated upon the failure to provide medical treatment, first the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, a plaintiff must show the defendant's response to the need was

deliberately indifferent.' The 'deliberate indifference' prong requires '(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need, and (b) harm caused by the indifference.' 'Indifference may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown in the way in which prison [officials] provide medical care.' '[T]he indifference to [a prisoner's] medical needs must be substantial. Mere "indifference," "negligence," or "medical malpractice" will not support this [claim].' Even gross negligence is insufficient to establish deliberate indifference to serious medical needs." (*Lemire v. Cal. Dep't of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1081−1082, internal citations omitted.)

"Indications that a plaintiff has a serious medical need include '[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain.' " (*Colwell v. Bannister* (9th Cir. 2014) 763 F.3d 1060, 1066.)

- "Consistent with that concept and the clear connections between mental health treatment and the dignity and welfare of prisoners, the Eighth Amendment's prohibition against cruel and unusual punishment requires that prisons provide mental health care that meets 'minimum constitutional requirements.' When the level of a prison's mental health care 'fall[s] below the evolving standards of decency that mark the progress of a maturing society,' the prison fails to uphold the constitution's dignitary principles." (*Disability Rights Montana, Inc. v. Batista* (9th Cir. 2019) 930 F.3d 1090, 1097, internal citation omitted.)

- "We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer, supra,* 511 U.S. at p. 837.)

- "The subjective standard of deliberate indifference requires 'more than ordinary lack of due care for the prisoner's interests or safety.' The state of mind for deliberate indifference is subjective recklessness. But the standard is 'less stringent in cases involving a prisoner's medical needs . . . because "the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns." ' " (*Snow v. McDaniel* (9th Cir. 2012) 681 F.3d 978, 985, internal citations omitted.)

- "[D]eliberate indifference 'may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.'. … '[A] prisoner need not show his harm was substantial.' " (*Wilhelm v. Rotman* (9th Cir. 2012) 680 F.3d 1113, 1122, internal citation omitted.)

- "[A]llegations that a prison official has ignored the instructions of a prisoner's treating physician are sufficient to state a claim for deliberate indifference." (*Wakefield v. Thompson* (9th Cir. 1999) 177 F.3d 1160, 1165.)

- "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice

does not become a constitutional violation merely because the victim is a prisoner." (*Estelle, supra,* 429 U.S. at p. 106.)

- " 'A difference of opinion between a physician and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference.' Rather, '[t]o show deliberate indifference, the plaintiff "must show that the course of treatment the doctors chose was medically unacceptable under the circumstances" and that the defendants "chose this course in conscious disregard of an excessive risk to plaintiff's health." ' " (*Colwell, supra,* 763 F.3d at p. 1068.)

- "It has been recognized ... that inadequate medical treatment may, in some instances, constitute a violation of 42 United States Code section 1983. In *Sturts v. City of Philadelphia,* for example, the plaintiff alleged that defendants acted 'carelessly, recklessly and negligently' when they failed to remove sutures from his eye, neck and face. The court concluded that although plaintiff was alleging inadequate medical treatment, he had stated a cause of action under section 1983: '... where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments. In some cases, however, the medical attention rendered may be so woefully inadequate as to amount to no treatment at all, thereby rising to the level of a § 1983 claim. ...' " (*Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 176-177 [216 Cal.Rptr. 661, 703 P.2d 1], internal citations omitted.)

- "Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citation omitted.)

- "[T]here is a two-pronged test for evaluating a claim for deliberate indifference to a serious medical need: First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, the plaintiff must show the defendant's response to the need was deliberately indifferent. This second prong . . . is satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." (*Akhtar v. Mesa* (9th Cir. 2012) 698 F.3d 1202, 1213.)

- "Where a plaintiff alleges systemwide deficiencies, 'policies and practices of statewide and systematic application [that] expose all inmates in [the prison's] custody to a substantial risk of serious harm,' we assess the claim through a two-pronged inquiry. The first, objective, prong requires that the plaintiff show that the conditions of the prison pose 'a substantial risk of serious harm.' The second, subjective, prong requires that the plaintiff show that a prison official was deliberately indifferent by being 'aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists,' and 'also draw[ing] the inference.' " (*Disability Rights Montana, Inc., supra,* 930 F.3d at p. 1097, internal citations and footnote omitted.)

- "A prison medical official who fails to provide needed treatment because he lacks the necessary resources can hardly be said to have intended to punish the inmate. The challenged instruction properly advised the jury to consider the resources [defendant] had available in determining whether

he was deliberately indifferent." (*Peralta, supra,* 744 F.3d at p. 1084.)

- "We recognize that prison officials have a 'better grasp' of the policies required to operate a correctional facility than either judges or juries. For this reason, in excessive force and conditions of confinement cases, we instruct juries to defer to prison officials' judgments in adopting and executing policies needed to preserve discipline and maintain security. [¶] Such deference is generally absent from serious medical needs cases, however, where deliberate indifference 'can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates.' " (*Mendiola-Martinez v. Arpaio* (9th Cir. 2016) 836 F.3d 1239, 1254, internal citations omitted.)

- "[T]rial judges in prison medical care cases should not instruct jurors to defer to the adoption and implementation of security-based prison policies, unless a party's presentation of the case draws a plausible connection between a security-based policy or practice and the challenged medical care decision." (*Chess v. Dovey* (9th Cir. 2015) 790 F.3d 961, 962.)

- "Although claims by pretrial detainees arise under the Fourteenth Amendment and claims by convicted prisoners arise under the Eighth Amendment, our cases do not distinguish among pretrial and postconviction detainees for purposes of the excessive force, conditions of confinement, and medical care deference instructions." (*Shorter v. Baca* (9th Cir. 2018) 895 F.3d 1176, 1182, fn. 4.)

- "We now turn to the second prong of the inquiry, whether the defendants were deliberately indifferent. This is not a case in which there is a difference of medical opinion about which treatment is best for a particular patient. Nor is this a case of ordinary medical mistake or negligence. Rather, the evidence is undisputed that [plaintiff] was denied treatment for his monocular blindness solely because of an administrative policy, even in the face of medical recommendations to the contrary. A reasonable jury could find that [plaintiff] was denied surgery, not because it wasn't medically indicated, not because his condition was misdiagnosed, not because the surgery wouldn't have helped him, but because the policy of the [defendant] is to require an inmate to endure reversible blindness in one eye if he can still see out of the other. This is the very definition of deliberate indifference." (*Colwell, supra,* 763 F.3d at p. 1068.)

- "[C]laims for violations of the right to adequate medical care 'brought by pretrial detainees against individual defendants under the Fourteenth Amendment' must be evaluated under an objective deliberate indifference standard. Based thereon, the elements of a pretrial detainee's medical care claim against an individual defendant under the due process clause of the Fourteenth Amendment are: (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries. 'With respect to the third element, the defendant's conduct must be objectively unreasonable, a test that will necessarily "turn[ ] on the facts and circumstances of each particular case." ' The ' "mere lack of due care by a state official" does not deprive an individual of life, liberty, or property under the Fourteenth Amendment.' Thus, the plaintiff must 'prove more than negligence but less than subjective intent—something akin to reckless disregard.' "

(*Gordon v. County of Orange* (9th Cir. 2018) 888 F.3d 1118, 1124–1125, internal citations omitted.)

- "A 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.' The 'routine discomfort' that results from incarceration and which is 'part of the penalty that criminal offenders pay for their offenses against society' does not constitute a 'serious' medical need." (*Doty v. County of Lassen* (9th Cir. 1994) 37 F.3d 540, 546, internal citations and footnote omitted.)

Secondary Sources

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 244

8 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Constitutional Law, § ~~826~~901

Schwarzer, et al., California Practice Guide: Federal Civil Procedure Before Trial, Ch. 2E-10, *Special Jurisdictional Limitations--Eleventh Amendment As Limitation On Actions Against States*, ¶ 2:4923 (The Rutter Group)

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law-Prisons*, ¶ 11.09 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.15 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.183 (Matthew Bender)

3043. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Deprivation of Necessities (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her/*nonbinary pronoun*] to prison conditions that deprived [him/her/*nonbinary pronoun*] of basic rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was imprisoned under conditions that deprived [him/her/*nonbinary pronoun*] of [***describe deprivation, e.g., clothing***];**

2. **That this deprivation was sufficiently serious in that it denied [***name of plaintiff***] a minimal necessity of life;**

3. **That [***name of defendant***]'s conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

4. **That [***name of defendant***] knew that [his/her/*nonbinary pronoun*] conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

5. **That there was no reasonable justification for the deprivation;**

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

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

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

Whether the risk was obvious is a factor that you may consider in determining whether [*name of defendant***] knew of the risk.**

New June 2015; Revised May 2020

Directions for Use

Give this instruction in a prisoner case involving deprivation of something serious. (See *Thomas v. Ponder* (9th Cir. 2010) 611 F.3d 1144, 1150–1151.) For an instruction involving the creation of a risk, see CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*. For an instruction on deprivation of medical care, see CACI No. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care.*

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to ~~his or her~~the inmate's health or safety. (*Farmer v. Brennan* (1994) 511 U.S. 825, 834 [114 S.Ct. 1970, 128 L.Ed.2d 811].) "Deliberate indifference" involves a two-part inquiry. First, the inmate must show that the

prison officials were aware of a substantial risk of serious harm to the inmate's health or safety. Second, the inmate must show that the prison officials had no reasonable justification for the conduct, in spite of that risk. (*Thomas, supra,* 611 F.3d at p. 1150.) Elements 4 and 5 express the deliberate-indifference components.

The "official duties" referred to in element 6 must be duties created by any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 6.

Sources and Authority

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

- "It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." (*Helling v. McKinney* (1993) 509 U.S. 25, 31 [113 S.Ct. 2475, 125 L.Ed.2d 22].)

- "Prison officials have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and personal safety." (*Johnson v. Lewis* (9th Cir. 2000) 217 F.3d 726, 731, internal citations omitted.)

- "[E]xtreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society,' 'only those deprivations denying "the minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an Eighth Amendment violation.' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)

- "[A] prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious,' a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities,'… ." (*Farmer, supra,* 511 U.S. at p. 834, internal citations omitted.)

- "'[O]nly the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety ... ." (*Farmer, supra,* 511 U.S. at p. 834, internal citations omitted.)

- "[A]n inmate seeking to prove an Eighth Amendment violation must 'objectively show that he was deprived of something "sufficiently serious," ' and 'make a subjective showing that the deprivation occurred with deliberate indifference to the inmate's health or safety.' The second step, showing 'deliberate indifference,' involves a two part inquiry. First, the inmate must show that the prison officials were aware of a 'substantial risk of serious harm' to an inmate's health or safety. This part of our inquiry may be satisfied if the inmate shows that the risk posed by the deprivation is obvious. Second, the inmate must show that the prison officials had no 'reasonable' justification for the deprivation, in spite of that risk." (*Thomas, supra,* 611 F.3d at p. 1150,

footnote and internal citations omitted.)

- "Next, the inmate must 'make a subjective showing that the deprivation occurred with deliberate indifference to the inmate's health or safety.' To satisfy this subjective component of deliberate indifference, the inmate must show that prison officials 'kn[e]w[] of and disregard[ed]' the substantial risk of harm, but the officials need not have intended any harm to befall the inmate; 'it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.' " (*Lemire v. Cal. Dep't of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1074, internal citations omitted.)

- "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." (*Farmer, supra,* 511 U.S. at p. 842, internal citation omitted.)

- "When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly." (*Farmer, supra,* 511 U.S. at p. 843 fn. 8.)

- "The precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement. The Supreme Court has written that the test of *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), which requires only a reasonable relationship to a legitimate penological interest to justify prison regulations, does not apply to Eighth Amendment claims. The existence of a legitimate penological justification has, however, been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes." (*Grenning v. Miller-Stout* (9th Cir. 2014) 739 F.3d 1235, 1240.)

- "We recognize that prison officials have a 'better grasp' of the policies required to operate a correctional facility than either judges or juries. For this reason, in … conditions of confinement cases, we instruct juries to defer to prison officials' judgments in adopting and executing policies needed to preserve discipline and maintain security." (*Mendiola-Martinez v. Arpaio* (9th Cir. 2016) 836 F.3d 1239, 1254, internal citation omitted.)

- "However, our precedent should not be misread to suggest that jail officials are automatically entitled to deference instructions in conditions of confinement or excessive force cases brought by prisoners, or § 1983 actions brought by former inmates. We have long recognized that a jury need not defer to prison officials where the plaintiff produces substantial evidence showing that the jail's policy or practice is an unnecessary, unjustified, or exaggerated response to the need for prison security." (*Shorter v. Baca* (9th Cir. 2018) 895 F.3d 1176, 1183, internal citations omitted.)

- "Although claims by pretrial detainees arise under the Fourteenth Amendment and claims by convicted prisoners arise under the Eighth Amendment, our cases do not distinguish among pretrial and postconviction detainees for purposes of the excessive force, conditions of confinement, and medical care deference instructions." (*Shorter, supra,* 895 F.3d at p. 1182, fn.

4.)

Secondary Sources

8 Witkin, Summary of California Law (~~10~~11th ed. ~~2010~~2017) Constitutional Law, § ~~816~~888

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶ 11.02 (Matthew Bender)

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

18 California Points and Authorities, Ch. 196, *Public Entities*, § 196.183 (Matthew Bender)

3070. Disability Discrimination—Access Barriers to Public Facility—Construction-Related Accessibility Standards Act—Essential Factual Elements (Civ. Code, §§ 54.3, 55.56)

[*Name of defendant***] is the owner of [a/an] [***e.g., restaurant***] named [***name of business***] that is open to the public. [***Name of plaintiff***] is a disabled person who [***specify disability that creates accessibility problems***].**

[*Name of plaintiff***] claims that [he/she/*nonbinary pronoun*] was denied full and equal access to [***name of defendant***]'s business on a particular occasion because of physical barriers. To establish this claim, [***name of plaintiff***] must prove both of the following:**

1. **That [***name of defendant***]'s business had barriers that violated construction-related accessibility standards in that [***specify barriers***]; and [either]**

2. **[That [***name of plaintiff***] personally encountered the violation on a particular occasion.]**

   [or]

   [That [*name of plaintiff***] was deterred from accessing [***name of defendant***]'s business on a particular occasion.]**

[A violation that [*name of plaintiff***] personally encountered may be sufficient to cause a denial of full and equal access if [he/she/*nonbinary pronoun*] experienced difficulty, discomfort, or embarrassment because of the violation.]**

[To prove that [*name of plaintiff***] was deterred from accessing [***name of defendant***]'s business on a particular occasion, [he/she/*nonbinary pronoun*] must prove both of the following:**

1. **That [***name of plaintiff***] had actual knowledge of one or more violations that prevented or reasonably dissuaded [him/her/*nonbinary pronoun*] from accessing [***name of defendant***]'s business, which [***name of plaintiff***] intended to patronize on a particular occasion.**

2. **That the violation(s) would have actually denied [***name of plaintiff***] full and equal access if [he/she/*nonbinary pronoun*] had tried to patronize [***name of defendant***]'s business on that particular occasion.]**

New December 2014; Revised December 2016, May 2020

Directions for Use

Use this instruction if a plaintiff seeks statutory damages based on a construction-related accessibility claim under the Disabled Persons Act (DPA) or the Unruh Civil Rights Act. (See Civ. Code, § 55.56(a).) Do not give this instruction if actual damages are sought. CACI No. 3067, *Unruh Civil Rights Act—Damages*, may be given for claims for actual damages under the Unruh Act and adapted for use under the

DPA.

The DPA provides disabled persons with rights of access to public facilities. (See Civ. Code, §§ 54, 54.1.) Under the DPA, a disabled person who encounters barriers to access at a public accommodation may recover minimum statutory damages for each particular occasion on which ~~he or she~~the disabled person was denied access. (Civ. Code, §§ 54.3, 55.56(f).) However, the Construction Related Accessibility Standard Act (CRASA) requires that before statutory damages may be recovered, the disabled person either have personally encountered the violation on a particular occasion or have been deterred from accessing the facility on a particular occasion. (See Civ. Code, § 55.56(b).) Also, specified violations are deemed to be merely technical and are presumed to not cause a person difficulty, discomfort, or embarrassment for the purpose of an award of minimum statutory damages. (See Civ. Code, § 55.56(e).)

Give either or both options for element 2 depending on whether the plaintiff personally encountered the barrier or was deterred from patronizing the business because of awareness of the barrier. The next-to-last paragraph is explanatory of the first option, and the last paragraph is explanatory of the second option.

Sources and Authority

- Disabled Persons Act: Right of Access to Public Facilities. Civil Code sections 54, 54.1.

- Action for Interference With Admittance to or Enjoyment of Public Facilities. Civil Code section 54.3.

- Construction-Related Accessibility Standard Act. Civil Code section 55.56.

- "Part 2.5 of division 1 of the Civil Code, currently consisting of sections 54 to 55.3, is commonly referred to as the "Disabled Persons Act," although it has no official title. Sections 54 and 54.1 generally guarantee individuals with disabilities equal access to public places, buildings, facilities and services, as well as common carriers, housing and places of public accommodation, while section 54.3 specifies remedies for violations of these guarantees, including a private action for damages." (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 674 fn. 8 [94 Cal.Rptr.3d 685, 208 P.3d 623].)

- "[L]egislation (applicable to claims filed on or after Jan. 1, 2009 ([Civ. Code,] § 55.57)) restricts the availability of statutory damages under sections 52 and 54.3, permitting their recovery only if an accessibility violation actually denied the plaintiff full and equal access, that is, only if 'the plaintiff personally encountered the violation on a particular occasion, or the plaintiff was deterred from accessing a place of public accommodation on a particular occasion' (§ 55.56, subd. (b)). It also limits statutory damages to one assessment per occasion of access denial, rather than being based on the number of accessibility standards violated. (*Id.,* subd. (e).)" (*Munson, supra,* 46 Cal.4th at pp. 677−678.)

- " '[S]ection 54.3 imposes the standing requirement that the plaintiff have suffered an actual denial of equal access before any suit for damages can be brought. … [A] plaintiff cannot recover damages under section 54.3 unless the violation actually denied him or her access to some public

facility. [¶] Plaintiff's attempt to equate a denial of equal access with the presence of a violation of federal or state regulations would nullify the standing requirement of section 54.3, since any disabled person could sue for statutory damages whenever he or she encountered noncompliant facilities, regardless of whether that lack of compliance actually impaired the plaintiff's access to those facilities. Plaintiff's argument would thereby eliminate any distinction between a cause of action for equitable relief under section 55 and a cause of action for damages under section 54.3.' " (*Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1223 [99 Cal.Rptr.3d 746].)

- "We do not read *Reycraft* and *Urhausen* for the proposition that plaintiffs may not sue someone other than the owner or operator of the public facility described in section 54, for violating a plaintiff's rights under the DPA. A defendant's ability to control a particular location may ultimately be relevant to the question of liability, that is, whether the defendant interfered with the plaintiff's admission to or enjoyment of a public facility. But nothing in the language of section 54.3 suggests that damages may not be recovered against nonowners or operators. To the contrary, section 54.3 broadly and plainly provides: '[a]ny person or persons, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities as specified in [s]ections 54 and 54.1 or otherwise interferes with the rights of an individual with a disability under [s]ections 54, 54.1 and 54.2 is liable for … actual damages … .' " (*Ruiz v. Musclewood Investment Properties, LLC* (2018) 28 Cal.App.5th 15, 24 [238 Cal.Rptr.3d 835].)

- "In our view, *Reycraft* does not require that a plaintiff who sues for interference of his rights must present himself to *defendant's* business, with the intent to utilize *defendant's* services. Instead, a plaintiff who seeks damages for a violation of section 54.3 must establish that he 'presented himself' to a 'public place' with the intent of 'utilizing its services in the manner in which those … services are typically offered to the public and was actually denied' admission or enjoyment (or had his admission or enjoyment interfered with) on a particular occasion. Here, as alleged, plaintiff presented himself at a public place (the sidewalk) with the intent of using it in the manner it is typically offered to the public (walking on it for travel), and actually had his enjoyment interfered with on six occasions. Plaintiff therefore has standing to sue for damages." (*Ruiz, supra,* 28 Cal.App.5th at p. 24, original italics, internal citation omitted.)

- "Like the Unruh Civil Rights Act, the DPA incorporates the ADA to the extent that 'A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section.' (Civ. Code, § 54, subd. (c)." (*Baughman v. Walt Disney World Co.* (2013) 217 Cal.App.4th 1438, 1446 [159 Cal.Rptr.3d 825].)

Secondary Sources

8 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Constitutional Law, § ~~957 et seq.~~1073

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.36 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.20 (Matthew Bender)

3071. Retaliation for Refusing to Authorize Disclosure of Medical Information—Essential Factual Elements (Civ. Code, § 56.20(b))

[*Name of plaintiff***] claims that [***name of defendant***] discriminated against [him/her/*nonbinary pronoun*] because [he/she/*nonbinary pronoun*] refused to authorize disclosure of [his/her/*nonbinary pronoun*] medical information to [***name of defendant***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] asked [***name of plaintiff***] to sign an authorization so that [***name of defendant***] could obtain medical information about [***name of plaintiff***] from [his/her/*nonbinary pronoun*] health care providers;**

2. **That [***name of plaintiff***] refused to sign the authorization;**

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

4. **That [***name of plaintiff***]'s refusal to sign the authorization was a substantial motivating reason for [***name of defendant***]'s decision to [***e.g., terminate plaintiff's employment***];**

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.**

Even if [*name of plaintiff***] proves all of the above, [***name of defendant***]'s conduct was not unlawful if [***name of defendant***] proves that the lack of the medical information made it necessary to [***e.g., terminate plaintiff's employment***].**

New June 2015; Revised May 2020

Directions for Use

An employer may not discriminate against an employee in terms or conditions of employment due to the employee's refusal to sign an authorization to release ~~his or her~~the employee's medical information to the employer. (Civ. Code, § 56.20(b).). However, an employer may take any action that is necessary in the absence of the medical information due to the employee's refusal to sign an authorization. (*Ibid.*)

Give this instruction if an employee claims that ~~his or her~~the employer retaliated against ~~him or her~~the employee for refusing to authorize release of medical information. The employee has the burden of proving a causal link between the refusal to authorize and the employer's retaliatory actions. The employer then has the burden of proving necessity. (See *Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437, 453 [177 Cal.Rptr.3d 145].) If necessary, the instruction may be expanded to define "medical information." (See Civ. Code, § 56.05(j) ["medical information" defined].)

The statute requires that the employer's retaliatory act be "due to" the employee's refusal to release the

medical information. (Civ. Code, § 56.20(b).) One court has instructed the jury that the refusal to release must be a "motivating reason" for the retaliation. (See *Kao, supra,* 229 Cal.App.4th at p. 453.) With regard to the causation standard under the Fair Employment and Housing Act, the California Supreme Court has held that the protected activity must have been a *substantial* motivating reason. (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*.)

Sources and Authority

- Confidentiality of Medical Information Act. Civil Code section 56 et seq.

- Employee's Refusal to Authorize Release of Medical Records to Employer. Civil Code section 56.20(b).

- "An employer 'discriminates' against an employee in violation of section 56.20, subdivision (b), if it improperly retaliates against or penalizes an employee for refusing to authorize the employee's *health care provider* to disclose confidential medical information *to the employer or others* (see Civ. Code, § 56.11), or for refusing to authorize *the employer* to disclose confidential medical information relating to the employee *to a third party* (see Civ. Code, § 56.21)." (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 861 [59 Cal. Rptr. 2d 696, 927 P.2d 1200], original italics.)

- "[T]he jury was instructed that if [plaintiff] proved his refusal to authorize release of confidential medical information for the FFD [fitness for duty examination] was 'the motivating reason for [his] discharge,' [defendant] 'nevertheless avoids liability by showing that … its decision to discharge [plaintiff] was necessary because [plaintiff] refused to take the FFD examination.' " (*Kao, supra,* 229 Cal.App.4th at p. 453.)

Secondary Sources

2 Witkin, California Evidence (~~4~~5th ed. 2012) Witnesses § ~~681~~540

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.202 (Matthew Bender)

3102A. Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15657.05; Civ. Code, § 3294(b))

[*Name of plaintiff***] also claims that [***name of employer defendant***] is responsible for [attorney fees and costs/ [and] [***name of decedent***]'s pain and suffering before death]. To establish this claim, [***name of plaintiff***] must prove by clear and convincing evidence [***insert one or more of the following four options:***]**

1. **[That [***name of individual defendant***] was an officer, a director, or a managing agent of [***name of employer defendant***] acting on behalf of [***name of defendant***];] [or]**

2. **[That an officer, a director, or a managing agent of [***name of employer defendant***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her/*nonbinary pronoun*] with a knowing disregard of the rights or safety of others;] [or]**

3. **[That an officer, a director, or a managing agent of [***name of employer defendant***] authorized [***name of individual defendant***]'s conduct;] [or]**

4. **[That an officer, a director, or a managing agent of [***name of employer defendant***] knew of [***name of individual defendant***]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if ~~he or she~~ the employee exercises substantial independent authority and judgment in ~~his or her~~ corporate decision-making such that ~~his or her~~ the employee's decisions ultimately determine corporate policy.

[If [*name of plaintiff***] proves the above, I will decide the amount of attorney fees and costs.]**

Derived from former CACI No. 3102 October 2008; Revised April 2009, May 2020

Directions for Use

This instruction should be given with CACI No. 3104 (neglect), CACI No. 3107 (physical abuse), or CACI No. 3110 (abduction) if the plaintiff is seeking the enhanced remedies of attorney fees and costs and/or damages for a decedent's pain and suffering against an employer and the employee is also a defendant. (See Civ. Code, § 3294(b); Welf. & Inst. Code, §§ 15657(c), 15657.05.) If the employer is the only defendant, give CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*. The requirements of Civil Code section 3294(b) need not be met in order to obtain enhanced remedies from an employer for financial abuse. (See Welf. & Inst. Code, § 15657.5(c).)

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Enhanced Remedies for Physical Abuse, ~~or~~ Neglect, or Abandonment. Welfare and Institutions Code section 15657.

- Enhanced Remedies Against Employer Based on Acts of Employee. Welfare and Institutions Code section 15657.5(c).

- Enhanced Remedies for Abduction. Welfare and Institutions Code section 15657.05.

- Punitive Damages Against Employer. Civil Code section 3294(b).

- "[A] finding of ratification of [agent's] actions by [employer], and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney, supra,* 20 Cal.4th at pp. 31–32, internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], disapproved on other grounds in *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 164 [202 Cal.Rptr.3d 447, 370 P.3d 1011], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

Balisok, Civil Litigation Series: Elder Abuse Litigation, §§ 9:1, 9:67, 10:1 (The Rutter Group)

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.41–6.44

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

3102B. Employer Liability for Enhanced Remedies—Employer Defendant Only (Welf. & Inst. Code, §§ 15657, 15657.05; Civ. Code, § 3294(b))

[*Name of plaintiff***] also claims that [***name of defendant***] is responsible for [attorney fees and costs/ [and] [***name of decedent***]'s pain and suffering before death]. To establish this claim, [***name of plaintiff***] must prove by clear and convincing evidence [***insert one or more of the following four options:***]**

1. **[That the employee who committed the acts was an officer, a director, or a managing agent of [***name of defendant***] acting on behalf of [***name of defendant***]]; [or]**

2. **[That an officer, a director, or a managing agent of [***name of defendant***] had advance knowledge of the unfitness of the employee who committed the acts and employed [him/her/*nonbinary pronoun*] with a knowing disregard of the rights or safety of others;] [or]**

3. **[That an officer, a director, or a managing agent of [***name of defendant***] authorized the conduct of the employee who committed the acts;] [or]**

4. **[That an officer, a director, or a managing agent of [***name of defendant***] knew of the wrongful conduct of the employee who committed the acts and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if ~~he or she~~the employee exercises substantial independent authority and judgment in ~~his or her~~ corporate decision-making such that ~~his or her~~the employee's decisions ultimately determine corporate policy.

[If [*name of plaintiff***] proves the above, I will decide the amount of attorney fees and costs.]**

Derived from former CACI No. 3102 October 2008; Revised April 2009, May 2020

Directions for Use

This instruction should be given with CACI No. 3104 (neglect), CACI No. 3107 (physical abuse), or CACI No. 3110 (abduction) if the plaintiff is seeking the enhanced remedies of attorney fees and costs and/or damages for a decedent's pain and suffering against an employer and the employee is not also a defendant. (See Civ. Code, § 3294(b); Welf. & Inst. Code, §§ 15657(c), 15677.05.) If the employee is also a defendant, give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*. The requirements of Civil Code section 3294(b) need not be met in order to obtain enhanced remedies from an employer for financial abuse. (See Welf. & Inst. Code, § 15657.5(c).)

Sources and Authority

- Enhanced Remedies for Physical Abuse, ~~or~~ Neglect, or Abandonment. Welfare and Institutions Code section 15657.

- Enhanced Remedies Against Employer for Acts of Employee. Welfare and Institutions Code, section 15657.5(c).

- Enhanced Remedies for Abduction. Welfare and Institutions Code section 15657.05.

- Punitive Damages Against Employer. Civil Code section 3294(b).

- "[A] finding of ratification of [agent's] actions by [employer], and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], disapproved on other grounds in *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 164 [202 Cal.Rptr.3d 447, 370 P.3d 1011], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

Balisok, Civil Litigation Series: Elder Abuse Litigation, §§ 9:1, 9:67, 10:1 (The Rutter Group)

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.41–6.44

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

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:***]**

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

New September 2003; Revised January 2019, May 2020

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)

3114. "Malice" Explained

"Malice" means that [[*name of individual defendant*]/[*name of employer defendant*]'s employee] acted with intent to cause injury or that [his/her*/nonbinary pronoun*] conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when ~~he or she~~the person is aware of the probable dangerous consequences of ~~his or her~~the person's conduct and deliberately fails to avoid those consequences.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

New September 2003; Revised October 2008, May 2020

Directions for Use

If the individual responsible for the elder abuse is a defendant in the case, use [*name of individual defendant*]. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee."

Sources and Authority

- "Malice" for Punitive Damages Defined. Civil Code section 3294(c)(1).

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "Under the statute, 'malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1559

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elders*, § 5.33[1] (Matthew Bender)

3203. Reasonable Number of Repair Opportunities—Rebuttable Presumption (Civ. Code, § 1793.22(b))

The number of opportunities to make repairs is presumed to be reasonable if [*name of plaintiff***] proves that within [18 months from delivery of the [***new motor vehicle***] to [him/her/*nonbinary pronoun*/it]] [or] [the first 18,000 miles] [***insert option A, B, and/or C:***]**

[A.

1. The vehicle was made available to [*name of defendant***] [or its authorized repair facility] for repair of the same substantially impairing defect two or more times; [and]**

2. The defect resulted in a condition that was likely to cause death or serious bodily injury if the vehicle were driven; [and]

3. [[*Name of plaintiff***] directly notified [***name of manufacturer***] in writing about the need to repair the defect;] [or]]**

[B.

1. The vehicle was made available to [*name of defendant***] [or its authorized repair facility] for repair of the same substantially impairing defect four or more times; [and]**

2. [[*Name of plaintiff***] directly notified [***name of manufacturer***] in writing about the need to repair the defect;] [or]]**

[C. The vehicle was out of service for repair of substantially impairing defects by [*name of defendant***] [or its authorized repair facility] for more than 30 days.]**

If [*name of plaintiff***] has proved these facts, then the number of opportunities to make repairs was reasonable unless [***name of defendant***] proves that under all the circumstances [***name of defendant***] [or its authorized repair facility] was not given a reasonable opportunity to repair the defect.**

[The 30-day limit for repairing defects will be lengthened if [*name of defendant***] proves that repairs could not be made because of conditions beyond the control of [***name of defendant***] or its authorized repair facility.]**

New September 2003; Revised February 2005, May 2020

Directions for Use

This instruction should not be given if none of the enumerated situations apply to the plaintiff's case. (*Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1245 [13 Cal.Rptr.3d 679].)

Note that the factfinder's inquiry should be focused on overall reasonableness of the opportunities plaintiff gave defendant to make repairs. Therefore, while satisfying the rebuttable presumption (without having it overcome by defendant) is one way for plaintiff to satisfy the reasonable opportunities requirement, ~~he or she~~the plaintiff may do so in other ways instead. Likewise, because the statutory presumption is rebuttable, defendant is allowed an opportunity to overcome it.

The rebuttable presumption concerning the number of repair attempts applies only to new motor vehicles-see the Tanner Consumer Protection Act. (Civ. Code, § 1793.22(b).)

The bracketed language in the first two optional paragraphs concerning notice made directly to the manufacturer are applicable only if "the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner's manual, the provisions of [the Tanner Consumer Protection Act] and that of [Civil Code section 1793.2(d)], including the requirement that the buyer must notify the manufacturer directly." (See Civ. Code, § 1793.22(b)(3).) This is a matter that the judge should determine ahead of time as an issue of law.

Sources and Authority

- Replacement or Reimbursement After Reasonable Number of Repair Attempts. Civil Code section 1793.2(d)(2).

- Reasonable Number of Repair Opportunities. Civil Code section 1793.22(b).

- "We believe ... that the only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable *opportunity* to repair the vehicle.' Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1103–1104 [109 Cal.Rptr.2d 583], internal citations and footnote omitted.)

Secondary Sources

2 California UCC Sales & Leases (Cont.Ed.Bar) Prelitigation Remedies, § 17.10

8 California Forms of Pleading and Practice, Ch. 91, *Automobiles: Actions Involving Defects and Repairs*, § 91.16 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.104 (Matthew Bender)

5 California Civil Practice: Business Litigation, § 53:27 (Thomson Reuters)

3230. Continued Reasonable Use Permitted

The fact that [*name of plaintiff*] continued to use the [*consumer good/new motor vehicle*] after delivering it for repair does not waive [his/her/*nonbinary pronoun*] right to demand replacement or reimbursement. Nor does it reduce the amount of damages that you should award to [*name of plaintiff*] if you find that [he/she/*nonbinary pronoun*] has proved [his/her/*nonbinary pronoun*] claim against [*name of defendant*].

New June 2012; Revised May 2020

Directions for Use

Give this instruction to make it clear to the jury that the fact that the buyer continued to use the product after delivering it for repair does not waive ~~his or her~~the buyer's right to reimbursement and damages. (See *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1240–1244 [13 Cal.Rptr.3d 679].) Continued use is relevant, however, to the jury's consideration of whether the vehicle was substantially impaired. See CACI No. 3204, *"Substantially Impaired" Explained,* factor (d).

There may be some uncertainty about the defendant's right to a damages offset for continued use. In an older case, the court held that principles of rescission under the Uniform Commercial Code survive under the Song-Beverly Consumer Warranty Act, and that the seller remains protected through a recoupment right of setoff for the buyer's use of the good beyond the time of revoking acceptance. (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 898 [263 Cal.Rptr. 64].) However, a more recent case rejected the proposition that pre Song-Beverly Commercial Code rules on continued use survive under Song-Beverly. (See *Jiagbogu, supra,* 118 Cal.App.4th at p. 1240.) The last sentence of this instruction is based on *Jiagbogu,* but in light of the potential uncertainty on the damages offset issue, the trial court will need to decide whether *Jiagbogu* or *Ibrahim* states the applicable rule.

Sources and Authority

- "[Defendant] contends that [plaintiff]'s request for restitution amounted to a rescission. But [Civil Code] section 1793.2 does not refer to rescission or any portion of the Commercial Code that discusses rescission. The [Song-Beverly] Act does not parallel the Commercial Code; it provides different and more extensive consumer protections. [Plaintiff] did not invoke rescission, or any of the common law doctrines or Commercial Code provisions relating to that remedy. It would not matter if he had referred to rescission in his buyback request, as long as he sought a remedy only under the Act, which contains no provision requiring formal rescission to obtain relief. [Defendant] acknowledges in its brief that [plaintiff] requested refund *or replacement*. That comports with a claim under the Act, not with a traditional cause of action for rescission." (*Jiagbogu, supra,* 118 Cal.App.4th at p. 1240, original italics, internal citations omitted.)

- "Within the context of the California Uniform Commercial Code courts around the country are in general agreement that reasonable continued use of motorized vehicles does not, as a matter of law, prevent the buyer from asserting rescission (or its U.Com.Code equivalent, revocation of acceptance). This consensus is based upon the judicial recognition of practical realities—

purchasers of unsatisfactory vehicles may be compelled to continue using them due to the financial burden to securing alternative means of transport for a substantial period of time. The seller remains protected through a recoupment right of setoff for the buyer's use of the good beyond the time of revoking acceptance." (*Ibrahim, supra,* 214 Cal.App.3d at pp. 897–898, internal citations omitted.)

- "Nothing in the language of either the Uniform Commercial Code or the Song-Beverly Act suggests that abrogation of the common law principles relating to continued use and waiver of a buyer's right to rescind was intended. The former expressly specifies that 'the principles of law and equity . . . shall supplement its provisions.' (Cal. U. Com. Code, § 1103.) The legal principles governing continued use quoted previously are thus still applicable, as are the rules regulating the equitable right of setoff." (*Ibrahim, supra,* 214 Cal.App.3d at p. 898, internal citations omitted.)

- "Since we reject [defendant]'s basic argument that a request for replacement or refund under the Act constitutes rescission, we find no error in the trial court's refusal to instruct on waiver of right to rescind or on statutory offsets for postrescission use." (*Jiagbogu, supra,* 118 Cal.App.4th at p. 1242.)

- "[Civil Code] Section 1793.2, subdivision (d)(2)(C), and (d)(2)(A) and (B) to which it refers, comprehensively addresses replacement and restitution; specified predelivery offset; sales and use taxes; license, registration, or other fees; repair, towing, and rental costs; and other incidental damages. None contains any language authorizing an offset in any situation other than the one specified. This omission of other offsets from a set of provisions that thoroughly cover other relevant costs indicates legislative intent to exclude [post-delivery use] offsets." (*Jiagbogu, supra,* 118 Cal.App.4th at pp. 1243–1244.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 198, 318

8 California Forms of Pleading and Practice, Ch. 91, *Automobiles: Actions Involving Defects and Repairs*, § 91.18 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales*, § 502.42 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.102 et seq. (Matthew Bender)

30 California Legal Forms: Transaction Guide, Ch. 92, *Service Contracts*, § 92.53 (Matthew Bender)

3335. Affirmative Defense—"Good Faith" Explained

In deciding whether [*name of defendant*] acted in good faith in attempting to meet competition, you must decide whether [his/her/*nonbinary pronoun*/its] belief was based on facts that would lead a reasonable person to believe that the price ~~he or she~~the defendant was offering would meet the legal price of ~~his or her~~the defendant's competitor. You must consider all of the facts and circumstances present, including, but not limited to:

1. **The nature and source of the information on which [*name of defendant*] relied;**

2. **[*Name of defendant*]'s prior experience, if any, with similar information or with persons who provided the information;**

3. **[*Name of defendant*]'s prior pricing practices; and**

4. **[*Name of defendant*]'s general business practices.**

[*Name of defendant*] does not have to prove that [his/her/*nonbinary pronoun*/its] price did actually meet the legal price of its competitor; only that [he/she/*nonbinary pronoun*/it] reasonably believed that [he/she/*nonbinary pronoun*/it] was offering a price that would meet the competitor's price.

New September 2003; Revised May 2020

Directions for Use

This instruction provides the jury with a general listing of circumstances against which it might consider evidence in the record to decide whether a defendant's attempts to meet competition were in good faith. The final paragraph eases the defendant's burden of proof with respect to the "meet but don't beat" element because a defendant is required only to prove its reasonable belief that its prices would meet, but not beat, a competitor's prices.

Sources and Authority

- Good-Faith Price to Meet Competition Permitted. Business and Professions Code section 17050(d), (e).

- "The requirement [to ascertain the 'legal prices' of competitors] is not absolute. It is merely that the defendants shall have endeavored 'in good faith' to meet the legal prices of a competitor." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 117 [153 P.2d 9].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609–615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.53 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.46[2], 5.51, 5.100[7]

3408. Vertical Restraints—"Coercion" Explained

Coercion is conduct that interferes with the freedom of a reseller to sell in accordance with ~~his or her~~ the reseller's own judgment. [It may include a threat by [*name of defendant*] to stop doing business with [[*name of plaintiff*]/a reseller] or to hold back any product or service important to [his/her/*nonbinary pronoun*/its] competition in the market.] A unilateral decision to deal or refuse to deal with a particular reseller does not constitute coercion.
Coercion may be proven directly or indirectly. In deciding whether there was coercion, you may consider, among other factors, the following:

(a) Whether [*name of defendant*] penalized or threatened to penalize [*name of plaintiff*] for not following [his/her/*nonbinary pronoun*/its] suggestions;

(b) Whether [*name of defendant*] made or threatened to make an important benefit depend on [*name of plaintiff*] following [his/her/*nonbinary pronoun*/its] suggestions;

(c) Whether [*name of defendant*] required [*name of plaintiff*] to get approval before doing something other than what [he/she/*nonbinary pronoun*/it] suggested; and

(d) The relative bargaining power of [*name of defendant*] and [*name of plaintiff*].

New September 2003; Revised May 2020

Directions for Use

In the bracketed portion of the first paragraph, the word "reseller" should be used if the plaintiff is not the reseller.

Sources and Authority

- "[T]he 'conspiracy' or 'combination' necessary to support an antitrust action can be found where a supplier or producer, by coercive conduct, imposes restraints to which distributors involuntarily adhere. If a 'single trader' pressures customers or dealers into adhering to resale price maintenance, territorial restrictions, exclusive dealing arrangements or illegal 'tie-ins,' an unlawful combination is established, irrespective of any monopoly or conspiracy, and despite the recognized right of a producer to determine with whom it will deal." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 720 [187 Cal.Rptr. 797], internal citations omitted.)

- "If a seller does no more than announce a policy designed to restrain trade, and declines to sell to those who fail to adhere to the policy, no illegal combination is established." (*Kolling, supra,* 137 Cal.App.3d at p. 721, internal citations omitted.)

- "A manufacturer may choose those with whom it wishes to deal and unilaterally may refuse to deal with a distributor or customer for business reasons without running afoul of the antitrust laws. It will

thus be rare for a court to infer a vertical combination solely from a business's unilateral refusal to deal with distributors or customers who do not comply with certain conditions. Nonetheless, there is a line of cases that supports the proposition that a manufacturer may form a 'conspiracy' or 'combination' under the antitrust laws if it imposes restraints on dealers or customers by coercive conduct and they involuntarily adhere to those restraints." (*Dimidowich v. Bell & Howell* (9th Cir. 1986) 803 F.2d 1473, 1478, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591–607

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.52[5] (Matthew Bender)

3511B. Damage to Remainder During Construction (Code Civ. Proc., § 1263.420(b))

The [*name of condemnor*] has taken only a part of [*name of property owner*]'s property. [*Name of property owner*] claims that [he/she/*nonbinary pronoun*/it] suffered damage to the remaining property during construction of the project for which the property was taken. This loss was because of [*specify reasons alleged for damage due to construction, e.g., reduced business because construction made access to owner's business more difficult*].

If you determine that [*name of property owner*] suffered damage to [his/her/*nonbinary pronoun*/its] remaining property during construction, you must determine the amount of this damage and include it in determining just compensation.

New May 2017; Revised May 2020

Directions for Use

Give this instruction if the owner claims that ~~he or she~~the owner suffered an economic loss on the property not taken during construction of the project, for example because of decreased business due to access being made more difficult. (See *City of Fremont v. Fisher* (2008) 160 Cal.App.4th 666, 676 [73 Cal.Rptr.3d 54].) Courts have referred to these damages as "temporary severance damages" (see, e.g., *City of Fremont, supra,* 160 Cal.App.4th at p. 676.), though the statute does not call them either "temporary" or "severance." (See Code Civ. Proc., § 1263.420(b) [damage to the remainder caused by the construction and use of the project for which the property is taken].)

It is for the jury to determine if such a loss has actually occurred as long as the claim is not speculative, conjectural, or remote. (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 973 [62 Cal.Rptr.3d 623, 161 P.3d 1175].)

A property owner may also be able to recover severance damages if the remaining property has decreased in value because of the partial taking. If severance damages are sought, give CACI No. 3511A, *Severance Damages to Remainder*. Read CACI No. 3512, *Severance Damages—Offset for Benefits*, if benefits to the owner's remaining property are at issue.

Sources and Authority

- Damages to Remainder During Construction. Code of Civil Procedure section 1263.420(b).
- Benefit to Remainder. Code of Civil Procedure section 1263.430.
- "When property acquired by eminent domain is part of a larger parcel, compensation must be awarded for the injury, if any, to the remainder. Such compensation is commonly called severance damages. When the property taken is but part of a single legal parcel, the property owner need only demonstrate injury to the portion that remains to recover severance damages." (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 741 [25 Cal.Rptr.2d 480, 863 P.2d 725], internal citations omitted.)

- "Temporary severance damages resulting from the construction of a public project are also compensable. A property owner 'generally should be able "to present evidence to show whether and to what extent the delay disrupted its use of the remaining property." ' However, 'the mere fact of a delay associated with construction' does not, without more, entitle the property owner to temporary severance damages. The temporary easement or taking must interfere with the owner's *actual* intended use of the property." (*City of Fremont, supra,* 160 Cal.App.4th at p. 676, original italics.)

- "If [owner] had sold the property during the construction period and if the ongoing construction had temporarily lowered the sales price of the property, it would appear that [owner] would be entitled to recover that loss from [city]. But the mere fact of a delay associated with construction of the pipeline did not, without more, entitle [owner] to temporary severance damages relating to the financing or marketing of the property in this eminent domain action. [¶] This is not to say, however, that [owner] is barred from recovering damages for actual injury it may have suffered during the construction of the pipeline. On remand, [owner] may have the opportunity before the trial court to create an appropriate record to support its claim of severance damages. In addition, '[w]hen the condemnation action is tried before the improvement is constructed, and substantial although temporary interference with the property owner's rights of possession or access occurs during construction, the property owner may maintain a subsequent action for such damage occurring during construction.' " (*Metropolitan Water Dist. of So. California, supra,* 41 Cal.4th at p. 975, internal citations omitted.)

- "[Owner] sought temporary severance damages for impairment to his property because of construction activities associated with the project. Specifically, [owner] asserted the effect of removal of all landscaping for a period of one year, and the closure of two of four driveways on his property for four months during construction entitles him to temporary severance damages. In addition, [owner] asserts the access to his property was substantially impaired by the traffic detour traveling east through the intersection of East Airway Boulevard and Isabel Avenue created by the construction project." (*City of Livermore v. Baca* (2012) 205 Cal.App.4th 1460, 1471 [141 Cal.Rptr.3d 271] [court erred in excluding evidence of the above].)

- "The Legislature has framed the question of whether property should be viewed as an integrated whole in terms of whether the land remaining after the taking forms part of a 'larger parcel'; the issue is one of law for decision by the court." (*City of San Diego, supra*, 6 Cal.4th at p. 745, internal citations omitted.)

- "Both sides here thus agree that the court, not the jury, must make certain determinations that are a predicate to the award of severance damages. But [condemnor] is on weaker ground when it attempts to derive … a general rule that 'as a matter of constitutional and decisional law, *all* issues having to do with the existence of, or entitlement to, severance damages are entrusted to the trial judge,' such that '[o]nly after the trial judge has determined that severance damages exist does the jury consider the amount of those severance damages.' [Condemnor]'s proposed rule assumes that questions relating to the measurement of severance damages can be readily distinguished from questions relating to the entitlement to them in the first place but, as we have previously cautioned, the two concepts are not necessarily 'so easily separable.' " (*Metropolitan Water Dist. of So. California, supra,* 41 Cal.4th at p. 972, original italics, internal citations omitted.)

- "In determining severance damage, the jury must assume 'the most serious damage' which will be caused to the remainder by the taking of the easement and construction of the property." (*San Diego Gas & Electric Co. v. Daley* (1988) 205 Cal.App.3d 1334, 1345 [253 Cal.Rptr. 144], internal citations omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 720 [66 Cal.Rptr.2d 630, 941 P.2d 809].)

- "[W]hether access to a property has been 'substantially impaired' for purposes of determining severance damages is a question for the court, even though '[s]ubstantial impairment cannot be fixed by abstract definition; it must be found in each case upon the basis of the factual situation.' " (*City of Perris v. Stamper* (2016) 1 Cal.5th 576, 594 [205 Cal.Rptr.3d 797, 376 P.3d 1221].)

- "Although the measure of compensation that is 'just' for purposes of both the federal and state takings clause is often determined by the 'fair market value' of what has been lost, both federal and state takings cases uniformly recognize that the fair market value standard is not applicable in all circumstances and that there is no rigid or fixed standard that is appropriate in all settings." (*Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 186 [204 Cal.Rptr.3d 770, 375 P.3d 887].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 1236–1244

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) Ch. 5

14 California Real Estate Law and Practice, Ch. 508, *Evidence: General*, §§ 508.24, 508.25 (Matthew Bender)

4A Nichols on Eminent Domain, Ch. 14, *Damages for Partial Takings*, §§ 14.01–14.03 (Matthew Bender)

5 Nichols on Eminent Domain, Ch. 16, *Consequential Damages as a Result of Proposed Use*, §§ 16.01–16.05 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.140 (Matthew Bender)

3513. Goodwill

In this case, [*name of business owner*] is entitled to compensation for any loss of goodwill as a part of just compensation. "Goodwill" is the benefit that a business gains as a result of its location, reputation for dependability, skill, or quality, and any other circumstances that cause a business to keep old customers or gain new customers. You must include the amount of any loss of goodwill as an item in your award for just compensation.

New September 2003; Revised February 2007

Sources and Authority

- Compensation for Loss of Goodwill. Code of Civil Procedure section 1263.510.

- "Goodwill is the amount by which a business's overall value exceeds the value of its constituent assets, often due to a recognizable brand name, a sterling reputation, or an ideal location. Regardless of the cause, however, goodwill almost always translates into a business's profitability." (*People ex rel. Dept. of Transportation v. Dry Canyon Enterprises, LLC* (2012) 211 Cal.App.4th 486, 493−494 [149 Cal.Rptr.3d 601], internal citation omitted.)

- "Historically, lost business goodwill was not recoverable under eminent domain law. However, in 1975 the Legislature enacted section 1263.510 'in response to widespread criticism of the injustice wrought by the Legislature's historic refusal to compensate condemnees whose ongoing businesses were diminished in value by a forced relocation. [Citations.] The purpose of the statute was unquestionably to provide monetary compensation for the kind of losses which typically occur when an ongoing small business is forced to move and give up the benefits of its former location.' Thus, a business owner's right to compensation for loss of goodwill is a statutory right, not a constitutional right." (*City and County of San Francisco v. Coyne* (2008) 168 Cal.App.4th 1515, 1522 [86 Cal.Rptr.3d 255], internal citations omitted.)

- "Determining liability for loss of goodwill under section 1263.510 involves a two-step process. 'First, the court determines *entitlement*: that is, whether the party seeking compensation has presented sufficient evidence of the conditions for compensation set forth in subdivision (a)—causation, unavoidability, and no double recovery—such that the party is entitled to *some* compensation. If the party meets this burden, the matter proceeds to a second step, in which a jury (unless waived) determines the *amount* of the loss.' Thus, if that party meets certain ' "qualifying conditions for such compensation," ' it has a right to a jury trial on the amount of compensation due." (*Los Angeles County Metropolitan Transportation Authority v. Yum Yum Donut Shops, Inc.* (2019) 32 Cal.App.5th 662, 669 [244 Cal.Rptr.3d 201], original italics, internal citation omitted.)

- "[T]he owner of a business conducted on property taken by eminent domain is entitled to compensation for loss of goodwill resulting from the taking. (*Thee Aguila, Inc. v. Century Law Group, LLP* (2019) 37 Cal.App.5th 22, 27 [249 Cal.Rptr.3d 254, 258].)

- " 'Under section 1263.510, subdivision (a), the business owner has the initial burden of showing entitlement to compensation for lost goodwill.' " (*City and County of San Francisco, supra,* 168 Cal.App.4th at pp. 1522–1523, internal citations omitted.)

- "Since the conditions set forth in subdivision (a) all pertain to the 'loss' of 'goodwill,' the initial obligation to establish entitlement to compensation requires a showing, 'as a threshold matter, that the business had goodwill to lose.' " (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation* (2016) 5 Cal.App.5th 190, 201 [209 Cal.Rptr.3d 461].)

- "[I]n the entitlement phase, the party seeking compensation need only show that there was *some* loss of the benefit that the business was enjoying before the taking due to its location, reputation, and the like, without necessarily having to quantify its precise value." (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation, supra,* 5 Cal.App.5th at p. 204, original italics.)

- "After entitlement to goodwill is shown (which includes a showing that compensation for the loss will not be duplicated) neither party has the burden of proof with regard to valuation." (*Redevelopment Agency of the City of Pomona v. Thrifty Oil Co.* (1992) 4 Cal.App.4th 469, 475 [5 Cal.Rptr.2d 687], internal citations omitted.)

- "Only an owner of a business conducted on the real property taken may claim compensation for loss of goodwill." (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 537 [86 Cal.Rptr.2d 473], internal citation omitted.)

- "[W]hile there are no explicit statutory requirements regarding an expert's use of a particular methodology for valuing lost goodwill, the expert's methodology must provide a fair estimate of *actual value* and cannot be based on hypothetical or speculative uses of a condemned business … ." (*City and County of San Francisco, supra,* 168 Cal.App.4th at p. 1523, original italics.)

- "The underlying purpose of this statute is to provide compensation for the kind of losses which typically occur when an ongoing business is forced to move and give up the benefits of its former location. It includes not only compensation for lost patronage itself, but also for expenses reasonably incurred in an effort to prevent a loss of patronage." (*San Diego Metropolitan Transit Development Bd., supra,* 73 Cal.App.4th at p. 537, internal citations omitted.)

- "Goodwill must, of course, be measured by a method which excludes the value of tangible assets or the normal return on those assets. However, the courts have wisely maintained that there is no single acceptable method of valuing goodwill. Valuation methods will differ with the nature of the business or practice and with the purpose for which the evaluation is conducted." (*People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 271, fn. 7 [203 Cal.Rptr. 772, 681 P.2d 1340], internal citations omitted.)

- "The value of this goodwill may be determined using a variety of methods: for example,

determining the total value of the business by capitalizing its cash flow, and then subtracting its tangible assets; or determining the amount by which the business's average profits exceed a fair rate of return on the fair market value of its tangible assets, and then capitalizing that amount. But the essential idea is that there is some intangible 'X-factor' that gives the business greater value than it would otherwise have." (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation, supra,* 5 Cal.App.5th at p. 201, internal citation omitted.)

- "Certainly a comparison of the pre-taking and post-taking goodwill values would be one way to quantify the amount of goodwill that was lost due to the taking. But it is not evident from the appellate record that the amount of lost goodwill could not be calculated in some other manner." (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation, supra,* 5 Cal.App.5th at p. 205.)

- "Section 1263.510 does not dictate that the only way to obtain compensation for the loss of goodwill is to prove pre-taking goodwill value based on a business value in excess of its tangible assets. Nor does the statute define goodwill as the value of a business not attributable to its tangible assets." (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation, supra,* 5 Cal.App.5th at p. 211.)

- "[A] 'cost to create' approach is a permissible means by which to value goodwill under [Code of Civil Procedure] section 1263.510 where, as here, a nascent business has not yet experienced excess profits but clearly has goodwill within the meaning of the statute and experiences a total loss of goodwill due to condemnation of the property on which the business is operated." (*Inglewood Redevelopment Agency v. Aklilu* (2007) 153 Cal.App.4th 1095, 1102 [64 Cal.Rptr.3d 519].)

- "As *Aklilu* implicitly recognized, unless there is independent proof that a business possesses goodwill in the first place, the cost-to-create methodology does not reflect the cost of creating any actual goodwill. Instead, it simply adds up costs and calls the total 'goodwill.' The relationship between goodwill and the costs to create breaks down even further when the condemnation takes only a portion of the business's goodwill. In that situation, it becomes necessary to figure out which costs match up with which portions of goodwill that are lost; in most cases, this will devolve into an exercise in futility or fiction." (*Dry Canyon Enterprises, LLC, supra,* 211 Cal.App.4th at p. 494.)

- "Since quantifying the loss of goodwill is a matter concerning the amount of goodwill lost, it is for the jury to decide between the competing views of the experts." (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation, supra,* 5 Cal.App.5th at pp. 213–214.)

- "A business which is required to move because of the taking of the property on which it operates has suffered a loss from the taking. This is true whether the tenancy is for a fixed term, or is a periodic tenancy as in this case. The value of the lost goodwill is affected by the probable remaining term of the tenancy. Evidence of the remaining length of a lease and the existence of an option to renew a lease are, of course, relevant for determining the amount of

compensation, if any, to be paid for loss of goodwill. Similarly, evidence of the pre-condemnation duration of a periodic tenancy and the quality and mutual satisfaction in the landlord and tenant relationship are probative for determination of compensation for loss of goodwill." (*Los Angeles Unified Sch. Dist. v. Pulgarin* (2009) 175 Cal.App.4th 101, 107 [95 Cal.Rptr.3d 527], internal citation omitted.)

- "The statute's unambiguous plain language provides that a condemnee must show it cannot prevent a loss of goodwill by relocating or otherwise taking reasonable steps to prevent that loss to be entitled to a jury trial on the amount of that unavoidable loss. A fortiori, if the condemnee would lose goodwill—even if it relocated its business or otherwise reasonably mitigated the loss—the condemnee satisfies its threshold burden." (*Los Angeles County Metropolitan Transportation Authority, supra,* 32 Cal.App.5th at p. 670.)

- "[I]n some circumstances, there may be a limited right to reimbursement for costs incurred to mitigate loss of goodwill." (*Los Angeles Unified School Dist. v. Casasola* (2010) 187 Cal.App.4th 189, 208 [114 Cal.Rptr.3d 318].)

- "Although the statutory scheme applies only to eminent domain proceedings, the right to recover lost goodwill has been extended to the indirect condemnee. Thus, 'goodwill is compensable in an inverse condemnation action to the same extent and with the same limitations on recovery found in ... section 1263.510.' " (*San Diego Metropolitan Transit Development Bd., supra,* 73 Cal.App.4th at p. 537, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1383–1385

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:314−7.316.3 (The Rutter Group)

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 8C-H, *Foundation*, ¶ 8:748.2 (The Rutter Group)

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.64–4.78

14 California Real Estate Law and Practice, Ch. 508, *Evidence: General*, § 508.19; Ch. 512, *Compensation*, § 512.13 (Matthew Bender)

4 Nichols on Eminent Domain, Ch. 13, *Loss of Business Goodwill*, § 13.18[5] (Matthew Bender)

6A Nichols on Eminent Domain, Ch. 29, *Loss of Business Goodwill*, §§ 29.01–29.08 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.136 (Matthew Bender)

3700. Introduction to Vicarious Responsibility

[One may authorize another to act on ~~his or her~~one's behalf in transactions with third persons. This relationship is called "agency." The person giving the authority is called the "principal"; the person to whom authority is given is called the "agent."]

[An employer/A principal] is responsible for harm caused by the wrongful conduct of [his/her/*nonbinary pronoun*/its] [employees/agents] while acting within the scope of their [employment/authority].

[An [employee/agent] is always responsible for harm caused by [his/her/*nonbinary pronoun*/its] own wrongful conduct, whether or not the [employer/principal] is also liable.]

New September 2003; Revised June 2015, May 2020

Directions for Use

This instruction provides the jury with some basic background information about the doctrine of respondeat superior. Include the first paragraph if the relationship at issue is one of principal-agent. If the employee or agent is also a defendant, give the third paragraph.

This instruction should be followed by either CACI No. 3703, *Legal Relationship Not Disputed*, CACI No. 3704, *Existence of "Employee" Status Disputed*, or CACI No. 3705, *Existence of "Agency" Relationship Disputed*.

Sources and Authority

- "Agency" Defined. Civil Code section 2295.
- Principal's Responsibility for Acts of Agent. Civil Code section 2338.
- "Agency is the relation that results from the act of one person, called the principal, who authorizes another, called the agent, to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal." (*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.* (1991) 1 Cal.App.4th 300, 304 [1 Cal.Rptr.2d 680].)
- " ' "An agent 'is anyone who undertakes to transact some business, or manage some affair, for another, by authority of and on account of the latter, and to render an account of such transactions.' [Citation.] 'The chief characteristic of the agency is that of representation, the authority to act for and in the place of the principal for the purpose of bringing him or her into legal relations with third parties. [Citations.]' [Citation.] 'The significant test of an agency relationship is the principal's right to control the activities of the agent.' " ' " (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1171−1172 [201 Cal.Rptr.3d 390].)

- "Under the doctrine of respondeat superior, an employer is vicariously liable for his employee's torts committed within the scope of the employment. This doctrine is based on " 'a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business." ' " (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967 [227 Cal.Rptr. 106, 719 P.2d 676].)

- " '[A] principal is liable to third parties … for the frauds or other wrongful acts committed by [its] agent in and as a part of the transaction of' the business of the agency." (*Daniels, supra,* 246 Cal.App.4th at p. 1172.)

- "[U]nder the Tort Claims Act, public employees are liable for injuries caused by their acts and omissions to the same extent as private persons. Vicarious liability is a primary basis for liability on the part of a public entity, and flows from the responsibility of such an entity for the acts of its employees under the principle of respondeat superior. As the Act provides, '[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would … have given rise to a cause of action against that employee,' unless 'the employee is immune from liability.' (Gov. Code, § 815.2, subds. (a), (b).)" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1128 [119 Cal.Rptr.2d 709, 45 P.3d 1171], internal citations omitted.)

- "[W]here the liability of an employer in tort rests solely on the doctrine of respondeat superior, a judgment on the merits in favor of the employee is a bar to an action against the employer … ." (*Hilts v. County of Solano* (1968) 265 Cal.App.2d 161, 176 [71 Cal.Rptr. 275].)

- "An agent or employee is always liable for his own torts, whether his employer is liable or not." (*Fleet v. Bank of America N.A.* (2014) 229 Cal.App.4th 1403, 1411 [178 Cal.Rptr.3d 18].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 163–168

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, §§ 8.03–8.04 (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.01 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.11 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.14 (Matthew Bender)

10 California Points and Authorities, Ch. 100A*, Employer and Employee: Respondeat Superior*, § 100A.24A (Matthew Bender)

1 California Civil Practice: Torts, §§ 3:1–3:4 (Thomson Reuters)

3711. Partnerships

A partnership and each of its partners are responsible for the wrongful conduct of a partner acting within the scope of ~~his or her~~the partner's authority.

You must decide whether a partnership existed in this case. A partnership is a group of two or more persons who own a business in which all the partners agree to share the profits and losses. A partnership can be formed by a written or oral agreement or by an agreement implied by the parties' conduct.

New September 2003; Revised May 2020

Directions for Use

This instruction is not intended for cases involving limited liability partnerships.

Sources and Authority

- Formation of Partnership. Corporations Code section 16202.
- Liability of Partnership. Corporations Code section 16305(a).
- "Under traditional legal concepts the partnership is regarded as an aggregate of individuals with each partner acting as agent for all other partners in the transaction of partnership business, and the agents of the partnership acting as agents for all of the partners." (*Marshall v. International Longshoremen's and Warehousemen's Union* (1962) 57 Cal.2d 781, 783 [22 Cal.Rptr. 211, 371 P.2d 987].)
- "[T]he partners of a partnership are jointly and severally liable for the conduct and torts injuring a third party committed by one of the partners." (*Black v. Sullivan* (1975) 48 Cal.App.3d 557, 569 [122 Cal.Rptr. 119], internal citations omitted.)
- " '[A] partnership need not be evidenced by writing [citation]. It is immaterial that the parties do not designate the relationship as a partnership or realize that they are partners, for the intent may be implied from their acts [citations].' 'In that sense, any partnership without a written agreement is a "de facto" partnership.' '[T]he question of partnership is one of fact … .' " (*Eng v. Brown* (2018) 21 Cal.App.5th 675, 694 [230 Cal.Rptr.3d 771], internal citation omitted.)
- "Ordinarily the existence of a partnership is evidenced by the right of the respective parties to participate in the profits and losses and in the management of the business." (*Eng, supra,* 21 Cal.App.5th at p. 694.)
- "The CACI instructions cited by the court [CACI Nos. 3711, 3712] are correct and were pertinent to the jury's question regarding partnership formation." (*Eng, supra,* 21 Cal.App.5th at p. 706.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Partnership, § 43

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.06 (Matthew Bender)

35 California Forms of Pleading and Practice, Ch. 402, *Partnerships: Actions Between General Partners and Partnership*, § 402.12 (Matthew Bender)

17 California Points and Authorities, Ch. 170, *Partnerships*, § 170.20 et seq. (Matthew Bender)

1 California Civil Practice: Torts, §§ 3:36–3:37 (Thomson Reuters)

3723. Substantial Deviation

If [an employee/a representative] combines ~~his or her~~the [employee/representative]'s personal business with the employer's business, then the [employee/representative]'s conduct is within the scope of [employment/authorization] unless the [employee/representative] substantially deviates from the employer's business.

Deviations that do not amount to abandoning the employer's business, such as incidental personal acts, minor delays, or deviations from the most direct route, are reasonably expected and within the scope of employment.

[Acts that are necessary for [an employee/a representative]'s comfort, health, and convenience while at work are within the scope of employment.]

New September 2003; Revised June 2006, April 2008, June 2014, May 2020

Directions for Use

This instruction may be given with CACI No. 3720, *Scope of Employment*, if the facts indicate that the employee has combined business and personal activities. In such a situation, the employee's personal activities must constitute a "substantial deviation" from or "abandonment" of the employer's business in order to be outside of the scope of employment. (See *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004 [47 Cal.Rptr.2d 478, 906 P.2d 440].) The words "reasonably expected" express foreseeability.

This instruction may be given with CACI No. 3725, *Going-and-Coming Rule—Vehicle-Use Exception,* but not with CACI No. 3724, *Going-and-Coming Rule—Business-Errand Exception*. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 907−908 [162 Cal.Rptr.3d 280].)

Give the optional third paragraph if the employee was at the work site when the act giving rise to liability occurred, but was not directly involved in performing job duties at the time (for example, at lunch or on break). (See *Vogt v. Herron Construction, Inc.* (2011) 200 Cal.App.4th 643, 651 [132 Cal.Rptr.3d 683].)

Sources and Authority

- "[C]ases that have considered recovery against an employer for injuries occurring within the scope and during the period of employment have established a general rule of liability 'with a few exceptions' in instances where the employee has 'substantially deviated from his duties for personal purposes.' " (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 218 [285 Cal.Rptr. 99, 814 P.2d 1341], internal citation omitted.)

- "An exception [to employer liability] is made when the employee has substantially deviated from his duties for personal purposes at the time of the tortious act. While a minor deviation is foreseeable and will not excuse the employer from liability, a deviation from the employee's duties that is ' "so material or substantial as to amount to an entire departure" ' from those duties will take the

employee's conduct out of the scope of employment." (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 95 [162 Cal.Rptr.3d 752], internal citations omitted.)

- "While the question of whether an employee has departed from his special errand is normally one of fact for the jury, where the evidence clearly shows a complete abandonment, the court may make the determination that the employee is outside the scope of his employment as a matter of law." (*Moradi, supra,* 219 Cal.App.4th at p. 907.)

- "In some cases, the relationship between an employee's work and wrongful conduct is so attenuated that a jury could not reasonably conclude that the act was within the scope of employment." (*Mary M., supra,* 54 Cal.3d at p. 213, internal citations omitted.)

- "The fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer." (*Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133, 139 [176 Cal.Rptr. 287], internal citation omitted.)

- "One traditional means of defining this foreseeability is seen in the distinction between minor '*deviations*' and substantial '*departures*' from the employer's business. The former are deemed foreseeable and remain within the scope of employment; the latter are unforeseeable and take the employee outside the scope of his employment." (*Moradi, supra,* 219 Cal.App.4th at p. 901, original italics.)

- " ' "[W]here the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly nor indirectly could he have been serving his employer." ' " (*Farmers Ins. Group, supra,* 11 Cal.4th at p. 1004.)

- "Generally, '[i]f the main purpose of [the employee's] activity is still the employer's business, it does not cease to be within the scope of the employment by reason of incidental personal acts, slight delays, or deflections from the most direct route.' " (*Halliburton Energy Services, Inc., supra,* 220 Cal.App.4th at p. 98.)

- "Important factors in determining whether there has been a complete departure or merely a deviation are those of time and place. Thus, the fact that the employee is on the same route of return which he would use for both his employer's mission and his own is a factor tending to show a combination of missions. The amount of time consumed in the personal activity is likewise to be weighed. The nature of the digression is also to be considered. If the digression was in itself an inducement for [employee] to undertake the special errand or was connected with the performance of the errand, for example, as a reward, the jury would be entitled to weigh these facts in deciding whether there had been the complete departure from duty which is requisite to terminate course of employment." (*Trejo v. Maciel* (1966) 239 Cal.App.2d 487, 496–497 [48 Cal.Rptr. 765].)

- "[A]cts necessary to the comfort, convenience, health, and welfare of the employee while at work, though strictly personal and not acts of service, do not take the employee outside the scope of employment." (*Vogt, supra,* 200 Cal.App.4th at p. 651.)

- "Here, the required vehicle exception to the going and coming rule, not the special errand exception, governs our analysis. Accordingly, we have not applied the six factors used in special errand cases to determine whether [employee] was acting within the scope of her employment at the time of the accident. [¶] Rather, we have applied the relevant principles under the required vehicle exception. Those principles differ from the six factors used to determine whether the special errand exception applies. In the present case, [employer] required [employee] to use her personal vehicle to travel to and from the office and other destinations. She also had to use her personal vehicle before, during, and after regular work hours to develop new business. We have properly examined whether [employee]'s use of her personal vehicle conferred an incidental benefit on [employer]—it did; whether her planned stops at the frozen yogurt shop and the yoga studio were an unforeseeable, substantial departure from her commute—they were not; whether they were a foreseeable, minor deviation from her regular commute—they were; whether they were not so unusual or startling that it would be unfair to include the resulting loss among the other costs of the employer's business—they were not; and whether they were necessary for [employee]'s comfort, convenience, health, and welfare—they were." (*Moradi, supra,* 219 Cal.App.4th at pp. 907–908.)

- "We envision the link between respondeat superior and most work-related cell phone calls while driving as falling along a continuum. Sometimes the link between the job and the accident will be clear, as when an employee is on the phone for work at the moment of the accident. Oftentimes, the link will fall into a gray zone, as when an employee devotes some portion of his time and attention to work calls during the car trip so that the journey cannot be fairly called entirely personal. But sometimes, as here, the link is de minimis—one call of less than one minute eight or nine minutes before an accident while traveling on a personal errand of several miles' duration heading neither to nor from a worksite. When that happens, we find no respondeat superior as a matter of law." (*Miller v. American Greetings Corp.* (2008) 161 Cal.App.4th 1055, 1063 [74 Cal.Rptr.3d 776].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 176–194

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1686

Haning, et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, *Vicarious Liability*, ¶ 2:716, 2:735 (The Rutter Group)

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

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

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

100A.28, 100A.35 (Matthew Bender)

1 California Civil Practice: Torts § 3:8 (Thomson Reuters)

3725. Going-and-Coming Rule—Vehicle-Use Exception

In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer's business, then the drive to and from work is within the scope of employment. The employer's requirement may be either express or implied.

The drive to and from work may also be within the scope of employment if the use of the employee's vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle's use and expects the employee to make it available regularly. The employee's agreement may be either express or implied.

New September 2003; Revised June 2014, May 2017, May 2019, May 2020

Directions for Use

This instruction sets forth the vehicle use exception to the going-and-coming rule, sometimes called the required-vehicle exception. (See (*Jorge v. Culinary Institute of America* (2016) 3 Cal.App.5th 382, 398, fn. 6 [207 Cal.Rptr.3d 586]; see also *Pierson v. Helmerich & Payne International Drilling Co.* (2016) 4 Cal.App.5th 608, 624–630 [209 Cal.Rptr.3d 222 [vehicle-use exception encompasses two categories; required-vehicle and incidental-use, both of which are expressed within CACI No. 3725].) It may be given with CACI No. 3720, *Scope of Employment*.

Under the going-and-coming rule, commute time is not within the scope of employment. However, commute time is within the scope of employment if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has reasonably come to rely on its use and to expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment. (See *Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301 [105 Cal.Rptr.3d 718].) Whether there is such a requirement or agreement can be a question of fact for the jury. (See *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 723 [159 Cal. Rptr. 835, 602 P.2d 755].)

Under this exception, the commute itself is considered the employer's business. However, scope of employment may end if the employee substantially deviates from the commute route for personal reasons. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 899, 907–908 [162 Cal.Rptr.3d 280].) If substantial deviation is alleged, give CACI No. 3723, *Substantial Deviation*.

One court has stated that the employee must have been using the vehicle to do the employer's business or provide a benefit for the employer *at the time of the accident*. (*Newland v. County of L.A.* (2018) 24 Cal.App.5th 676, 693 [234 Cal.App.3d 374], emphasis added.) However, many cases have applied the vehicle use exception without imposing this time-of-the-accident requirement. (See, e.g., *Moradi, supra,* 219 Cal.App.4th at p. 892 (employee was just going home at the time of the accident); *Lobo, supra,* 182

Cal.App.4th at p. 302 (same); *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal.App.3d 803, 806–807 [99 Cal.Rptr. 666] (same); see also *Smith v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 814, 815 [73 Cal.Rptr. 253, 447 P.2d 365] (workers compensation case: accident happened on the way to work).) *Newland* could be read as requiring the employee to need the vehicle for the employer's business on the *day* of the accident, even if ~~he or she~~the employee was not engaged in the employer's business at the *time* of the accident. (See *Newland supra,* 24 Cal.App.5th at p. 696 ["no evidence that [employee] required a vehicle for work on the day of the accident, and no evidence that the [employer] received any direct or incidental benefit from [employee] driving to and from work that day"].)

Sources and Authority

- " 'An offshoot of the doctrine of respondeat superior is the so-called "going and coming rule." Under this rule, an employee is not regarded as acting within the scope of employment while going to or coming from the workplace. … This is based on the concept that the employment relationship is suspended from the time the employee leaves work until he or she returns, since the employee is not ordinarily rendering services to the employer while traveling. …' " (*Jeewarat v. Warner Brothers Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435 [98 Cal.Rptr.3d 837].)

- "The 'required-vehicle' exception to the going and coming rule and its variants have been given many labels. In *Halliburton, supra,* 220 Cal.App.4th 87, we used the phrase 'incidental benefit exception' as the equivalent of the required-vehicle exception. In *Felix v. Asai* (1987) 192 Cal.App.3d 926 [237 Cal. Rptr. 718] (*Felix*), we used the phrase 'vehicle-use exception.' The phrase 'required-use doctrine' also has been used. The 'vehicle-use' variant appears in the title to California Civil Jury Instruction (CACI) No. 3725, 'Going-and-Coming Rule—Vehicle-Use Exception.' The various labels and the wide range of circumstances they cover have the potential to create uncertainty about the factual elements of the exception—a topic of particular importance when reviewing a motion for summary judgment for triable issues of *material* fact. [¶] To structure our analysis of this exception, and assist the clear statement of the factual elements of its variants, we adopt the phrase 'vehicle-use exception' from *Felix* and CACI No. 3725 to describe the exception in its broadest form. Next, under the umbrella of the vehicle-use exception, we recognize two identifiable categories with different factual elements. We label those two categories as the 'required-vehicle exception' and 'incidental benefit exception' because those labels emphasize the factual difference between the two categories." (*Pierson, supra,* 4 Cal.App.5th at pp. 624–625, original italics, internal citations omitted.)

- "Our division of the vehicle-use exception for purposes of this summary judgment motion should not be read as implying that this division is required, or even helpful, when presenting the scope of employment issue to a jury. The broad formulation of the vehicle-use exception in CACI No. 3725 correctly informs the jury that the issue of ultimate fact—namely, the scope of employment—may be proven in different ways." (*Pierson, supra,* 4 Cal.App.5th at p. 625, fn. 4.)

- "The portion of CACI No. 3725 addressing an employer requirement states: '[I]f an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer's business, then the drive to and from work is within the scope of employment. The employer's requirement may be either express or implied.' " (*Pierson, supra,* 4 Cal.App.5th at p. 625.)

"Our formulation of the incidental benefit exception is based on the part of CACI No. 3725 that states: 'The drive to and from work may … be within the scope of employment if the use of the employee's vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle's use and expects the employee to make it available regularly.' The 'agreement may be either express or implied.' The existence of an express or implied agreement can be a question of fact for the jury." (*Pierson, supra,* 4 Cal.App.5th at p. 629.)

- " '[W]hen a business enterprise requires an employee to drive to and from its office in order to have his vehicle available for company business during the day, accidents on the way to or from the office are statistically certain to occur eventually, and, the business enterprise having required the driving to and from work, the risk of such accidents are risks incident to the business enterprise.' [¶] These holdings are the bases for the CACI instruction, the first paragraph of which tells the jury that the drive to and from work is within the scope of employment if the "employer requires [the] employee to drive to and from the workplace so that the vehicle is available for the employer's business," and the second paragraph, that the drive may be if 'the use of the employee's vehicle provides some direct or incidental benefit to the employer' and 'there may be a benefit to the employer if, one, the employee has [agreed] to make the vehicle available as an accommodation to the employer, and two, the employer has reasonably come to rely on the vehicle's use and expect the employee to make it available regularly.' (CACI No. 3725.)" (*Jorge, supra,* 3 Cal.App.5th at pp. 401–402, internal citation omitted.)

- " 'A well-known exception to the going-and-coming rule arises *where the use of the car gives some incidental benefit to the employer*. Thus, the key inquiry is whether there is an incidental benefit derived by the employer. [Citation.]' … The exception can apply if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has 'reasonably come to rely upon its use and [to] expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment.' " (*Lobo, supra,* 182 Cal.App.4th at p. 297, original italics, internal citations omitted.)

- " 'To be sure, ordinary commuting is beyond the scope of employment … . Driving a required vehicle, however, is a horse of another color because it satisfies the control and benefit elements of respondeat superior. An employee who is required to use his or her own vehicle provides an "essential instrumentality" for the performance of the employer's work. … When a vehicle must be provided by an employee, the employer benefits by not having to have available an office car and yet possessing a means by which off-site visits can be performed by its employees.' " (*Moradi, supra,* 219 Cal.App.4th at p. 899.)

- "When an employer requires an employee to use a personal vehicle, it exercises meaningful control over the method of the commute by compelling the employee to foreswear the use of carpooling, walking, public transportation, or just being dropped off at work." (*Moradi, supra,* 219 Cal.App.4th at p. 899.)

- "The cases invoking the required-vehicle exception all involve employees whose jobs entail the

regular use of a vehicle to accomplish the job in contrast to employees who use a vehicle to commute to a definite place of business." (*Tryer v. Ojai Valley School Dist.* (1992) 9 Cal.App.4th 1476, 1481 [12 Cal.Rptr.2d 114].)

- "[N]ot all benefits to the employer are of the type that satisfy the incidental benefits exception. The requisite benefit must be one that is 'not common to commute trips by ordinary members of the work force.' Thus, employers benefit when employees arrive at work on time, but this benefit is insufficient to satisfy the incidental benefits exception. An example of a sufficient benefit is where an employer enlarges the available labor market by providing travel expenses and paying for travel time." (*Pierson, supra,* 4 Cal.App.5th at p. 630.)

- "Where the incidental benefit exception applies, the employee's commute directly between work and home is considered to be within the scope of employment for respondeat superior purposes. Minor deviations from a direct commute are also included, but there is no respondeat superior liability if the employee substantially departs from the employer's business or is engaged in a purely personal activity at the time of the tortious injury." (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 97 [162 Cal.Rptr.3d 752].)

- "Here, the required vehicle exception to the going and coming rule, not the special errand exception, governs our analysis. Accordingly, we have not applied the six factors used in special errand cases to determine whether [employee] was acting within the scope of her employment at the time of the accident. [¶] Rather, we have applied the relevant principles under the required vehicle exception. Those principles differ from the six factors used to determine whether the special errand exception applies. In the present case, [employer] required [employee] to use her personal vehicle to travel to and from the office and other destinations. She also had to use her personal vehicle before, during, and after regular work hours to develop new business. We have properly examined whether [employee]'s use of her personal vehicle conferred an incidental benefit on [employer]—it did; whether her planned stops at the frozen yogurt shop and the yoga studio were an unforeseeable, substantial departure from her commute—they were not; whether they were a foreseeable, minor deviation from her regular commute—they were; whether they were not so unusual or startling that it would be unfair to include the resulting loss among the other costs of the employer's business—they were not; and whether they were necessary for [employee]'s comfort, convenience, health, and welfare—they were." (*Moradi, supra,* 219 Cal.App.4th at pp. 907−908.)

- "One exception to the going and coming rule has been recognized when the commute involves ' "an incidental benefit to the employer, not common to commute trips by ordinary members of the work force." [Citation.]' When the employer incidentally benefits from the employee's commute, that commute may become part of the employee's workday for the purposes of respondeat superior liability. [¶] The incidental benefit exception has been applied when the employer furnishes, or requires the employee to furnish, a vehicle for transportation on the job, and the negligence occurs while the employee is traveling to or from work in that vehicle." (*Halliburton Energy Services, Inc., supra,* 220 Cal.App.4th at p. 96, internal citation omitted.)

- "[T]he employer benefits when a vehicle is available to the employee during off-duty hours in case it is needed for emergency business trips." (*Moreno v. Visser Ranch, Inc.* (2018) 30 Cal.App.5th 568, 580 [241 Cal.Rptr.3d 678].)

- "Public policy would be ill-served by a rule establishing 24-hour employer liability for on-call employees, regardless of the nature of the employee's activities at the time of an accident." (*Le Elder v. Rice* (1994) 21 Cal.App.4th 1604, 1610 [26 Cal.Rptr.2d 749].)

- "[T]he trier of fact remains free to determine in a particular case that the employee's use of his or her vehicle was too infrequent to confer a sufficient benefit to the employer so as to make it reasonable to require the employer to bear the cost of the employee's negligence in operating the vehicle. This is particularly true in the absence of an express requirement that the employee make his or her vehicle available for the employer's benefit or evidence that the employer actually relied on the availability of the employee's car to further the employer's purposes." (*Lobo v. Tamco* (2014) 230 Cal.App.4th 438, 447 [178 Cal.Rptr.3d 515].)

- "Whether the transit is part of the employment relationship tends to be a more subtle issue than whether the transit was between home and work. … 'These are the extraordinary transits that vary from the norm because the employer requires a special, different transit, means of transit, or use of a car, for some particular reason of his own. When the employer gains that kind of a particular advantage, the job does more than call for routine transport to it; it plays a different role, bestowing a special benefit upon the employer by reason of the extraordinary circumstances. The employer's special request, his imposition of an unusual condition, removes the transit from the employee's choice or convenience and places it within the ambit of the employer's choice or convenience, restoring the employer-employee relationship.' " (*Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1038–1039 [219 Cal.Rptr.3d 630].)

"Liability may be imposed on an employer for an employee's tortious conduct while driving to or from work, if at the time of the accident, the employee's use of a personal vehicle was required by the employer or otherwise provided a benefit to the employer." (*Newland, supra,* 24 Cal.App.5th at p. 679.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 195

Haning~~,~~ et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, Part II *Theories Of Recovery—Vicarious Liability*, ¶ 2:803 (The Rutter Group)

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

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.26 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 3:10 (Thomson Reuters)

3726. Going-and-Coming Rule—Business-Errand Exception

In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if the employee, while commuting, is on an errand for the employer, then the employee's conduct is within the scope of ~~his or her~~the employee's employment from the time the employee starts on the errand until ~~he or she~~the employee returns from the errand or until ~~he or she~~the employee completely abandons the errand for personal reasons.

In determining whether an employee has completely abandoned a business errand for personal reasons, you may consider the following:

a. The intent of the employee;

b. The nature, time, and place of the employee's conduct;

c. The work the employee was hired to do;

d. The incidental acts the employer should reasonably have expected the employee to do;

e. The amount of freedom allowed the employee in performing [his/her/*nonbinary pronoun*] duties; and

f. The amount of time consumed in the personal activity;

g. [*specify other factors, if any*].

New September 2003; Revised June 2014, June 2017, Revised and Renumbered from CACI No. 3724 November 2017, Revised May 2020

Directions for Use

This instruction sets forth the business errand exception to the going-and-coming rule, sometimes called the "special errand" or "special mission" exception. (*Sumrall v. Modern Alloys, Inc.* (2017) 10 Cal.App.5th 961, 968, fn. 1 [216 Cal.Rptr.3d 848]; see *Pierson v. Helmerich & Payne Internat. Drilling Co.* (2016) 4 Cal.App.5th 608, 632–633, fn.6 [209 Cal.Rptr.3d 222] [citing this instruction].) It may be given with CACI No. 3720, *Scope of Employment*.

Under the going-and-coming rule, commute time is not within the scope of employment. However, if the employee is engaged in a "special errand" or a "special mission" for the employer while commuting, it will negate the going-and-coming rule and put the employee within the scope of employment. (*Jeewarat v. Warner Brothers Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435−436 [98 Cal.Rptr.3d 837].)

Scope of employment ends once the employee abandons or substantially deviates from the special errand. The second paragraph sets forth factors that the jury may consider in determining whether there has been

abandonment of a business errand. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 907 [162 Cal.Rptr.3d 280] [opinion may be read to suggest that for the business-errand exception, CACI No. 3723, *Substantial Deviation,* should not be given].)

Sources and Authority

- " 'An offshoot of the doctrine of respondeat superior is the so-called "going and coming rule." Under this rule, an employee is not regarded as acting within the scope of employment while going to or coming from the workplace. … This is based on the concept that the employment relationship is suspended from the time the employee leaves work until he or she returns, since the employee is not ordinarily rendering services to the employer while traveling. …' " (*Jeewarat, supra,* 177 Cal.App.4th at p. 435.)

- " 'The *special-errand* exception to the going-and-coming rule is stated as follows: "If the employee is not simply on his way from his home to his normal place of work or returning from said place to his home for his own purpose, but is coming from his home or returning to it on a *special errand* either as part of his regular duties or at a specific order or request of his employer, the employee is considered to be in the scope of his employment from the time that he starts on the errand until he has returned or until he deviates therefrom for personal reasons." ' " (*Moradi, supra,* 219 Cal.App.4th at p. 906, original italics.)

- "When an employee is engaged in a 'special errand' or a 'special mission' for the employer it will negate the 'going and coming rule.' … The employer is 'liable for torts committed by its employee while traveling to accomplish a special errand because the errand benefits the employer. … ' " (*Jeewarat, supra,* 177 Cal.App.4th at p. 436, internal citations omitted.)

- "The term 'special errand' is something of a misnomer because it implies that the employer must make a specific request for a particular errand. However, the 'special errand' can also be part of the employee's regular duties. Thus, we have chosen to use the term 'business errand' throughout this opinion, as it is more precise and descriptive." (*Sumrall, supra,* 10 Cal.App.5th at p. 968 fn.1, internal citation omitted.)

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

- "It is not necessary that the employee is directly engaged in his job duties; included also are errands that incidentally or indirectly benefit the employer. It is essential, however, that the errand be either part of the employee's regular duties or undertaken at the specific request of the employer." (*Morales-Simental v. Genentech, Inc.* (2017) 16 Cal.App.5th 445, 452–453 [224 Cal.Rptr.3d 319], internal citation omitted.)

- "[T]he mere fact that a trip may be related to an employee's job does not impose liability on the employer. … [T]o bring an employee's trip within the special errand exception, the employer must request or at least expect it of the employee." (*Morales-Simental, supra,* 16 Cal.App.5th at p. 455, internal citation omitted.)

- "[Plaintiffs] assert that [employee], as a supervisorial employee tasked with hiring, had authority to act on [employer]'s behalf and, in essence, request himself to complete a special errand connected to that task. This argument finds no support in the extensive body of going and coming case law, and we decline plaintiffs' invitation to expand the special errand exception in the manner they suggest. What they propose is an invitation to self-serving pretense by anyone with a plausible claim to supervisorial authority." (*Morales-Simental, supra,* 16 Cal.App.5th at p. 456.)

  - "[I]n determining whether an employee has completely abandoned pursuit of a *business errand* for pursuit of a personal objective, a variety of relevant circumstances should be considered and weighed. Such factors may include [(1)] the intent of the employee, [(2)] the nature, time and place of the employee's conduct, [(3)] the work the employee was hired to do, [(4)] the incidental acts the employer should reasonably have expected the employee to do, [(5)] the amount of freedom allowed the employee in performing his duties, and [(6)] the amount of time consumed in the personal activity. … While the question of whether an employee has departed from his *special errand* is normally one of fact for the jury, where the evidence clearly shows a complete abandonment, the court may make the determination that the employee is outside the scope of his employment as a matter of law." (*Moradi, supra,* 219 Cal.App.4th at p. 907, original italics.)

- "Several general examples of the special-errand exception appear in the cases. One would be where an employee goes on a business errand for his employer leaving from his workplace and returning to his workplace. Generally, the employee is acting within the scope of his employment while traveling to the location of the errand and returning to his place of work. The exception also may be applicable to the employee who is called to work to perform a special task for the employer at an irregular time. The employee is within the scope of his employment during the entire trip from his home to work and back to his home. The exception is further applicable where the employer asks an employee to perform a special errand after the employee leaves work but before going home. In this case, as in the other examples, the employee is normally within the scope of his employment while traveling to the special errand and while traveling home from the special errand." (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 931–932 [237 Cal.Rptr. 718], internal citations omitted.)

- "Plaintiffs contend an employee's attendance at an out-of-town business conference authorized and paid for by the employer may be a special errand for the benefit of the employer under the special errand doctrine. [Defendant] asserts that the special errand doctrine does not apply to commercial travel. We conclude that a special errand may include commercial travel such as the business trip in this case." (*Jeewarat, supra,* 177 Cal.App.4th at p. 436.)

"An employee who has gone upon a special errand does not cease to be acting in the course of his employment upon his accomplishment of the task for which he was sent. He is in the course of his employment during the entire trip." (*Trejo v. Maciel* (1966) 239 Cal.App.2d 487, 495 [48 Cal.Rptr. 765].)

- "Whether the transit is part of the employment relationship tends to be a more subtle issue than whether the transit was between home and work. … 'These are the extraordinary transits that vary from the norm because the employer requires a special, different transit, means of transit, or use of a car, for some particular reason of his own. When the employer gains that kind of a particular advantage, the job does more than call for routine transport to it; it plays a different role, bestowing a

special benefit upon the employer by reason of the extraordinary circumstances. The employer's special request, his imposition of an unusual condition, removes the transit from the employee‘s choice or convenience and places it within the ambit of the employer's choice or convenience, restoring the employer-employee relationship.’ ” (*Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1038–1039 [219 Cal.Rptr.3d 630].)

- “[W]here an employee is required by the employment to work at both the employer's premises and at home, he is in the course of employment while traveling between the employer's premises and home.” (*Zhu, supra,* 12 Cal.App.5th at p. 1040.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency, §§ 192–195

Finley, California Summary Judgment and Related Termination Motions § 1:1 et seq. (The Rutter Group)

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

2 California Employment Law, Ch. 30, *Employers’ Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer’s Liability for Employee’s Torts*, §§ 248.11, 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.22 (Matthew Bender)

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

1 California Civil Practice: Torts § 3:10 (Thomson Reuters)

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

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

New November 2017; Revised May 2020

Directions for Use

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

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

Sources and Authority

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

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

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

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

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

- "To the same effect are the cases where the employer furnishes transportation to and from work. ' "The essential prerequisite to compensation is that the danger from which the injury results be one to which he is exposed as an employee in his particular employment," and '[t]his requirement is met when, as an employee and solely by reason of his relationship as such to his employer, he enters a vehicle regularly provided by his employer for the purpose of transporting him to or from the place of employment.' Here, again, it is the employer's decision to make the transit part of the employment relationship." (*Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1039 [219 Cal.Rptr.3d 630].)

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

Secondary Sources

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

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

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liablity for Employee's Torts*, § 248.16[4] (Matthew Bender)

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

3800. Comparative Fault Between and Among Tortfeasors

[*Name of indemnitee***] claims that [he/she/*nonbinary pronoun*] [is/was] required to pay [***describe liability, e.g., "a court judgment in favor of [name of plaintiff]"***] and that [***name of indemnitor***] must reimburse [***name of indemnitee***] based on [***name of indemnitor***]'s share of responsibility. In order for [***name of indemnitee***] to recover from [***name of indemnitor***], [***name of indemnitee***] must prove both of the following:**

1. **That [***name of indemnitor***] [was negligent/[***describe underlying tort***]]; and**

2. **That [***name of indemnitor***]'s [negligence/[***describe tortious conduct***]] contributed as a substantial factor in causing [***name of plaintiff***]'s harm.**

[[*Name of indemnitor***] claims that [***name of indemnitee***] [and] [***insert identification of others***] contributed as [a] substantial factor[s] in causing [***name of plaintiff***]'s harm. To succeed, [***name of indemnitor***] must prove both of the following:**

1. **That [***name of indemnitee***] [and] [***insert identification of others***] [[was/were] negligent/[***other basis of responsibility***]]; and**

2. **That [***name of indemnitee***] [and] [***insert identification of others***] contributed as [a] substantial factor[s] in causing [***name of plaintiff***]'s harm.**

You will be asked to determine the percentages of responsibility of [*name of indemnitor***][,/ and] [[***name of indemnitee***][, and] all other persons responsible] for [***name of plaintiff***]'s harm.]**

New September 2003; Revised May 2020

Directions for Use

Read the last bracketed portion when the indemnitor claims that the indemnitor was not the sole cause of the indemnitee's liability or loss~~he or she was not the sole cause~~.

This instruction is intended for use in cases where the plaintiff seeks equitable indemnity from another responsible tortfeasor who was not a party to the original action or proceeding from which the liability in question arose. For cases in which the indemnitee seeks equitable indemnity against a co-defendant or cross-defendant as part of the original tort action, see CACI No. 406, *Apportionment of Responsibility*.

Sources and Authority

- "[T]he right to indemnity flows from payment of a joint legal obligation on another's behalf." (*AmeriGas Propane, LP v. Landstar Ranger, Inc.* (2014) 230 Cal.App.4th 1153, 1167 [179 Cal.Rptr.3d 330].)

- "The elements of a cause of action for indemnity are (1) a showing of fault on the part of the indemnitor and (2) resulting damages to the indemnitee for which the indemnitor is … equitably responsible." (*Bailey v. Safeway, Inc.* (2011) 199 Cal.App.4th 206, 217 [131 Cal.Rptr.3d 41].)

- "In order to attain ... a system ... in which liability for an indivisible injury caused by concurrent tortfeasors will be borne by each individual tortfeasor 'in direct proportion to [his] respective fault,' we conclude that the current equitable indemnity rule should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis." (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 598 [146 Cal.Rptr. 182, 578 P.2d 899], internal citation omitted.)

- "Unlike subrogation, in which the claimant stands in the shoes of the injured party, 'The basis for the remedy of equitable indemnity is restitution. "[O]ne person is unjustly enriched at the expense of another when the other discharges liability that it should be his responsibility to pay." [Citations.] [¶] California common law recognizes a right of partial indemnity under which liability among multiple tortfeasors may be apportioned according to the comparative negligence of each.' The test for indemnity is thus whether the indemnitor and indemnitee jointly caused the plaintiff's injury." (*AmeriGas Propane, L.P. v. Landstar Ranger, Inc.* (2010) 184 Cal.App.4th 981, 989 [109 Cal.Rptr.3d 686], internal citation omitted.)

- "[C]omparative equitable indemnity includes the entire range of possible apportionments, from no right to any indemnity to a right of complete indemnity. Total indemnification is just one end of the spectrum of comparative equitable indemnification." (*Far West Financial Corp. v. D & S Co., Inc.* (1988) 46 Cal.3d 796, 808 [251 Cal.Rptr. 202, 760 P.2d 399], internal quotation marks and citation omitted.)

- "[W]e conclude that a cause of action for equitable indemnity is a legal action seeking legal relief. As such, the [defendant] was entitled to a jury trial." (*Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 698 [59 Cal.Rptr.2d 303].)

- "[W]e hold that ... the comparative indemnity doctrine may be utilized to allocate liability between a negligent and a strictly liable defendant." (*Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 332 [146 Cal.Rptr. 550, 579 P.2d 441].)

- "[Indemnitor]'s liability was not based on its independent acts or omissions, but was based solely on its role as retailer of [manufacturer]'s defectively designed product. As a matter of fundamental fairness, a manufacturer … cannot seek equitable indemnification from a retailer found not to have been negligent or independently at fault, but found to be liable solely under the strict liability theory of design defect. Under these limited circumstances the retailer is not 'at fault' within the meaning of a cause of action for equitable indemnification." (*Bailey, supra,* 199 Cal.App.4th at p. 215.)

- For purposes of equitable indemnity, "it matters not whether the tortfeasors acted in concert to create a single injury, or successively, in creating distinct and divisible injury." (*Blecker v. Wolbart* (1985) 167 Cal.App.3d 1195, 1203 [213 Cal.Rptr. 781].)

- "[W]e conclude comparative fault principles should be applied to intentional torts, at least to the

extent that comparative equitable indemnification can be applied between concurrent intentional tortfeasors." (*Baird v. Jones* (1993) 21 Cal.App.4th 684, 690 [27 Cal.Rptr.2d 232].)

- Statutes may limit one's right to recover comparative indemnity. (See, e.g., *E.W. Bliss Co. v. Superior Court* (1989) 210 Cal.App.3d 1254, 1259 [258 Cal.Rptr. 783] [Lab. Code, § 4558(d) provides that there is no right of action for comparative indemnity against an employer for injuries resulting from the removal of an operation guard from a punch press].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 112, 115

California Tort Guide (Cont.Ed.Bar 3d ed.) General Principles, §§ 1.52–1.59

5 Levy et al., California Torts, Ch. 74, *Comparative Negligence*, §§ 74.01–74.13 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution*, § 300.61 (Matthew Bender)

11 California Points and Authorities, Ch. 115, *Indemnity and Contribution*, § 115.60 et seq. (Matthew Bender)

1 California Civil Practice: Torts §§ 4:14–4:18 (Thomson Reuters)

3801. Implied Contractual Indemnity

[*Name of indemnitee***] claims that [he/she/***nonbinary pronoun***] [is/was/may be] required to pay [***describe liability, e.g., "a court judgment in favor of plaintiff John Jones"***] because [***name of indemnitor***] [failed to use reasonable care in performing work under an agreement with [***name of indemnitee***]/[***specify other basis of responsibility***]]. In order for [***name of indemnitee***] to recover from [***name of indemnitor***], [***name of indemnitee***] must prove both of the following:**

1. **That [***name of indemnitor***] [failed to use reasonable care in [performing the work/[***describe work or services, e.g., testing the soil***]] under an agreement with [***name of indemnitee***]/[***specify other basis of responsibility***]]; and**

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

[[*Name of indemnitor***] claims that [[***name of indemnitee***] [and] [***insert identification of others***]] contributed as [a] substantial factor[s] in causing [***name of plaintiff***]'s harm. To succeed, [***name of indemnitor***] must prove both of the following:**

1. **That [[***name of indemnitee***] [and] [***insert identification of others***]] [was/were] [negligent/[***specify other basis of responsibility***]]; and**

2. **That [[***name of indemnitee***] [and] [***insert identification of others***]] contributed as [a] substantial factor[s] in causing [***name of plaintiff***]'s harm.**

You will be asked to determine the percentages of responsibility of [*name of indemnitor***][,/ and] [[***name of indemnitee***][, and] all other persons responsible] for [***name of plaintiff***]'s harm.]**

New September 2003; Revised December 2007, May 2020

Directions for Use

The party identifications in this instruction assume a cross-complaint between indemnitor and indemnitee defendants. In a direct action by the indemnitee against the indemnitor, "*name of plaintiff*" will refer to the person to whom the indemnitee has incurred liability.

Implied contractual indemnity may arise for reasons other than the indemnitor's negligent performance under the contract. If the basis of the claim is other than negligence, specify the conduct involved. (See *Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 974 [56 Cal.Rptr.3d 177] [breach of warranty].)

Read the last bracketed portion if the indemnitor claims that ~~he or she~~the indemnitor was not the sole cause of the indemnitee's liability or loss. Select options depending on whether the indemnitor alleges contributory conduct of the indemnitee, of others, or of both. Element 1 will have to be modified if there

are different contributing acts alleged against the indemnitee and others; for example, if the indemnitee is alleged to have been negligent and another party is alleged to be strictly liable.

A special finding that an agreement existed may create a need for instructions, but it is a question of law whether an agreement implies a duty to indemnify.

Sources and Authority

- "In general, indemnity refers to 'the obligation resting on one party to make good a loss or damage another party has incurred.' Historically, the obligation of indemnity took three forms: (1) indemnity expressly provided for by contract (express indemnity); (2) indemnity implied from a contract not specifically mentioning indemnity (implied contractual indemnity); and (3) indemnity arising from the equities of particular circumstances (traditional equitable indemnity). [¶] Although the foregoing categories of indemnity were once regarded as distinct, we now recognize there are only two basic types of indemnity: express indemnity and equitable indemnity. Though not extinguished, implied contractual indemnity is now viewed simply as 'a form of equitable indemnity.' " (*Prince v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151, 1157 [90 Cal.Rptr.3d 732, 202 P.3d 1115], internal citations omitted.)

- "The right to implied contractual indemnity is predicated upon the indemnitor's breach of contract, 'the rationale ... being that a contract under which the indemnitor undertook to do work or perform services necessarily implied an obligation to do the work involved in a proper manner and to discharge foreseeable damages resulting from improper performance absent any participation by the indemnitee in the wrongful act precluding recovery.' ... 'An action for implied contractual indemnity is not a claim for contribution from a joint tortfeasor; it is not founded upon a tort or upon any duty which the indemnitor owes to the injured third party. It is grounded upon the indemnitor's breach of duty *owing to the indemnitee* to properly perform its contractual duties.' " (*West v. Superior Court* (1994) 27 Cal.App.4th 1625, 1633 [34 Cal.Rptr.2d 409], internal citations omitted, original italics.)

- "[A]n implied contractual indemnity claim, like a traditional equitable indemnity claim, is subject to the *American Motorcycle* rule that a party's liability for equitable indemnity is based on its *proportional share of responsibility* for the damages to the injured party." (*Prince, supra,* 45 Cal.4th at p. 1165, original italics.)

- "[O]ur recognition that 'a claim for implied contractual indemnity is a form of equitable indemnity subject to the rules governing equitable indemnity claims' corrects any misimpression that joint liability is not a component." (*Prince, supra,* 45 Cal.4th at p. 1166, internal citation omitted.)

- "[U]nder [Code of Civil Procedure] section 877.6, subsection (c), ... an [implied contractual] indemnity claim, like other equitable indemnity claims, may not be pursued against a party who has entered into a good faith settlement." (*Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1031 [269 Cal.Rptr. 720, 791 P.2d 290].)

- "We conclude the trial court erred in denying [the indemnitee's] implied contractual indemnity based on [indemnitee's] failure to prove [the indemnitor's] breach of warranty was the product of [indemnitor's] failure to use reasonable care in performing its contractual duties. [Indemnitee] does

not need to prove a negligent breach of contract to be entitled to implied contractual indemnity." (*Garlock Sealing Technologies, supra,* 148 Cal.App.4th at p. 974, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 118, 178

Haning et al., California Practice Guide: Personal Injury, Ch. 4-D, *Techniques Where Settlement Not Forthcoming*, ¶ 4:189.6a (The Rutter Group)

5 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.03[6] (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 300, *Contribution and Indemnity*, § 300.61[5] (Matthew Bender)

11 California Points and Authorities, Ch. 115, *Indemnity and Contribution*, § 115.91[3][a] (Matthew Bender)

1 California Civil Practice: Torts § 4:13 (Thomson Reuters~~ West~~)

3903Q. Survival Damages (Economic Damage) (Code Civ. Proc, § 377.34)

If you decide that [*name of plaintiff*] has proved [his/her/*nonbinary pronoun*] claim against [*name of defendant*] for the death of [*name of decedent*], you must also decide the amount of damages that [*name of decedent*] sustained before death and that [he/she/*nonbinary pronoun*] would have been entitled to recover because of [*name of defendant*]'s conduct[, including any [penalties/ [or] punitive damages] as explained in the other instructions that I will give you].

[*Name of plaintiff*] may recover the following damages:

[1. The reasonable cost of reasonably necessary medical care that [*name of decedent*] received;]

[2. The amount of [income/earnings/salary/wages] that [he/she/*nonbinary pronoun*] lost before death;]

[3. The reasonable cost of health care services that [*name of decedent*] would have provided to [*name of family member*] before [*name of decedent*]'s death;]

[4. [*Specify other recoverable economic damage.*]]

You may not award damages for any loss for [*name of decedent*]'s shortened life span attributable to [his/her/*nonbinary pronoun*] death.

New May 2019; Revised November 2019, May 2020

Directions for Use

Give this instruction if a deceased person's estate claims survival damages for harm that the decedent incurred in ~~his or her~~the decedent's lifetime. This instruction addresses survival damages in a claim against a defendant who is alleged to have caused the decedent's death. However, survival damages are available for any claim incurred while alive, not just a claim based on the decedent's death. (See *County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 294 [87 Cal.Rptr.2d 441, 981 P.2d 68].) In a case that does not involve conduct that caused the decedent's death, modify the instruction to include the damages recoverable under the particular claim rather than the damages attributable to the death.

Survival damages can include punitive damages and penalties. (See Code Civ. Proc., § 377.34.) Include the bracketed language in the last sentence of the opening paragraph if either or both are sought. If punitive damages are claimed, give the appropriate instruction from CACI Nos. 3940–3949.

If items 1 and 2 are given, do not also give CACI No. 3903A, *Medical Expenses—Past and Future (Economic Damages)*, and CACI No. 3903C, *Past and Future Lost Earnings (Economic Damages)*, as the future damages parts of those instructions are not applicable. Other 3903 group instructions may be omitted if their items of damages are included under item 3 and must not be given if they include future damages.

Damages for pain, suffering, or disfigurement are not recoverable in a survival action except at times in an elder abuse case. (Code Civ. Proc., § 377.34; see *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1265 [45 Cal.Rptr.3d 222]; see also instructions in the 3100 Series, Elder Abuse and Dependent Adult Civil Protection Act.)

Sources and Authority

- Survival Damages. Code of Civil Procedure section 377.34.

- "In California, 'a cause of action for or against a person is not lost by reason of the person's death' and no 'pending action . . . abate[s] by the death of a party . . .' In a survival action by the deceased plaintiff's estate, the damages recoverable expressly exclude 'damages for pain, suffering, or disfigurement.' They do, however, include all 'loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages.' Thus, under California's survival law, an estate can recover not only the deceased plaintiff's lost wages, medical expenses, and any other pecuniary losses incurred before death, but also punitive or exemplary damages." (*County of L.A., supra,* 21 Cal.4th at pp. 303–304, internal citations omitted.)

- "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. (See … CACI No. 3903E ["Loss of Ability to Provide Household Services (Economic Damage)"].)" (*Williams v. The Pep Boys Manny Moe & Jack of California* (2018) 27 Cal.App.5th 225, 238 [238 Cal.Rptr.3d 809], internal citations omitted.)

- "The second category requires more discussion. That consists of the reasonable value of 24-hour nursing care that Decedent *would have provided* to his wife *after* his death and before she passed away in 2014, nearly four years later. As appellants explain this claim, 'to the extent his children were forced to provide gratuitous home health care and other household services to [wife] up to the time of her death, [Decedent's] estate is also entitled to recover those costs as damages since he had been providing those services for his wife before he died.' … The parties disagree as to whether such damages are recoverable. Appellants contend that they are properly recovered as ' "lost years" damages,' representing economic losses the decedent incurred during the period by which his life expectancy was shortened; [defendant], in contrast, contends that they are not recoverable because they were not 'sustained or incurred before death,' as required by section 377.34. We conclude that [defendant] has the better argument." (*Williams, supra,* 27 Cal.App.5th at p. 238, original italics.)

- "By expressly authorizing recovery of only penalties or punitive damages that the decedent would have been entitled to recover had the decedent lived, the Legislature necessarily implied that *other* categories of damages that the decedent would have been entitled to recover had the decedent lived would not be recoverable in a survival action." (*Williams, supra,* 27 Cal.App.5th at p. 239, original italics.)

- "In survival actions, … damages are narrowly limited to 'the loss or damage that the decedent sustained or incurred before death', which by definition *excludes* future damages. For a trial court to award ' "lost years" damages' in a survival action—that is, damages for 'loss of future economic benefits that [a decedent] would have earned during the period by which his life expectancy was shortened'—would collapse this fundamental distinction and render the plain language of 377.34 meaningless." (*Williams, supra,* 27 Cal.App.5th at p. 240, original italics, internal citations omitted.)

- "The same conclusion [that they are not recoverable in a survival action] would seem to follow as to the trial court's award of damages for the value of Decedent's lost pension benefits and Social Security benefits." (*Williams, supra,* 27 Cal.App.5th at p. 240, fn. 21.)

- "[T]here is at least one exception to the rule that damages for the decedent's predeath pain and suffering are not recoverable in a survivor action. Such damages are expressly recoverable in a survivor action under the Elder Abuse Act if certain conditions are met." (*Quiroz, supra,* 140 Cal.App.4th at p. 1265.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 27

4 Levy et al., California Torts, Ch. 55, *Death and Survival Actions*, § 55.21 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions*, § 181.45 (Matthew Bender)

6 California Points and Authorities, Ch. 66, *Death and Survival Actions*, § 66.63 et seq. (Matthew Bender)

3921. Wrongful Death (Death of an Adult)

If you decide that [*name of plaintiff*] has proved [his/her/*nonbinary pronoun*] claim against [*name of defendant*] for the death of [*name of decedent*], you also must decide how much money will reasonably compensate [*name of plaintiff*] for the death of [*name of decedent*]. This compensation is called "damages."

[*Name of plaintiff*] does not have to prove the exact amount of these damages. However, you must not speculate or guess in awarding damages.

The damages claimed by [*name of plaintiff*] fall into two categories called economic damages and noneconomic damages. You will be asked to state the two categories of damages separately on the verdict form.

[*Name of plaintiff*] claims the following economic damages:

1. **The financial support, if any, that [*name of decedent*] would have contributed to the family during either the life expectancy that [*name of decedent*] had before [his/her/*nonbinary pronoun*] death or the life expectancy of [*name of plaintiff*], whichever is shorter;**

2. **The loss of gifts or benefits that [*name of plaintiff*] would have expected to receive from [*name of decedent*];**

3. **Funeral and burial expenses; and**

4. **The reasonable value of household services that [*name of decedent*] would have provided.**

Your award of any future economic damages must be reduced to present cash value.

[*Name of plaintiff*] also claims the following noneconomic damages:

1. **The loss of [*name of decedent*]'s love, companionship, comfort, care, assistance, protection, affection, society, moral support[; [and]/.]**

[2. The loss of the enjoyment of sexual relations[; [and]/.]]

[3. The loss of [*name of decedent*]'s training and guidance.]

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

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

In determining [*name of plaintiff*]'s loss, do not consider:

1. **[*Name of plaintiff*]'s grief, sorrow, or mental anguish;**

2. **[*Name of decedent*]'s pain and suffering; or**

3. **The poverty or wealth of [*name of plaintiff*].**

In deciding a person's life expectancy, you may consider, among other factors, the average life expectancy of a person of that age, as well as that person's health, habits, activities, lifestyle, and occupation. According to [*insert source of information*], the average life expectancy of a [*insert number*]-year-old [male/female] is [*insert number*] years, and the average life expectancy of a [*insert number*]-year-old [male/female] is [*insert number*] years. This published information is evidence of how long a person is likely to live but is not conclusive. Some people live longer and others die sooner.

[In computing these damages, consider the losses suffered by all plaintiffs and return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs.]

New September 2003; Revised December 2005, February 2007, April 2008, December 2009, June 2011, December 2013, May 2020

Directions for Use

If the decedent recovered damages for lost earning capacity in ~~his or her~~the decedent's lifetime, an heir's recovery for lost financial support (economic damages item 1) is to be measured by the decedent's physical condition at the time of death. There is no similar limitation on recovery for loss of consortium (noneconomic damages item 1). (*Boeken v. Philip Morris USA Inc.* (2013) 217 Cal.App.4th 992, 997−1000 [159 Cal.Rptr.3d 195]; see *Blackwell v. American Film Co.* (1922) 189 Cal. 689, 694 [209 P. 999].)

One of the life-expectancy subjects in the second sentence of the second-to-last paragraph should be the decedent, and the other should be the plaintiff. This definition is intended to apply to the element of damages pertaining to the financial support that the decedent would have provided to the plaintiff.

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended. (See Life Expectancy Table—Male and Life Expectancy Table—Female, following the Damages series.) The first column shows the age interval between

the two exact ages indicated. For example, 50–51 means the one-year interval between the fiftieth and fifty-first birthdays.

For an instruction, worksheets, and tables for use in reducing future economic damages to present value, see CACI No. 3904B, *Use of Present-Value Tables*.

The paragraph concerning not reducing noneconomic damages to present cash value is bracketed because the law is not completely clear. It has been held that all damages, pecuniary and nonpecuniary, must be reduced to present value. (See *Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 [184 Cal.Rptr. 87]; cf. Restat 2d of Torts, § 913A [future *pecuniary* losses must be reduced to present value].) The view of the court in *Fox* was that damages for lost value of society, comfort, care, protection and companionship must be monetarily quantified, and thus become pecuniary and subject to reduction to present value. However, the California Supreme Court subsequently held that with regard to future pain and suffering, 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]), so there is no further reduction to present value. (See CACI No. 3904A, *Present Cash Value,* and CACI No. 3904B, *Use of Present-Value Tables*.) While it seems probable that *Salgado* should apply to wrongful death actions, no court has expressly so held.

Assuming that *Salgado* applies to wrongful death, this paragraph is important to ensure that the jury does not apply any tables and worksheets provided to reduce future economic damages to present value (see CACI No. 3904B) to the noneconomic damages also. Note that because only future economic damages are to be reduced to present value, the jury must find separate amounts for economic and noneconomic damages and for past and present economic damages. (See CACI No. VF-3905, *Damages for Wrongful Death (Death of an Adult)*.)

Sources and Authority

- Cause of Action for Wrongful Death. Code of Civil Procedure section 377.60.
- Damages for Wrongful Death. Code of Civil Procedure section 377.61.
- "Generally, wrongful death claims are legally distinct from claims for personal injury and loss of consortium. 'A cause of action for wrongful death is a statutory claim that compensates specified heirs of the decedent for losses suffered as a result of a decedent's death.' Although each heir has a 'personal and separate' claim, the wrongful death statutes ordinarily require joint litigation of the heirs' claims in order to prevent a series of suits against the tortfeasor. However, that requirement does not deprive a court of subject matter jurisdiction to try a wrongful death action when an heir fails to participate in the action." (*LAOSD Asbestos Cases* (2018) 28 Cal.App.5th 862, 872 [240 Cal.Rptr.3d 1], internal citations omitted.)
- "A cause of action for wrongful death is purely statutory in nature, and therefore 'exists only so far and in favor of such person as the legislative power may declare.' " (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1184 [272 Cal.Rptr. 304], internal citations

omitted.)

- "There are three distinct public policy considerations involved in the legislative creation of a cause of action for wrongful death: '(1) compensation for survivors, (2) deterrence of conduct and (3) limitation, or lack thereof, upon the damages recoverable.' " (*Barrett, supra,* 222 Cal.App.3d at p. 1185, internal citation omitted.)

- "The elements of the cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages, consisting of the *pecuniary loss* suffered by the *heirs*." (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968 [191 Cal.Rptr.3d 766], original italics.)

- "'[W]rongful act' as used in section 377 means any kind of tortious act, including the tortious act of placing defective products into the stream of commerce." (*Barrett, supra,* 222 Cal.App.3d at p. 1191.)

- "In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence." (*Novak v. Continental Tire North America* (2018) 22 Cal.App.5th 189, 195 [231 Cal.Rptr.3d 324].)

- "Under Code of Civil Procedure section 377.61, damages for wrongful death "are measured by the financial benefits the heirs were receiving at the time of death, those reasonably to be expected in the future, and the monetary equivalent of loss of comfort, society, and protection." (*Boeken, supra,* 217 Cal.App.4th at p. 997.)

- "These benefits include the personal services, advice, and training the heirs would have received from the deceased, and the value of her society and companionship. 'The services of children, elderly parents, or nonworking spouses often do not result in measurable net income to the family unit, yet unquestionably the death of such a person represents a substantial "injury" to the family for which just compensation should be paid.' " (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423 [167 Cal.Rptr. 270], internal citations omitted.)

- " 'The pecuniary value of the society, comfort, and protection that is lost through the wrongful death of a spouse, parent, or child may be considerable in cases where, for instance, the decedent had demonstrated a "kindly demeanor" toward the statutory beneficiary and rendered assistance or "kindly offices" to that person. [Citation.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 198−199 [191 Cal.Rptr.3d 263].)

- "Factors such as the closeness of a family unit, the depth of their love and affection, and the character of the decedent as kind, attentive, and loving are proper considerations for a jury assessing noneconomic damages … ." (*Soto, supra,* 239 Cal.App.4th at p. 201.)

- "California permits recovery in a child's wrongful death action for loss of a parent's consortium." (*Boeken, supra,* 217 Cal.App.4th at pp. 997−998.)

- "Code of Civil Procedure section 377 has long allowed the recovery of funeral expenses in

California wrongful death actions." (*Vander Lind v. Superior Court* (1983) 146 Cal.App.3d 358, 364 [194 Cal.Rptr. 209].)

- "Where, as here, decedent was a husband and father, a significant element of damages is the loss of financial benefits he was contributing to his family by way of support at the time of his death and that support reasonably expected in the future. The total future lost support must be reduced by appropriate formula to a present lump sum which, when invested to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts and for the period such future benefits would have been received." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 520–521 [196 Cal.Rptr. 82], internal citations 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, original italics.)

- "The California statutes and decisions ... have been interpreted to bar the recovery of punitive damages in a wrongful death action." (*Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, 450 [131 Cal.Rptr. 14, 551 P.2d 334], internal citation omitted.) There is an exception to this rule for death by felony homicide for which the defendant has been convicted. (Civ. Code, § 3294(d).)

- "California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action." (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72 [137 Cal.Rptr. 863, 562 P.2d 1022], internal citations omitted.)

- "[A] simple instruction excluding considerations of grief and sorrow in wrongful death actions will normally suffice." (*Krouse, supra,* 19 Cal.3d at p. 69.)

- "[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of monetary support where minors are involved, the irrelevance of the heirs' respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish apportionment by the court, rather than the jury, is consistent with the efficient administration of justice." (*Canavin, supra,* 148 Cal.App.3d at pp. 535–536.)

- "[W]here all statutory plaintiffs, properly represented by legal counsel waive judicial apportionment, the trial court should instruct the jury to return separate verdicts unless the remaining considerations enumerated above mandate refusal." (*Canavin, supra,* 148

Cal.App.3d at p. 536.)

- "We note that the court instructed the jury that in determining pecuniary loss they should consider inter alia the age, state of health and respective life expectancies of the deceased and each plaintiff but should be concerned only with 'the shorter of the life expectancies, that of one of the plaintiffs or that of the deceased. ...' This was a correct statement of the law." (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 120–121 [34 Cal.Rptr. 754], internal citation omitted.)

- "It is the shorter expectancy of life that is to be taken into consideration; for example; if, as in the case here, the expectancy of life of the parents is shorter than that of the son, the benefits to be considered are those only which might accrue during the life of the surviving parents." (*Parsons v. Easton* (1921) 184 Cal. 764, 770–771 [195 P. 419], internal citation omitted.)

- "The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive." (*Allen, supra,* 109 Cal.App.3d at p. 424, internal citations omitted.)

- "Accordingly, the trial court in this case did not err in refusing [defendant]'s two proposed jury instructions, and in denying its request to modify CACI No. 3921, its motion for a directed verdict, its motion for a judgment notwithstanding the verdict, and its motion for a new trial, all of which were based on the erroneous ground that [plaintiff]'s loss of consortium damages were to be measured from [decedent]'s physical condition at the time of his death." (*Boeken, supra,* 217 Cal.App.4th at p. 1000.)

Secondary Sources

9 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1873–1880

California Tort Damages (Cont.Ed.Bar 2d ed.) Wrongful Death, §§ 3.1–3.58

4 Levy et al., California Torts, Ch. 55, *Death and Survival Actions*, §§ 55.10–55.13 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, §§ 177.163–177.167 (Matthew Bender)

6 California Points and Authorities, Ch. 64*, Damages: Tort*, § 64.25 (Matthew Bender)

California Civil Practice: Torts, §§ 23:8–23:8.2 (Thomson Reuters)

3940. Punitive Damages—Individual Defendant—Trial Not Bifurcated

If you decide that [*name of defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages only if [*name of plaintiff*] proves by clear and convincing evidence that [*name of defendant*] engaged in that conduct with malice, oppression, or fraud.

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when ~~he or she~~the person is aware of the probable dangerous consequences of ~~his or her~~the person's conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her/*nonbinary pronoun*] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff*].

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant*]'s conduct? In deciding how reprehensible [*name of defendant*]'s conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether [*name of defendant*] disregarded the health or safety of others;

3. Whether [*name of plaintiff*] was financially weak or vulnerable and [*name of defendant*] knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/*nonbinary pronoun*/it];

4. Whether [*name of defendant*]'s conduct involved a pattern or practice; and

5. Whether [*name of defendant*] acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and

[*name of plaintiff*]'s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that [*name of defendant*] knew was likely to occur because of [his/her/*nonbinary pronoun*/its] conduct]?

(c) In view of [*name of defendant*]'s financial condition, what amount is necessary to punish [him/her/*nonbinary pronoun*/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [*name of defendant*] has substantial financial resources. [Any award you impose may not exceed [*name of defendant*]'s ability to pay.]

[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/*nonbinary pronoun*/its] alleged misconduct on persons other than [*name of plaintiff*].]

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008, May 2020

Directions for Use

This instruction is intended to apply to individual persons only. When the plaintiff is seeking punitive damages against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, or CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When plaintiff is seeking punitive damages against both an individual person and a corporate defendant, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given where an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of

wrongful acts." (*Neal, supra,* 21 Cal.3d at p. 928, fn. 13.)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal." (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)

- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)

- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "While 'there is no rigid formula and other factors may be dispositive especially when net worth is manipulated and fails to reflect actual wealth,' net worth is often described as 'the critical determinant of financial condition.' [¶] A plaintiff seeking punitive damages must provide a balanced overview of the defendant's financial condition; a selective presentation of financial condition evidence will not survive scrutiny." (*Farmers & Merchants Trust Co. v. Vanetik* (2019) 33 Cal.App.5th 638, 648 [245 Cal.Rptr.3d 608], internal citation omitted.)

- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)

- "[T]he 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.,* injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility

analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 560 [131 Cal.Rptr.3d 382].)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility,

particularly if the defendant deliberately exploited that vulnerability." (*Bullock, supra,* 198 Cal.App.4th at p. 562, internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)

- "[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]" (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and

proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "Under the statute, 'malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 725, internal citations omitted.)

- "We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ['reasonable relation'] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1727, 1729, 1731, 1743–1748, 1780–1796

Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.01–54.06, 54.20–54.25 (Matthew Bender)

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

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3941. Punitive Damages—Individual Defendant—Bifurcated Trial (First Phase)

If you decide that [*name of defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages. At this time, you must decide whether [*name of plaintiff*] has proved by clear and convincing evidence that [*name of defendant*] engaged in that conduct with malice, oppression, or fraud. The amount of punitive damages, if any, will be decided later.

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when ~~he or she~~the person is aware of the probable dangerous consequences of ~~his or her~~the person's conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her/*nonbinary pronoun*] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff*].

New September 2003; Revised April 2004, December 2005, May 2020

Directions for Use

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof*.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- Evidence of Profits or Financial Condition. Civil Code section 3295(d).
- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29

Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "Under the statute, 'malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1559, 1562, 1572–1577, 1607–1623

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.1–14.8, 14.15–14.18, 14.23

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.01–54.06, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51[17] (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.24 et seq. (Matthew Bender)

3943. Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated

If you decide that [*name of employee/agent*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages against [*name of defendant*] for [*name of employee/agent*]'s conduct. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages against [*name of defendant*] for [*name of employee/agent*]'s conduct only if [*name of plaintiff*] proves by clear and convincing evidence that [*name of employee/agent*] engaged in that conduct with malice, oppression, or fraud.

"Malice" means that [*name of employee/agent*] acted with intent to cause injury or that [*name of employee/agent*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when ~~he or she~~the person is aware of the probable dangerous consequences of ~~his or her~~the person's conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of employee/agent*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her/*nonbinary pronoun*] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of employee/agent*] intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff*].

[*Name of plaintiff*] must also prove [one of] the following by clear and convincing evidence:

1. **[That [*name of employee/agent*] was an officer, a director, or a managing agent of [*name of defendant*], who was acting on behalf of [*name of defendant*]; [or]]**

2. **[That an officer, a director, or a managing agent of [*name of defendant*] had advance knowledge of the unfitness of [*name of employee/agent*] and employed [him/her/*nonbinary pronoun*] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That an officer, a director, or a managing agent of [*name of defendant*] authorized [*name of employee/agent*]'s conduct; [or]]**

4. **[That an officer, a director, or a managing agent of [*name of defendant*] knew of [*name of employee/agent*]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if ~~he or she~~the employee exercises substantial independent

authority and judgment in ~~his or her~~ corporate decisionmaking such that ~~his or her~~the employee's decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant*]'s conduct? In deciding how reprehensible [*name of defendant*]'s conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether [*name of defendant*] disregarded the health or safety of others;

3. Whether [*name of plaintiff*] was financially weak or vulnerable and [*name of defendant*] knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/*nonbinary pronoun*/it];

4. Whether [*name of defendant*]'s conduct involved a pattern or practice; and

5. Whether [*name of defendant*] acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that [*name of defendant*] knew was likely to occur because of [his/her/*nonbinary pronoun*/its] conduct]?

(c) In view of [*name of defendant*]'s financial condition, what amount is necessary to punish [him/her/*nonbinary pronoun*/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [*name of defendant*] has substantial financial resources. [Any award you impose may not exceed [*name of defendant*]'s ability to pay.]

[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/*nonbinary pronoun*/its] alleged misconduct on persons other than [*name of plaintiff*].]

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008, May 2020

Directions for Use

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated.* When punitive damages are

sought against a corporation or other entity for the conduct of its directors, officers, or managing agents, use CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated.*

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated,* for additional

sources and authority.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- " 'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b)." (*Weeks, supra,* 63 Cal.App.4th at p. 1154, internal citation omitted.)

- "Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra,* 63 Cal.App.4th at pp. 1154–1155.)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 562 [131 Cal.Rptr.3d 382], internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only

equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible -- although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock, supra,* 198 Cal.App.4th at p. 560.)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm

caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal." (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)

- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)

- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "While 'there is no rigid formula and other factors may be dispositive especially when net worth is manipulated and fails to reflect actual wealth,' net worth is often described as 'the critical determinant of financial condition.' [¶] A plaintiff seeking punitive damages must provide a balanced overview of the defendant's financial condition; a selective presentation of financial condition evidence will not survive scrutiny." (*Farmers & Merchants Trust Co. v. Vanetik* (2019) 33 Cal.App.5th 638, 648 [245 Cal.Rptr.3d 608], internal citation omitted.)

- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is

recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)

- "[T]he 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)

- "[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]" (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)

- "[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- "Subdivision (b) ... governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice." (*Weeks, supra,* 63 Cal.App.4th at p. 1137.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- The concept of "managing agent" "assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly

unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions … ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A*. (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- "Although it is generally true, … that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168, internal citations omitted.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.20–14.23, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

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

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3944. Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase)

If you decide that [*name of employee/agent*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages against [*name of defendant*] for [*name of employee/agent*]'s conduct. At this time, you must decide whether [*name of plaintiff*] has proved by clear and convincing evidence that [*name of employee/agent*] engaged in that conduct with malice, oppression, or fraud. The amount of punitive damages, if any, will be decided later.

"Malice" means that [*name of employee/agent*] acted with intent to cause injury or that [*name of employee/agent*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when ~~he or she~~the person is aware of the probable dangerous consequences of ~~his or her~~the person's conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of employee/agent*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her/*nonbinary pronoun*] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of employee/agent*] intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff*].

[*Name of plaintiff*] must also prove [one of] the following by clear and convincing evidence:

1. **[That [*name of employee/agent*] was an officer, a director, or a managing agent of [*name of defendant*] who was acting on behalf of [*name of defendant*]; [or]]**

2. **[That an officer, a director, or a managing agent of [*name of defendant*] had advance knowledge of the unfitness of [*name of employee/agent*] and employed [him/her/*nonbinary pronoun*] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That an officer, a director, or a managing agent of [*name of defendant*] authorized [*name of employee/agent*]'s conduct; [or]]**

4. **[That an officer, a director, or a managing agent of [*name of defendant*] knew of [*name of employee/agent*]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if ~~he or she~~the employee exercises substantial independent authority and judgment in ~~his or her~~ corporate decision-making such that ~~his or her~~the employee's decisions ultimately determine corporate policy.

New September 2003; Revised April 2004, December 2005, May 2020

Directions for Use

CACI No. 3942, *Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)* may be used for the second phase of a bifurcated trial.

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3948, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (First Phase)*. When punitive damages are sought against a corporation or other entity for the conduct of its directors, officers, and managing agents, use CACI No. 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase).*

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- Deferral of Financial Condition Evidence to Second Stage. Civil Code section 3295(d).
- "[E]vidence of ratification of [agent's] actions by [defendant], and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490].)
- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29

Cal.App.4th at p. 276.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144].)

- "Under the statute, 'malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions … ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A*. (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- "Although it is generally true … that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent

conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14, 14.23

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d] (Matthew Bender)

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

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.24 et seq. (Matthew Bender)

3945. Punitive Damages—Entity Defendant—Trial Not Bifurcated

If you decide that [*name of defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages against [*name of defendant*] only if [*name of plaintiff*] proves that [*name of defendant*] engaged in that conduct with malice, oppression, or fraud. To do this, [*name of plaintiff*] must prove [one of] the following by clear and convincing evidence:

1. **[That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of [*name of defendant*], who acted on behalf of [*name of defendant*]; [or]]**

2. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [*name of defendant*]; [or]]**

3. **[That one or more officers, directors, or managing agents of [*name of defendant*] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when ~~he or she~~the person is aware of the probable dangerous consequences of ~~his or her~~the person's conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her/*nonbinary pronoun*] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff*].

An employee is a "managing agent" if ~~he or she~~the employee exercises substantial independent authority and judgment in ~~his or her~~ corporate decisionmaking such that ~~his or her~~the employee's decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant*]'s conduct? In deciding how reprehensible [*name of defendant*]'s conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether [*name of defendant*] disregarded the health or safety of others;

3. Whether [*name of plaintiff*] was financially weak or vulnerable and [*name of defendant*] knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/*nonbinary pronoun*/it];

4. Whether [*name of defendant*]'s conduct involved a pattern or practice; and

5. Whether [*name of defendant*] acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that [*name of defendant*] knew was likely to occur because of [his/her/*nonbinary pronoun*/its] conduct]?

(c) In view of [*name of defendant*]'s financial condition, what amount is necessary to punish [him/her/*nonbinary pronoun*/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [*name of defendant*] has substantial financial resources. [Any award you impose may not exceed [*name of defendant*]'s ability to pay.]

[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/*nonbinary pronoun*/its] alleged misconduct on persons other than [*name of plaintiff*].]

New September 2004; Revised April 2004, June 2004, December 2005, June 2006, April 2007, August 2007, October 2008, May 2020

Directions for Use

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, or managing agents. When the plaintiff seeks to hold an employer or principal liable for the conduct of a specific employee or agent, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated.* When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d

525].) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock v. Philip Morris USA,*

Inc. (2011) 198 Cal.App.4th 543, 562 [131 Cal.Rptr.3d 382], internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful

conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock, supra,* 198 Cal.App.4th at p. 560.)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 987 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal." (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)

- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)

- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "While 'there is no rigid formula and other factors may be dispositive especially when net worth is manipulated and fails to reflect actual wealth,' net worth is often described as 'the critical determinant of financial condition.' [¶] A plaintiff seeking punitive damages must provide a balanced overview of the defendant's financial condition; a selective presentation of financial condition evidence will not survive scrutiny." (*Farmers & Merchants Trust Co. v. Vanetik* (2019) 33 Cal.App.5th 638, 648 [245 Cal.Rptr.3d 608], internal citation omitted.)

- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)

- "[T]he 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)

- "[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]" (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 723 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or

employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions … ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A*. (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- "Although it is generally true … that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15

[85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.18–14.31, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

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

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3946. Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase)

If you decide that [*name of defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages. The amount, if any, of punitive damages will be an issue decided later.

At this time, you must decide whether [*name of plaintiff*] has proved that [*name of defendant*] engaged in that conduct with malice, oppression, or fraud. To do this, [*name of plaintiff*] must prove [one of] the following by clear and convincing evidence:

1. **[That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of [*name of defendant*] who acted on behalf of [*name of defendant*]; [or]]**

2. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [*name of defendant*]; [or]]**

3. **[That one or more officers, directors, or managing agents of [*name of defendant*] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when ~~he or she~~the person is aware of the probable dangerous consequences of ~~his or her~~the person's conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her/*nonbinary pronoun*] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff*].

An employee is a "managing agent" if ~~he or she~~the person exercises substantial independent authority and judgment in ~~his or her~~the person's corporate decision-making such that ~~his or her~~the person's decisions ultimately determine corporate policy.

New September 2003; Revised April 2004, December 2005, May 2020

Directions for Use

CACI No. 3942, *Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)* may be used for the second phase of a bifurcated trial.

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, and managing agents. When the plaintiff is seeking to hold an employer or principal liable for the conduct of a specific employee or agent, use CACI No. 3944, *Punitive Damages Against Employer or Principal For Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase).* When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3948, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (First Phase)*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294..

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "Under the statute, 'malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions … ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A*. (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- "Although it is generally true … that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate

decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

Secondary Sources

9 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.13–14.14, 14.23

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51[17] (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.24 et seq. (Matthew Bender)

3947. Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated

If you decide that [*name of individual defendant*]'s or [*name of entity defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages against [*name of individual defendant*] only if [*name of plaintiff*] proves by clear and convincing evidence that [*name of individual defendant*] engaged in that conduct with malice, oppression, or fraud.

You may award punitive damages against [*name of entity defendant*] only if [*name of plaintiff*] proves that [*name of entity defendant*] acted with malice, oppression, or fraud. To do this, [*name of plaintiff*] must prove [one of] the following by clear and convincing evidence:

1. **[That the malice, oppression, or fraud was conduct of one or more officers, directors, or managing agents of [*name of entity defendant*], who acted on behalf of [*name of entity defendant*]; [or]]**

2. **[That an officer, a director, or a managing agent of [*name of entity defendant*] had advance knowledge of the unfitness of [*name of individual defendant*] and employed [him/her/*nonbinary pronoun*] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [*name of entity defendant*]; [or]]**

4. **[That one or more officers, directors, or managing agents of [*name of entity defendant*] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that a defendant acted with intent to cause injury or that a defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his, her, or its conduct and deliberately fails to avoid those consequences.

"Oppression" means that a defendant's conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her/*nonbinary pronoun*] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that a defendant intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff*].

An employee is a "managing agent" if ~~he or she~~the employee exercises substantial independent authority and judgment in ~~his or her~~ corporate decisionmaking such that ~~his or her~~the employee's decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors separately for each defendant in determining the amount:

(a) How reprehensible was that defendant's conduct? In deciding how reprehensible a defendant's conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether the defendant disregarded the health or safety of others;

3. Whether [*name of plaintiff*] was financially weak or vulnerable and the defendant knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/*nonbinary pronoun*];

4. Whether the defendant's conduct involved a pattern or practice; and

5. Whether the defendant acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that the defendant knew was likely to occur because of [his/her/*nonbinary pronoun*/its] conduct]?

(c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/*nonbinary pronoun*/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant's ability to pay.]

[Punitive damages may not be used to punish a defendant for the impact of [his/her/*nonbinary pronoun*/its] alleged misconduct on persons other than [*name of plaintiff*].]

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008, May 2020

Directions for Use

This instruction is intended to apply if punitive damages are sought against both an individual person and a corporate defendant. When punitive damages are sought only against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or*

Employee—Trial Not Bifurcated, or CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When punitive damages are sought against an individual defendant, use CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to

be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- " 'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b)." (*Weeks, supra,* 63 Cal.App.4th at p. 1154, internal citation omitted.)

- "Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra,* 63 Cal.App.4th at pp. 1154–1155.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)
- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 562 [131 Cal.Rptr.3d 382], internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may

be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock, supra,* 198 Cal.App.4th at p. 560.)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant

directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal." (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)

- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)

- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "While 'there is no rigid formula and other factors may be dispositive especially when net worth is manipulated and fails to reflect actual wealth,' net worth is often described as 'the critical determinant of financial condition.' [¶] A plaintiff seeking punitive damages must provide a balanced overview of the defendant's financial condition; a selective presentation of financial condition evidence will not survive scrutiny." (*Farmers & Merchants Trust Co. v. Vanetik* (2019) 33 Cal.App.5th 638, 648 [245 Cal.Rptr.3d 608], internal citation omitted.)

- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)

- "[T]he 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)

- "[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]" (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- "Subdivision (b) ... governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice." (*Weeks, supra,* 63 Cal.App.4th at p. 1137.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions … ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A*. (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- "Although it is generally true … that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.18–14.31, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

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

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3948. Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (First Phase)

If you decide that [*name of individual defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages against [*name of individual defendant*] and, if so, against [*name of corporate defendant*]. The amount, if any, of punitive damages will be an issue decided later.

You may award punitive damages against [*name of individual defendant*] only if [*name of plaintiff*] proves by clear and convincing evidence that [*name of individual defendant*] engaged in that conduct with malice, oppression, or fraud.

"Malice" means that a defendant acted with intent to cause injury or that a defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his, her, or its conduct and deliberately fails to avoid those consequences.

"Oppression" means that a defendant's conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her/*nonbinary pronoun*] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that a defendant intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff*].

You may also award punitive damages against [*name of corporate defendant*] based on [*name of individual*]'s conduct if [*name of plaintiff*] proves [one of] the following by clear and convincing evidence:

1. **[That [*name of individual defendant*] was an officer, a director, or a managing agent of [*name of corporate defendant*] who was acting on behalf of [*name of corporate defendant*] at the time of the conduct constituting malice, oppression, or fraud; [or]]**

2. **[That an officer, a director, or a managing agent of [*name of corporate defendant*] had advance knowledge of the unfitness of [*name of individual defendant*] and employed [him/her/*nonbinary pronoun*] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That [*name of individual defendant*]'s conduct constituting malice, oppression, or fraud was authorized by an officer, a director, or a managing agent of [*name of corporate defendant*]; [or]]**

4. **[That an officer, a director, or a managing agent of [*name of corporate defendant*]**

knew of [*name of individual defendant***]'s conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

An employee is a "managing agent" if ~~he or she~~the employee exercises substantial independent authority and judgment in ~~his or her~~corporate decision-making such that ~~his or her~~the employee's decisions ultimately determine corporate policy.

New September 2003; Revised April 2004, December 2005, May 2020

Directions for Use

Use CACI No. 3949, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (Second Phase)*, for the second phase of a bifurcated trial.

This instruction is intended to apply to cases where punitive damages are sought against both an individual person and a corporate defendant. When damages are sought only against a corporate defendant, use CACI No. 3944, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase),* or CACI No. 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase).* When damages are sought against individual defendants, use CACI No. 3941, *Punitive Damages--Individual Defendant—Bifurcated Trial (First Phase)*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof*.

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- Deferral of Financial Condition Evidence to Second Stage. Civil Code section 3295(d).
- "[E]vidence of ratification of [agent's] actions by [defendant] and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d

258].)

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "Under the statute, 'malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly

unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra*, 8 Cal.4th at pp. 723–724.)

- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions … ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A*. (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- "Although it is generally true … that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decision making so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.13–14.14, 14.23

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51[17] (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.24 et seq. (Matthew Bender)

4000. Conservatorship—Essential Factual Elements

[*Name of petitioner***] claims that [***name of respondent***] is gravely disabled due to [a mental disorder/impairment by chronic alcoholism] and therefore should be placed in a conservatorship. In a conservatorship, a conservator is appointed to oversee, under the direction of the court, the care of persons who are gravely disabled due to a mental disorder or chronic alcoholism. To succeed on this claim, [***name of petitioner***] must prove beyond a reasonable doubt all of the following:**

1. That [*name of respondent***] [has a mental disorder/is impaired by chronic alcoholism]; [and]**

2. That [*name of respondent***] is gravely disabled as a result of the [mental disorder/chronic alcoholism][; and/.]**

[3. That [*name of respondent***] is unwilling or unable voluntarily to accept meaningful treatment.]**

New June 2005; Revised June 2016

Directions for Use

There is a split of authority as to whether element 3 is required. (Compare *Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1467 [257 Cal.Rptr. 860] ["[M]any gravely disabled individuals are simply beyond treatment."] with *Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369] [jury should be allowed to consider all factors that bear on whether person should be on LPS conservatorship, including willingness to accept treatment].)

Sources and Authority

- Right to Jury Trial. Welfare and Institutions Code section 5350(d).
- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).
- "The Lanterman-Petris-Short Act (the act) governs the involuntary treatment of the mentally ill in California. Enacted by the Legislature in 1967, the act includes among its goals ending the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious mental disorders, guaranteeing and protecting public safety, safeguarding the rights of the involuntarily committed through judicial review, and providing individualized treatment, supervision and placement services for the gravely disabled by means of a conservatorship program." (*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1008–1009 [36 Cal.Rptr.2d 40, 884 P.2d 988].)
- "LPS Act commitment proceedings are subject to the due process clause because significant liberty

interests are at stake. But an LPS Act proceeding is civil. '[T]he stated purposes of the LPS Act foreclose any argument that an LPS commitment is equivalent to criminal punishment in its design or purpose.' Thus, not all safeguards required in criminal proceedings are required in LPS Act proceedings." (*Conservatorship of P.D.* (2018) 21 Cal.App.5th 1163, 1167 [231 Cal.Rptr.3d 79], internal citations omitted.)

- "The clear import of the LPS Act is to use the involuntary commitment power of the state sparingly and only for those truly necessary cases where a 'gravely disabled' person is incapable of providing for his basic needs either alone or with help from others." (*Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1280 [221 Cal.Rptr.3d 622].)

- "The right to a jury trial upon the establishment of conservatorship is fundamental to the protections afforded by the LPS. As related, that right is expressly extended to the reestablishment of an LPS conservatorship." (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, 1037 [226 Cal.Rptr. 33], internal citations omitted.)

- "[T]he trial court erred in accepting counsel's waiver of [conservatee]'s right to a jury trial … . (*Estate of Kevin A.* (2015) 240 Cal.App.4th 1241, 1253 [193 Cal.Rptr.3d 237].)

- " 'The due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act.' An LPS commitment order involves a loss of liberty by the conservatee. Consequently, it follows that a trial court must obtain a waiver of the right to a jury trial from the person who is subject to an LPS commitment." (*Conservatorship of Heather W.* (2016) 245 Cal.App.4th 378, 382−383 [199 Cal.Rptr.3d 689].)

- "We ... hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons." (*Conservatorship of Davis, supra,* 124 Cal.App.3d at p. 328.)

- "The jury should determine if the person voluntarily accepts meaningful treatment, in which case no conservatorship is necessary. If the jury finds the person will not accept treatment, then it must determine if the person can meet his basic needs on his own or with help, in which case a conservatorship is not justified." (*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1092–1093 [242 Cal.Rptr. 289].)

- "Our research has failed to reveal any authority for the proposition [that] without a finding that the proposed conservatee is unable or unwilling to voluntarily accept treatment, the court must reject a conservatorship in the face of grave disability. ... Some persons with grave disabilities are beyond treatment. Taken to its logical conclusion, they would be beyond the LPS Act's reach, according to the argument presented in this appeal." (*Conservatorship of Symington, supra,* 209 Cal.App.3d at p. 1469.)

- "The party seeking imposition of the conservatorship must prove the proposed conservatee's grave disability beyond a reasonable doubt and the verdict must be issued by a unanimous jury." (*Conservatorship of Susan T., supra,* 8 Cal.4th at p. 1009, internal citation omitted.)

- "Although there is no private right of action for a violation of section 5152, 'aggrieved individuals can enforce the [LPS] Act's provisions through other common law and statutory causes of action, such as negligence, medical malpractice, false imprisonment, assault, battery, declaratory relief, United States Code section 1983 for constitutional violations, and Civil Code section 52.1. [Citations.]' " (*Swanson v. County of Riverside* (2019) 36 Cal.App.5th 361, 368 [248 Cal.Rptr.3d 476].)

Secondary Sources

~~14~~ 15 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Wills and Probate, § ~~945~~1007

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

2 California Conservatorship Practice (Cont.Ed.Bar) Ch. 23

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.30 et seq. (Matthew Bender)

4002. "Gravely Disabled" Explained

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

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

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

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

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

New June 2005; Revised January 2018, May 2019, May 2020

Directions for Use

This instruction provides the definition of "gravely disabled" from Welfare and Institutions Code section 5008(h)(1)(A), which will be the applicable standard in most cases. The instruction applies to both adults and minors. (*Conservatorship of M.B.* (2018) 27 Cal.App.5th 98, 107 [237 Cal.Rptr.3d 775].)

Read the bracketed sentence at the end of the first paragraph if appropriate to the facts of the case. There is a second standard in Welfare and Institutions Code section 5008(h)(1)(B) involving a finding of mental incompetence under Penal Code section 1370. A different instruction will be required if this standard is alleged.

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

If there is evidence concerning the availability of third parties that are willing to provide assistance to the

proposed conservatee, see CACI No. 4007, *Third Party Assistance*.

Sources and Authority

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

- "The enactment of the LPS and with it the substitution of 'gravely disabled' for 'in need of treatment' as the basis for commitment of individuals not dangerous to themselves or others reflects a legislative determination to meet the constitutional requirements of precision. The term 'gravely disabled' is sufficiently precise to exclude unusual or nonconformist lifestyles. It connotes an inability or refusal on the part of the proposed conservatee to care for basic personal needs of food, clothing and shelter." (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 284 [139 Cal.Rptr. 357], footnotes omitted.)

- "[T]he public guardian must prove beyond a reasonable doubt that the proposed conservatee is gravely disabled." (*Conservatorship of Jesse G.* (2016) 248 Cal.App.4th 453, 461 [203 Cal.Rptr.3d 667].)

- "The stricter criminal standard is used because the threat to the conservatee's individual liberty and personal reputation is no different than the burdens associated with criminal prosecutions." (*Conservatorship of Smith* (1986) 187 Cal.App.3d 903, 909 [232 Cal.Rptr. 277] internal citations omitted.)

- "Bizarre or eccentric behavior, even if it interferes with a person's normal intercourse with society, does not rise to a level warranting conservatorship except where such behavior renders the individual helpless to fend for herself or destroys her ability to meet those basic needs for survival." (*Conservatorship of Smith, supra,* 187 Cal.App.3d at p. 909.)

- "Under [Welfare and Institutions Code] section 5350, subdivision (e)(1), 'a person is not "gravely disabled" if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter.' " (*Conservatorship of Jesse G., supra,* 248 Cal.App.4th at p. 460.)

- "While [third person] may not have shown that he could manage appellant's mental health symptoms as adeptly as would a person professionally trained to care for someone with a mental disorder, that is not the standard. As appellant states, '[t]he question in a LPS conservatorship case where the proposed conservatee asserts a third party assistance claim is not whether the third party will be able to manage the person's mental health symptoms completely. Rather, the dispositive question is whether the person is able to provide the proposed conservatee with food, clothing, and shelter on a regular basis." (*Conservatorship of Jesse G., supra,* 248 Cal.App.4th at p. 463 fn. 4.)

- "We ... hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or

shelter unaided by willing, responsible relatives, friends or appropriate third persons." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369].)

- "[A]n individual who will not voluntarily accept mental health treatment is not for that reason alone gravely disabled." (*Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1468 [257 Cal.Rptr. 860].)

- "[T]he pivotal issue is whether [respondent] was 'presently' gravely disabled and the evidence demonstrates that he was not. Accordingly, the order granting the petition must be overturned." (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d. 1030, 1034 [226 Cal.Rptr. 33], fn. omitted, citing to *Conservatorship of Murphy* (1982) 134 Cal.App.3d 15, 18 [184 Cal.Rptr. 363].)

- "[A] conservatorship cannot be established because of a perceived likelihood of future relapse. To do so could deprive the liberty of persons who will not suffer such a relapse solely because of the pessimistic statistical odds. Because of the promptness with which a conservatorship proceeding can be invoked the cost in economic and liberty terms is unwarranted." (*Conservatorship of Neal* (1987) 190 Cal.App.3d 685, 689 [235 Cal.Rptr. 577].)

- "A perceived likelihood of future relapse, without more, is not enough to justify establishing a conservatorship. Neither can such a likelihood justify keeping a conservatorship in place if its subject is not presently gravely disabled, in light of the statutory provisions allowing rehearings to evaluate a conservatee's current status." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 302 [256 Cal.Rptr. 415], internal citation omitted.)

- "[T]he definition of ' "[g]ravely disabled minor" ' from section 5585.25 is not part of the LPS Act, but is found in the Children's Civil Commitment and Mental Health Treatment Act of 1988. (§ 5585.) This definition applies 'only to the initial 72 hours of mental health evaluation and treatment provided to a minor. … Evaluation and treatment of a minor beyond the initial 72 hours shall be pursuant to the … [LPS Act].' (§ 5585.20.) Accordingly, we must apply the definition found in the LPS Act, and determine whether there was substantial evidence Minor suffered from a mental disorder as a result of which she 'would be unable to provide for [her] basic personal needs' if she had to so provide." (*Conservatorship of M.B., supra,* 27 Cal.App.5th at p. 107.)

Secondary Sources

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

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

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

4105. Duties of Stockbroker—Speculative Securities

Stockbrokers who trade in speculative securities and advise clients have a fiduciary duty to those clients:

1. **To make sure that the client understands the investment risks in light of ~~his or her~~the client's financial situation;**

2. **To inform the client that speculative investments are not suitable if the stockbroker believes that the client is unable to bear the financial risks involved; and**

3. **Not to solicit the client's purchase of speculative securities that the stockbroker considers to be beyond the client's risk threshold.**

If these duties are met and the client still insists on purchasing speculative securities, the stockbroker may advise the client about various speculative securities and purchase speculative securities that the client selects.

New June 2006; Revised May 2020

Directions for Use

This instruction should be read after CACI No. 4101, *Failure to Use Reasonable Care—Essential Factual Elements.*

Sources and Authority

- "[T]he stockbroker has a fiduciary duty (1) to ascertain that the investor understands the investment risks in the light of his or her actual financial situation; (2) to inform the customer that no speculative investments are suitable if the customer persists in wanting to engage in such speculative transactions without the stockbroker's being persuaded that the customer is able to bear the financial risks involved; and (3) to refrain completely from soliciting the customer's purchase of any speculative securities which the stockbroker considers to be beyond the customer's risk threshold. As long as these duties are met, if the customer nevertheless insists on purchasing speculative securities, the stockbroker is not barred from advising the customer about various speculative securities and purchasing for the customer those securities which the customer selects." (*Duffy v. Cavalier* (1989) 215 Cal.App.3d 1517, 1532 [264 Cal.Rptr. 740], internal citations and footnote omitted.)

- "[T]he relationship between any stockbroker and his or her customer is fiduciary in nature, imposing on the former the duty to act in the highest good faith toward the customer." (*Duffy, supra,* 215 Cal.App.3d at p. 1534, internal citations omitted.)

- "A stockbroker's fiduciary duty requires more than merely carrying out the stated objectives of the customer; at least where there is evidence, as there certainly was here, that the stockbroker's

recommendations were invariably followed, the stockbroker must 'determine the customer's actual financial situation and needs.' If it would be improper and unsuitable to carry out the speculative objectives expressed by the customer, there is a further obligation on the part of the stockbroker 'to make this known to [the customer], and [to] refrain from acting except upon [the customer's] express orders.' Under such circumstances, although the stockbroker can advise the customer about the speculative options available, he or she should not solicit the customer's purchase of any such speculative securities that would be beyond the customer's 'risk threshold.' " (*Duffy, supra,* 215 Cal.App.3d at p. 1538, internal citations omitted.)

Secondary Sources

45 California Forms of Pleading and Practice, Ch. 515, *Securities and Franchise Regulation*, § 515.15[3] (Matthew Bender)

4107. Duty of Disclosure by Real Estate Broker to Client

As a fiduciary, a real estate broker must disclose to ~~his or her~~the broker's client all material information that the broker knows or could reasonably obtain regarding the property or relating to the transaction.

The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of the transaction, the knowledge and experience of the client, the questions asked by the client, the nature of the property, and the terms of sale. ~~The b~~Brokers must place ~~himself or herself~~ themselves in the position of their clients and consider the type of information required for the client to make a well-informed decision.

[A real estate broker cannot accept information received from another person, such as the seller, as being true, and transmit it to ~~his or her~~the broker's client without either verifying the information or disclosing to the client that the information has not been verified.]

New April 2008; Revised December 2012, June 2013, May 2020

Directions for Use

This instruction may be read after CACI No. 4101, *Failure to Use Reasonable Care—Essential Factual Elements,* if a real estate broker's duty of disclosure to the broker's own client is at issue. Give the second paragraph if relevant to the facts of the case. For an instruction based on a broker's breach of duty to the buyer with regard to the property inspection required by Civil Code section 2079, see CACI No. 4108, *Failure of Seller's Real Estate Broker to Conduct Reasonable Inspection—Essential Factual Elements.*

While a broker's fiduciary duty to the client arises from the relationship and not from contract (*William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1312 [139 Cal.Rptr.3d 670]), the scope of the duty may be limited by contract. (See *Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 750−751 [17 Cal.Rptr.2d 734] [broker-client agreement may relieve broker of any duty to provide tax advice].) Any contractual limitations may be added to the second paragraph regarding what facts a broker must learn.

Sources and Authority

- "Under the common law, … a broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty. 'The broker as a fiduciary has a duty to learn the material facts that may affect the principal's decision. He is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision. The agent's duty to disclose material information to the principal includes the duty to disclose reasonably obtainable material information. [¶] . . . [¶] The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of each transaction, the knowledge and the experience of the principal, the questions asked by the principal, and the nature of the property and the terms of

sale. The broker must place himself in the position of the principal and ask himself the type of information required for the principal to make a well-informed decision. This obligation requires investigation of facts not known to the agent and disclosure of all material facts that might reasonably be discovered.' " (*Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 25–26 [73 Cal.Rptr.2d 784, internal citations omitted.)

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

- " '[W]here the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. …' When the seller's real estate agent or broker is also aware of such facts, 'he [or she] is under the same duty of disclosure.' " (*Holmes v. Summer* (2010) 188 Cal.App.4th 1510, 1518–1519 [116 Cal.Rptr.3d 419], internal citations omitted.)

- " 'A broker who is merely an innocent conduit of the seller's fraud may be innocent of actual fraud [citations], but in this situation the broker may be liable for negligence on a constructive fraud theory if he or she passes on the misstatements as true without personally investigating them.' " (*Salahutdin v. Valley of Cal.* (1994) 24 Cal.App.4th 555, 562 [29 Cal.Rptr.2d 463].)

- "[T]he broker has a fiduciary duty to investigate the material facts of the transaction, and he cannot accept information received from others as being true, and transmit it to the principal, without either verifying the information or disclosing to the principal that the information has not been verified. Because of the fiduciary obligations of the broker, the principal has a right to rely on the statements of the broker, and if the information is transmitted by the broker without verification and without qualification, the broker is liable to the principal for negligent misrepresentation." (*Salahutdin, supra,* 24 Cal.App.4th at pp. 562–563.)

- "[T]he fiduciary duty owed by brokers to their own clients is substantially more extensive than the *nonfiduciary* duty codified in [Civil Code] section 2079 [duty to visually inspect and disclose material facts]." (*Michel, supra,* 156 Cal.App.4th at p. 763, original italics.)

- "The statutory duties owed by sellers' brokers under section 2079 are separate and independent of the duties owed by brokers to their own clients who are buyers." (*William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1305 [139 Cal.Rptr.3d 670].)

- "[W]e are not persuaded by Defendants' reliance on Civil Code section 2079. Although we agree that that statute sets forth some of the duties of a real estate broker, it is not the only source of a broker's duties. 'Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency.' Here, the [plaintiffs]' claims are not contingent on an expansion of the statutorily defined duties of a real estate broker. Instead, their claim is more elementary. If a real estate broker has information that will adversely affect the value of a property he or she is selling, does that broker have a duty to share that information with

his or her client? The clear and uncontroversial answer to that question is yes." (*Ryan v. Real Estate of the Pacific, Inc.* (2019) 32 Cal.App.5th 637, 646 [244 Cal.Rptr.3d 129], internal citation omitted.)

- "[Fiduciary] duties require full and complete disclosure of all material facts respecting the property or relating to the transaction in question." (*Padgett v. Phariss* (1997) 54 Cal.App.4th 1270, 1286 [63 Cal.Rptr.2d 373].)

- "Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency." (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 164 [11 Cal.Rptr.3d 564].)

- "[R]eal estate brokers representing buyers of residential property are licensed professionals who owe fiduciary duties to their own clients. As such, this fiduciary duty is not a creature of contract and, therefore, did not arise under the buyer-broker agreement." (*William L. Lyon & Associates, Inc., supra,* 204 Cal.App.4th at p. 1312, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 914

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 2-C, *Broker's Relationship And Obligations To Principal And Third Parties*, ¶ 2:164 (The Rutter Group)

California Real Property Sales Transactions (Cont.Ed.Bar 4th ed.) §§ 2.132–2.136

3 California Real Estate Law and Practice, Ch. 61, *Employment and Authority of Brokers*, § 61.05, Ch. 63, *Duties and Liabilities of Brokers*, §§ 63.20–63.22 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 (Matthew Bender)

4108. Failure of Seller's Real Estate Broker to Conduct Reasonable Inspection—Essential Factual Elements (Civ. Code, § 2079)

[*Name of defendant*], as the real estate [broker/salesperson] for [*name of seller*], must conduct a reasonably competent and diligent visual inspection of the property offered for sale. Before the sale, [*name of defendant*] must then disclose to [*name of plaintiff*], the buyer, all facts that materially affect the value or desirability of the property that the investigation revealed or should have revealed.

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

1. **That [*name of defendant*] was [*name of seller*]'s real estate [broker/salesperson];**

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

3. **That [*name of defendant*] failed to conduct a reasonably competent and diligent visual inspection of the property;**

4. **That before the sale, [*name of defendant*] failed to disclose to [*name of plaintiff*] all facts that materially affected the value or desirability of the property that such an inspection would have revealed;**

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

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

New June 2013; Revised May 2020

Directions for Use

Give this instruction if the seller's real estate broker or salesperson did not conduct a visual inspection of the property and make disclosures to the buyer as required by Civil Code section 2079(a). For an instruction on the fiduciary duty of a real estate broker to ~~his or her~~the broker's own client, see CACI No. 4107, *Duty of Disclosure of Real Estate Broker to Client*.

The duty created by Civil Code section 2079 is not a fiduciary duty; it is strictly a limited duty created by statute. (See *Michel v. Moore & Associates, Inc.* (2007) 156 Cal.App.4th 756, 762 [67 Cal.Rptr.3d 797].)

Sources and Authority

- Statutory Duties of Seller's Real Estate Broker. Civil Code section 2079(a).

- Scope of Required Inspection. Civil Code section 2079.3.

- "Section 2079 requires sellers' real estate brokers, and their cooperating brokers, to conduct a 'reasonably competent and diligent visual inspection of the property,' and to disclose all material facts such an investigation would reveal to a prospective buyer." (*Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 23 [73 Cal.Rptr.2d 784], footnote omitted.)

- "Section 2079 was enacted to codify and focus the holding in *Easton v. Strassburger, supra,* 152 Cal. App. 3d 90. In *Easton,* the court recognized that case law imposed a duty on *sellers'* brokers to disclose material facts *actually known* to the broker. *Easton* expanded the holdings of former decisions to include a requirement that sellers' brokers must diligently inspect residential property and disclose material facts they obtain from that investigation. Further, the case held sellers' brokers are chargeable with knowledge they *should have known* had they conducted an adequate investigation." (*Field, supra,* 63 Cal.App.4th at p. 24, original italics.)

- "Section 2079 statutorily limits the duty of inspection recognized in *Easton* to one requiring only a *visual* inspection. Further, the statutory scheme expressly states a selling broker has no obligation to purchasers to investigate public records or permits pertaining to title or use of the property." (*Field, supra,* 63 Cal.App.4th at p. 24, original italics; see Civ. Code, § 2079.3.)

- "The statutory duties owed by sellers' brokers under section 2079 are separate and independent of the duties owed by brokers to their own clients who are buyers." (*William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1305 [139 Cal.Rptr.3d 670].)

- "In accordance with the clear and unambiguous language of section 2079, the inspection and disclosure duties of residential real estate brokers and their agents apply exclusively to prospective buyers, and not to other persons who are not parties to the real estate transaction. Only a transferee, that is, the ultimate purchaser, can recover from a broker or agent for breach of these duties." (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 165 [11 Cal.Rptr.3d 564].)

- "[W]e are not persuaded by Defendants' reliance on Civil Code section 2079. Although we agree that that statute sets forth some of the duties of a real estate broker, it is not the only source of a broker's duties. 'Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency.' " (*Ryan v. Real Estate of the Pacific, Inc.* (2019) 32 Cal.App.5th 637, 646 [244 Cal.Rptr.3d 129].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 174

Greenwald et al., California Practice Guide: Real Property Transactions, Ch. 2-C, *Broker's Relationship And Obligations To Principal And Third Parties,* ¶ 2:173 et seq. (The Rutter Group)

3 California Real Estate Law and Practice, Ch. 63, *Duties and Liabilities of Brokers*, § 63.20 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 et seq. (Matthew Bender)

2A California Points and Authorities, Ch. 31, *Brokers and Salespersons*, § 31.142 et seq. (Matthew Bender)

9 California Legal Forms, Ch. 23, *Real Property Sales Agreements*, § 23.20 (Matthew Bender)

Miller & Starr, California Real Estate 4th~~(3d ed. 2008) Ch. 1, *Duty of Seller of Real Property to Disclose*~~, § 1:41 (Thomson Reuters~~ West~~)

4109. Duty of Disclosure by Seller's Real Estate Broker to Buyer

A real estate broker for the seller of property must disclose to the buyer all facts known to the broker regarding the property or relating to the transaction that materially affect the value or desirability of the property. A broker must disclose these facts if ~~he or she~~the broker knows or should know that the buyer is not aware of them and cannot reasonably be expected to discover them through diligent attention and observation. The broker does not, however, have to disclose facts that the buyer already knows or could have learned with diligent attention and observation.

New December 2013; Revised May 2020

Directions for Use

This instruction should be read after CACI No. 400, *Negligence—Essential Factual Elements*, if a seller's real estate broker's breach of duty of disclosure to the buyer is at issue. A broker's failure to disclose known material facts to the buyer may constitute a breach of duty for purposes of a claim for negligence. Causation and damages must still be proved. This instruction may also be used with instructions in the Fraud and Deceit series (CACI No. 1900 et seq.) for a cause of action for misrepresentation or concealment. (See *Holmes v. Summer* (2010) 188 Cal.App.4th 1510, 1528 [116 Cal.Rptr.3d 419].)

For an instruction on the fiduciary duty of a real estate broker to ~~his or her~~the broker's own client, see CACI No. 4107, *Duty of Disclosure of Real Estate Broker to Client*. For an instruction on the duty of the seller's real estate broker under Civil Code section 2079 to conduct a visual inspection of the property and disclose to the buyer all facts materially affecting the value or desirability of the property that an investigation would reveal, see CACI No. 4108, *Failure of Seller's Real Estate Broker to Conduct Reasonable Inspection—Essential Factual Elements*.

Sources and Authority

- " '[W]here the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. [Citations.]' When the seller's real estate agent or broker is also aware of such facts, 'he [or she] is under the same duty of disclosure.' A real estate agent or broker may be liable 'for mere nondisclosure since his [or her] conduct in the transaction *amounts to a representation of the nonexistence of the facts which he has failed to disclose* [citation].' " (*Holmes, supra,* 188 Cal.App.4th at pp. 1518–1519, original italics, internal citations omitted.)

- "Even in the absence of a fiduciary duty to the buyer, listing agents are required to disclose to prospective purchasers all facts materially affecting the value or desirability of a property that a reasonable visual inspection would reveal. And regardless of whether a listing agent also represents the buyer, it is required to disclose to the buyer all known facts materially affecting the value or desirability of a property that are not known to or reasonably discoverable by the buyer." (*Horiike v. Coldwell Banker Residential Brokerage Co.* (2016) 1 Cal.5th 1024, 1040 [210 Cal.Rptr.3d 1, 383 P.3d 1094].)

- "The real estate agent or broker representing the seller is a party to the business transaction. In most instances he has a personal interest in it and derives a profit from it. Where such agent or broker possesses, along with the seller, the requisite knowledge … , whether he acquires it from, or independently of, his principal, he is under the same duty of disclosure. He is a party connected with the fraud and if no disclosure is made at all to the buyer by the other parties to the transaction, such agent or broker becomes jointly and severally liable with the seller for the full amount of the damages." (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 736 [29 Cal.Rptr. 201], footnote omitted.)

- "A breach of the duty to disclose gives rise to a cause of action for rescission or damages." (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1383 [89 Cal.Rptr.3d 659].)

- "The 'elements of a simple negligence action [are] whether [the defendant] owed a legal duty to [the plaintiff] to use due care, whether this legal duty was breached, and finally whether the breach was a proximate cause of [the plaintiff's] injury. [Citations.]' We have already stated that the buyers alleged facts sufficient to impose a legal duty on the brokers. Furthermore, they have alleged facts sufficient to show a breach of that duty. Finally, the buyers alleged that the breach caused them harm. In short, the buyers stated facts sufficient to constitute a cause of action on a negligence theory. Our cursory analysis of this one theory is enough to demonstrate that the trial court erred in sustaining the brokers' demurrer without leave to amend, but is not meant to preclude the buyers' pursuit of their other [fraud] theories." (*Holmes, supra,* 188 Cal.App.4th at p. 1528, internal citation omitted.)

- "Despite the absence of privity of contract, a real estate agent is clearly under a duty to exercise reasonable care to protect those persons whom the agent is attempting to induce into entering a real estate transaction for the purpose of earning a commission." (*Holmes, supra,* 188 Cal.App.4th at p. 1519.)

- "[A] seller's agent has no affirmative duty to disclose latent defects unless the agent '*also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer*.' " (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 445 [173 Cal.Rptr.3d 624], original italics.)

- "[W]hen a real estate agent or broker is aware that the amount of existing monetary liens and encumbrances exceeds the sales price of a residential property, so as to require either the cooperation of the lender in a short sale or the ability of the seller to put a substantial amount of cash into the escrow in order to obtain the release of the monetary liens and encumbrances affecting title, the agent or broker has a duty to disclose this state of affairs to the buyer, so that the buyer can inquire further and evaluate whether to risk entering into a transaction with a substantial risk of failure." (*Holmes, supra,* 188 Cal.App.4th at pp. 1522–1523.)

- "[W]e do not convert the seller's fiduciary into the buyer's fiduciary. The seller's agent under a listing agreement owes the seller '[a] fiduciary duty of utmost care, integrity, honesty, and loyalty … .' Although the seller's agent does not generally owe a fiduciary duty to the buyer, he or she nonetheless owes the buyer the affirmative duties of care, honesty, good faith, fair dealing and disclosure, as reflected in Civil Code section 2079.16, as well as such other nonfiduciary duties as are

otherwise imposed by law." (*Holmes, supra,* 188 Cal.App.4th at p. 1528, internal citation omitted.)

- "Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency." (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 164 [11 Cal.Rptr.3d 564].)

- "In enacting section 2079 [see CACI No. 4108], the Legislature did not intend to preclude a real estate agent's liability for fraud. However, because a seller's agent has no fiduciary relationship with a buyer, the courts have strictly limited the scope of an agent's disclosure duties under a fraudulent concealment theory." (*Peake, supra,* 227 Cal.App.4th at p. 444, intenral citation omitted.)

- "The primary difference between the disclosure obligations of an exclusive representative of a seller and a dual agent representing the seller and the buyer is the dual agent's duty to learn and disclose facts material to the property's price or desirability, including those facts that might reasonably be discovered by the buyer." (*Horiike, supra,* 1 Cal.5th at pp. 1040–1041.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 794

12 Witkin, Summary of California Law (10th ed. 2005) Real Property, § 473

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 2-C, *Broker's Relationship And Obligations To Principal And Third Parties*, ¶¶ 2:164, 2:172 (The Rutter Group)

California Real Property Sales Transactions (Cont.Ed.Bar 4th ed.) §§ 2.132–2.136

3 California Real Estate Law and Practice, Ch. 63, *Duties and Liabilities of Brokers*, §§ 63.20–63.22 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 (Matthew Bender)

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

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

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

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

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

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

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

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

New November 2017; Revised May 2020

Directions for Use

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

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

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

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

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

Sources and Authority

- Constructive Fraud. Civil Code section 1573.

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

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

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

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

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

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

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

Secondary Sources

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

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

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

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

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

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

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

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

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/*nonbinary pronoun*/it] because [***name of plaintiff***] filed this lawsuit in retaliation for [***name of defendant***]'s having exercised [his/her/*nonbinary pronoun*/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/*nonbinary pronoun*/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/*nonbinary pronoun*/it] proves that [he/she/*nonbinary pronoun*/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, May 2020

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~~the tenant 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)

4323. Affirmative Defense—Discriminatory Eviction (Unruh Act)

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/*nonbinary pronoun*] because [***name of plaintiff***] is discriminating against [him/her/*nonbinary pronoun*] because of [***insert protected class, e.g., her national origin, or other characteristic protected from arbitrary discrimination***]. To succeed on this defense, [***name of defendant***] must prove both of the following:**

1. **That [***name of defendant***] is [perceived as/associated with someone who is [perceived as]] [***insert protected class, e.g., Hispanic, or other characteristic***]; and**

2. **That [***name of plaintiff***] filed this lawsuit because of [***insert one of the following* **]**

   [[his/her/*nonbinary pronoun*/its] [perception of] [*name of defendant***]'s [***insert protected class, e.g., national origin, or other characteristic***].]**

   [[*name of defendant***]'s association with someone who is [perceived as] [***insert protected class, e.g., Hispanic, or other characteristic***].]**

New August 2007; Revised May 2020

Directions for Use

Throughout the instruction, insert either the defendant's protected status under the Unruh Act (see Civ. Code, § 51) or other characteristic on the basis of which the defendant alleges that ~~he or she~~the defendant has been arbitrarily discriminated against. (See *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 725–726 [180 Cal.Rptr. 496, 640 P.2d 115] [excluding all tenants with children is arbitrary illegal discrimination].)

In element 1, select the appropriate language based on whether the defendant (1) is a member of the protected class, (2) is perceived as a member of the protected class, (3) is associated with someone who is a member of the protected class, or (4) is associated with someone who is perceived as a member of the protected class.

In element 2, include the bracketed language regarding perception if the defendant is not actually a member of the protected class, but the allegation is that the plaintiff believes that the defendant is a member.

See also the Sources and Authority section under CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements*.

Sources and Authority

- Discrimination in Public Accommodations Prohibited (Unruh Act). Civil Code section 51.

- "In evaluating the legality of the challenged exclusionary policy in this case, we must recognize at the outset that in California, unlike many other jurisdictions, the Legislature has sharply circumscribed an apartment owner's traditional discretion to accept and reject tenants on the basis of the landlord's own likes or dislikes. California has brought such landlords within the embrace of the broad statutory provisions of the Unruh Act, Civil Code section 51. Emanating from and modeled upon traditional 'public accommodations' legislation, the Unruh Act expanded the reach of such statutes from common carriers and places of public accommodation and recreation, e.g., railroads, hotels, restaurants, theaters and the like, to include 'all business establishments of every kind whatsoever.' " (*Marina Point, Ltd., supra,* 30 Cal.3d at pp. 730–731, footnote omitted.)

- "[T]he 'identification of particular bases of discrimination -- color, race, religion, ancestry, and national origin -- *is illustrative rather than restrictive*. Although the legislation has been invoked primarily by persons alleging discrimination on racial grounds, its language and its history compel the conclusion that the Legislature intended to prohibit *all arbitrary discrimination by business establishments*.' " (*Marina Point, Ltd., supra,* 30 Cal.3d at p. 732, original italics.)

- "We hold that defendant should have been permitted to produce proof of the allegations of his special defenses of discrimination, which if proven would bar the court from ordering his eviction because such 'state action' would be violative of both federal and state Constitutions." (*Abstract Inv. Co. v. Hutchinson* (1962) 204 Cal.App.2d 242, 255 [22 Cal.Rptr. 309].)

- Evictions that contravene statutory or constitutional strictures provide a valid defense to unlawful detainer actions. (*Marina Point, Ltd., supra,* 30 Cal.3d at p. 727.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2005) Real Property, §§ 682–683

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.118–8.128

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.53, 10.67, 10.68

7 California Real Estate Law and Practice, Ch. 214, *Government Regulation and Enforcement*, § 214.10 (Matthew Bender)

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

11 California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.31 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Unlawful Detainer*, § 35.45 (Matthew Bender)

Miller & Starr, California Real Estate, Ch. 19, *Landlord-Tenant*, § 19:223 (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/*nonbinary pronoun*] 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, January 2019, May 2020

Directions for Use

This instruction is a tenant's affirmative defense alleging that ~~he or she~~the tenant is being evicted because ~~he or she~~the tenant 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~~ 11th ed. ~~2005~~2017) Real Property, § ~~683A~~714

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

4341. Statutory Damages on Showing of Malice (Code Civ. Proc., § 1174(b))

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun/*it] is entitled to statutory damages in addition to actual damages. To recover statutory damages, [*name of plaintiff*] must prove that [*name of defendant*] acted with malice.

A tenant acts with malice if ~~he or she~~the tenant willfully continues to occupy the property with knowledge that ~~he or she~~the tenant no longer has the right to do so.

You must determine how much, if any, statutory damages should be awarded, up to a maximum of $600. You should not award any statutory damages if you find that [*name of defendant*] had a good-faith and a reasonable belief in [his/her/*nonbinary pronoun/*its] right to continue to occupy the premises.

New August 2007; Revised May 2020

Sources and Authority

- Statutory Damages on Showing of Malice. Code of Civil Procedure section 1174(b).
- "The rule appears to be well established in California that a lessee of real property who wilfully, deliberately, intentionally and obstinately withholds possession of the property, with knowledge of the termination of his lease and against the will of the landlord, is liable for [statutory] damages." (*Erbe Corp. v. W & B Realty Co.* (1967) 255 Cal.App.2d 773, 780 [63 Cal.Rptr. 462].)
- "Authorities … do not hold that the [penalty should be imposed] where the conduct of the tenant is characterized by good faith and a reasonable belief in his right to remain … ." (*Board of Public Service Comm'rs v. Spear* (1924) 65 Cal.App. 214, 217–218 [223 P.423], internal citations omitted, overruled, other grounds, *Richard v. Degen & Brody, Inc.* (1960) 181 Cal.App.2d 289, 302–304, 5 Cal.Rptr. 263.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 738

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 12.32–12.34

2 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) § 26.13

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.95 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.27

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.13 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.22 (Matthew Bender)

Miller & Starr, California Real Estate, Ch. 19, *Landlord-Tenant*, § 19:208 (Thomson Reuters)

4574. Right to Repair Act—Affirmative Defense—Plaintiff's Subsequent Acts or Omissions (Civ. Code, § 945.5(d))

[*Name of defendant*] claims that [he/she/*nonbinary pronoun*/it] is not responsible for [*name of plaintiff*]'s harm because it was caused by [*name of plaintiff*]'s later [acts/ [or] omissions]. To establish this defense [*name of defendant*] must prove that the harm was caused by [[*name of plaintiff*]'s later [alterations/ordinary wear and tear/misuse/abuse/[or] neglect]/ [or] the structure's use for something other than its intended purpose].

New May 2019; Revised May 2020

Directions for Use

This instruction sets forth a builder's affirmative defense to a homeowner's construction defect claim under the Right to Repair Act, asserting that the harm was caused by the homeowner's alterations, ordinary wear and tear, misuse, abuse, or neglect, or by the structure's use for something other than its intended purpose. (Civ. Code, § 945.5(d).)

The homeowner is responsible for any acts or omissions by any of ~~his or her~~the homeowner's agents or independent third parties. (Civ. Code, § 945.5(d).) Modify the instruction as needed if the harm is alleged to have been caused by the subsequent acts of an agent or third party.

Sources and Authority

- Right to Repair Act Affirmative Defense of Alterations, Ordinary Wear and Tear, Misuse, Abuse, Neglect, or Use for Something Other Than Intended. Civil Code section 945.5(d).

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1312

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.43 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.70 (Matthew Bender)

5003. Witnesses

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

(a) How well did the witness see, hear, or otherwise sense what ~~he or she~~the witness described in court?

(b) How well did the witness remember and describe what happened?

(c) How did the witness look, act, and speak while testifying?

(d) Did the witness have any reason to say something that was not true? For example, did the witness show any bias or prejudice or have a personal relationship with any of the parties involved in the case or have a personal stake in how this case is decided?

(e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else ~~he or she~~the witness said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness did not tell the truth about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness did not tell the truth about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

You must not be biased against any witness because of ~~his or her~~the witness's disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [*insert any other impermissible form of bias*]].

New September 2003; Revised April 2004, April 2007, December 2012, December 2016, May 2020

Directions for Use

This instruction may be given as either an introductory instruction before trial (see CACI No. 107) or as a concluding instruction.

The advisory committee recommends that this instruction be read to the jury before reading instructions on the substantive law.

In the last paragraph, the court may delete inapplicable categories of potential jury bias.

Sources and Authority

- Role of Jury. Evidence Code section 312.
- Considerations for Evaluating the Credibility of Witnesses. Evidence Code section 780.
- Direct Evidence of Single Witness Sufficient. Evidence Code section 411.
- The willfully false witness instruction was formerly codified at Code of Civil Procedure section 2061. This statute was repealed in 1965 to avoid giving undue emphasis to this rule compared to other common-law rules. Refusal to give an instruction on this point is not error: "It should certainly not be deemed of vital importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar." (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671 [288 P. 834].)
- Standard 10.20(a)(2) of the Standards for Judicial Administration provides: "In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants."
- Canon 3(b)(5) of the Code of Judicial Ethics provides: "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment." Canon 3(b)(6) requires the judge to impose these standards on attorneys also.

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 299

Wegner~~,~~ et al., California Practice Guide: Civil Trials & Evidence, Ch. 10-D, *Objectives Of Cross-Examination*, ¶ 10:91 et seq. (The Rutter Group)

Wegner~~,~~ et al., California Practice Guide: Civil Trials & Evidence, Ch. 8E-F, *Limitations On Impeachment And Rehabilitation*, ¶ 8:2990 et seq. (The Rutter Group)

1A California Trial Guide, Unit 20, *Procedural Rules for Presentation of Evidence* (Matthew Bender)

14 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.110 et seq. (Matthew Bender)

Cotchett, California Courtroom Evidence, § 16.45 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, *Questioning Witnesses and Objections*, 11.03 et seq.

5005. Multiple Parties

[There are [*number*] plaintiffs in this trial. You should decide the case of each plaintiff separately as if it were a separate lawsuit. Each plaintiff is entitled to separate consideration of ~~his or her~~each plaintiff's own claim(s).]

[There are [*number*] defendants in this trial. You should decide the case against each defendant separately as if it were a separate lawsuit. Each defendant is entitled to separate consideration of ~~his or her~~ each defendant's own defenses.]

[Different aspects of this case involve different parties (plaintiffs and defendants). Each instruction will identify the parties to whom it applies. Pay particular attention to the parties named in each instruction.]

[*or*]

[Unless I tell you otherwise, all instructions apply to each plaintiff and defendant.]

New April 2004; Revised April 2009, May 2020

Directions for Use

If this instruction is used, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

The CACI instructions require the use of party names rather than party-status words like "plaintiff" and "defendant." In multiparty cases, it is important to name only the parties in each instruction to whom the instruction applies. For example, an instruction on loss of consortium (see CACI No. 3920) will not apply to all plaintiffs. Instructions on vicarious liability (see CACI No. 3700 et seq.) will not apply to all defendants. Unless all or nearly all of the instructions will apply to all of the parties, give the first option for the last paragraph.

Sources and Authority

"We realize, of course, that multiple defendants are involved and that each defendant is entitled to instructions on, and separate consideration of, every defense available and applicable to it. The purpose of this rule is to insure that the jury will distinguish and evaluate the separate facts relevant to each defendant." (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 58 [148 Cal.Rptr. 596, 583 P.2d 121], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (4th ed. 1997) Pleading, § 67 et seq.

27 California Forms of Pleading and Practice, Ch. 318, *Judgments*, § 318.15 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 5, *Parties*, 5.30 et seq.

Item number: 11

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Judicial Branch Education: Mandatory Judicial Education in Prevention of Discrimination, Sexual Harassment and Inappropriate Workplace Behavior and Unconscious Bias Training

Committee or other entity submitting the proposal:
Center for Judicial Education and Research Advisory Committee

Staff contact (name, phone and e-mail): Mary Ann Koory, 415-865-7525, maryann.koory@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: N/A
Project description from annual agenda: Based on the recommendations of the Work Group on the Prevention of Discrimination and Harassment, the CJER Advisory Committee proposes to amend rule 10.469 to make prevention of discrimination and harassment training mandatory for judicial officers.

If requesting July 1 or out of cycle, explain:
N/A

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

INVITATION TO COMMENT

SPR20-06

Title
Judicial Branch Education: Mandatory Judicial Training Requirement for Prevention of Discrimination, Sexual Harassment and Inappropriate Workplace Behavior, and Unconscious Bias

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 10.469

Proposed by
Center for Judicial Education and Research Advisory Committee
Hon. Kimberly A. Gaab, Chair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Mary Ann Koory, 415-865-7525
maryann.koory@jud.ca.gov

Executive Summary and Origin

Based on the recommendations of the Work Group on the Prevention of Discrimination and Harassment, and with input from other Judicial Council advisory bodies, the CJER Advisory Committee proposes to amend rule 10.469 of the California Rules of Court to make education on unconscious bias, as well as the prevention of discrimination and harassment, mandatory for judicial officers.

Background

Mandatory training for the prevention of sexual harassment has existed in California since 2005 when Assembly Bill 1825 mandated that all organizations with 50 or more employees must provide two hours of sexual harassment training and education to supervisory employees every two years. In January 2019, in response to the nationwide #MeToo movement, legislators passed AB 1343 which mandated sexual harassment training to non-supervisory employees every two years for employers with five employees or more, in addition to the training for supervisors already mandated by AB 1825.

In October 2018, the Chief Justice appointed the Work Group for the Prevention of Discrimination and Harassment (Work Group) to examine these related issues and further support the judicial branch's commitment to a workplace free of harassment and discrimination. The Work Group examined research and discussed potential areas for improvement relating to

harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification. The Work Group ultimately proposed recommendations to the JudicialCouncil, including, among others, recommendation 2(A)(1) that asked the council to direct the CJER Advisory Committee (CJERAC) to consult with other advisory bodies in considering modifications to the California Rules of Court to achieve the Work Group objectives. On July 19, 2019, the Judicial Council adopted the recommendations of the Work Group. The specific language of that recommendation is below.

Work Group Recommendation 2(A)(1)[1]
Consistent with the requirements of California Government Code sections 68088 and 11135, and the California Rules of Court, rules 10.461 et seq., the Work Group recommends that the Center for Judicial Education and Research Advisory Committee , in consultation with the administrative presiding justices, appellate court clerk/executive officers, trial court presiding judges, and trial court executive officers, under the oversight of the Rules and Projects Committee, engage in the rulemaking process regarding education for judicial officers on the prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification.

Current Education Rule Structure
The education rules for judicial officers are separated by court level. The Supreme Court and appellate court justices are covered by rule 10.461. Superior court judges and subordinate judicial officers ("SJOs") are covered by rules 10.462. Both rules discuss content-based and hours-based education recommendations for justices and judges.

Rule 10.469 applies to all categories of judicial officers and has a specific section that discusses education recommendations in the areas of access and fairness.

The Proposal

The CJER Advisory Committee proposes to change the wording of rule 10.469 under access and fairness education to mandatory rather than recommended, based on the recommendations of the Work Group. Specifically, the CJER Advisory Committee proposes adding a subsection to rule 10.469 (e) that reads:

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[1] Judicial Council of Cal., Work Group for the Prevention of Discrimination and Harassment, Rep., *Judicial Branch Administration: Prevention of Discrimination, Harassment, Retaliation, and Inappropriate Workplace Conduct Based on a Protected Classification* (June 12, 2019), recommendations 2(A)(1)), pp. 2–3 and 7–8: https://jcc.legistar.com/View.ashx?M=F&ID=7336325&GUID=6B7E4EDA-1AEF-457E-8045-CA0439798302

Each justice, judge, and subordinate judicial officer must participate in education on unconscious bias, as well as the prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct. This education must be taken at least once every three-year continuing education period as determined by rule 10.461(c)(1) and 10.462(d)(1).

Alternatives Considered

The Work Group considered alternatives before recommending that the California Rules of Court be amended to make discrimination and harassment training a mandatory requirement. Following the council's adoption of the Work Group's recommendations, the CJER Advisory Committee consulted with the Advisory Committee on Providing Access and Fairness, the Appellate Advisory Committee, the Administrative Presiding Justices Advisory Committee, the Trial Court Presiding Judges Advisory Committee, the Court Executives Advisory Committee, the appellate clerk/executive officers and the California Judges Association about the language of the proposed amendment. The amendment as proposed herein reflects input by those bodies, and includes a suggestion from the Administrative Presiding Justices Advisory Committee to specify unconscious bias education as well as education on the prevention of harassment and discrimination.

Fiscal and Operational Impacts

The education offered by the Center for Judicial Education and Research already includes training in unconscious bias and the prevention of harassment; the new requirements will lead to some expansion in those areas, as well as in the areas of prevention of discrimination, retaliation, and inappropriate workplace conduct. Education that fulfills this new requirement can also be provided by approved providers in addition to CJER. The major costs to the judicial branch associated with implementation of the amended rule are associated with the development of expanded education content in these areas.

There should be no direct fiscal and operational impacts for any other entity, including time spent by individual judicial officers on education. Although this proposal would add additional content requirements, the overall required number of education hours would not change; there should be no increase in time spent or related education costs to individual judicial officers or, by extension, to their courts. There are no additional negative impacts associated with justice partners, attorneys, self-represented litigants or the courts, although these entities may perceive benefits from working with judicial officers with more training in these areas.

The relatively minor implementation costs would be outweighed by the enormous benefits of educating judicial officers about these important issues.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, revising processes and procedures (please describe)?
- Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 10.469, at page 5

Rule 10.469 of the California Rules of Court would be amended, effective January 1, 2021, to read:

Rule 10.469. Judicial education recommendations for justices, judges, and subordinate judicial officers, and additional requirements

(a)–(d) * * *

(e) Fairness and access education; unconscious bias, prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct

(1) In order to achieve the objective of assisting judicial officers in preserving the integrity and impartiality of the judicial system through the prevention of bias, each justice, judge, and subordinate judicial officer should regularly participate in education on fairness and access. The education should include the following subjects: race and ethnicity, gender, sexual orientation, and persons with disabilities~~, and sexual harassment~~.

(2) Each justice, judge, and subordinate judicial officer must participate in education on unconscious bias, as well as the prevention of harassment, discrimination, retaliation, and inappropriate workplace conduct. This education must be taken at least once every three-year continuing education period as determined by rules 10.461(c)(1) and 10.462(d)(1).

Item number:12

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Unlawful Detainer: Complaint and Answer Forms (revise forms UD-100 and UD105)

Committee or other entity submitting the proposal:
Civil and Small Claims Advisory Committee

Staff contact (name, phone and e-mail): Anne M. Ronan, 415-865-8933, anne.ronan@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Assembly Bill 1482 (Tenant Protection Act of 2019), with certain exceptions, prohibits an owner of residential real property from terminating without just cause the lease of a tenant who has occupied the property for at least 12 months. In addition, Assembly Bill 1188 provides new rights for tenants providing shelter for persons at risk for homelessness and adds a number of protections for both the landlord and tenant, including the ability of the tenant to remove the person at risk of homelessness on short notice. Current forms will be revised, or new forms or rules developed as appropriate to implement these bills

If requesting July 1 or out of cycle, explain:

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

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.:
For business meeting on May 14–15, 2020

Title
Unlawful Detainer: Complaint and Answer Forms

Rules, Forms, Standards, or Statutes Affected
Revise forms UD-100 and UD-105

Recommended by
Civil and Small Claims Advisory Committee
Hon. Ann I. Jones, Chair

Agenda Item Type
Action Required

Effective Date
September 1, 2020

Date of Report
March 27, 2020

Contact
Anne M. Ronan, 415-865-8933
anne.ronan@jud.ca.gov

Executive Summary

The Civil and Small Claims Advisory Committee recommends revising the Judicial Council unlawful detainer complaint and answer forms to reflect recent changes to landlord-tenant law enacted by Assembly Bill 1482 (Stats. 2020, ch. 597), the Tenant Protection Act of 2019. This new law adds several sections to the Civil Code—one to place restrictions on terminations of tenancies (Civ. Code, § 1946.2) and two relating to caps on rent increases over a 12-month period (Civ. Code, §§ 1947.12, 1947.13). The new laws went into effect January 1, 2020, and will remain in effect until January 1, 2030.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council, effective September 1, 2020, revise *Complaint—Unlawful Detainer* (form UD-100) and *Answer—Unlawful Detainer* (form UD-105) to include new and revised items reflecting the provisions in the Tenant Protection Act requiring, for certain tenancies, just cause for evictions, additional notices in advance of eviction for certain reasons, and a cap on rental increases. The committee also recommends revising an item in form UD-100 relating to venue for unlawful detainer cases generally.

The revised forms are attached at pages 9–15.

Relevant Previous Council Action

The unlawful detainer (UD) complaint form was last revised 15 years ago to incorporate amendments to Code of Civil Procedure section 1166 requiring that a copy of the rental agreement, if available; a copy of the notice of termination of tenancy; and a proof of service of that notice be attached to an unlawful detainer complaint. The UD answer form has been revised several times in recent years to include new affirmative defenses that the Legislature has mandated be added to the form.

Analysis/Rationale

Although neither *Complaint—Unlawful Detainer* (form UD-100) nor *Answer—Unlawful Detainer* (form UD-105) is a mandatory form, both are used frequently for several reasons: the requirements of what must be in a residential UD complaint are very detailed and technical; the expedited nature of the process requires that the pleadings be created quickly; and many defendants, as well as an increasing number of plaintiffs, are self-represented. For these reasons, although landlords with tenancies subject to the provisions of the new law can create their own pleadings to reflect the new requirements, and tenants can add any applicable new affirmative defenses as an "other" affirmative defense on the current form, the committee is recommending that the forms be revised so that they can be used by all parties in residential UD actions, regardless of whether a tenancy at issue is subject to the new law.

Complaint—Unlawful Detainer (form UD-100)

New section 1946.2[1] places additional requirements on landlords relating to terminations of certain tenancies, several of which are now part of the prima facie UD case for those tenancies:

- Landlords may only terminate tenants who have been in residence for 12 months or longer with just cause, which must be stated in the notice terminating the tenancy. (§ 1946.2(a).)

- If the just cause is a curable lease violation (other than for payment of rent), the landlord must issue two notices rather than the traditional single notice to quit: an initial notice including an opportunity to cure under Code of Civil Procedure section 1161, paragraph 3, and if that period passes without a cure, a second notice for termination. (§ 1946.2(c).)

- When no-fault just cause applies, the landlord must provide relocation assistance in the form of either a credit for the last month's rent or a direct payment to the tenant in that amount. (§ 1946.2(d)(1).) If the landlord does not comply with this section, the notice of termination is void. If the landlord complies, but the tenant fails to vacate after expiration

[1] Unless otherwise noted, all statutory references in this document are to the Civil Code.

of the notice to terminate, the amount of relocation paid or credited to the tenant is recoverable as damages in the UD action. (§ 1946.2(d).)

The revised *Complaint—Unlawful Detainer* (form UD-100) includes two new items to reflect the requirements described above.

- Item 7 specifies whether the tenancy at issue in the complaint is subject to the new law. The new law applies only when tenants have been in the property for certain periods of time (see § 1946.2(a)(1) and (2)), and many properties are exempt (see § 1946.2(e)). If the assertion is that the tenancy is exempt from the new law (that is, checks item 7a in the form), the plaintiff must state which specific part of the law that assertion is based on.

- Item 8, to be completed only if the property is subject to the new law, attests to the just cause for the termination and identifies whether it was at-fault or no-fault just cause. If the latter, the plaintiff must identify which form of the required relocation assistance was paid and the amount paid. Item 8c allows the plaintiff to claim the relocation assistance as damages.[2]

Item 9 (which is in current *Complaint—Unlawful Detainer* as item 7) has also been revised. This item addresses the service of notices of termination: the plaintiff must identify which type of notice was given from a list provided, state the date the period in the notice ended, assert that the facts in the notice are true, and provide that a copy of the notice is attached. This item has been revised to reflect the new provisions regarding the notice required for at-fault evictions based on curable violations of the lease or rental agreement. (§ 1946.2(c).) That section requires that when the termination is based on "a curable lease violation," a landlord must serve two three-day notices:

(1) A three-day notice under Code of Civil Procedure section 1161, paragraph 3 (requiring a three-day notice that includes the options of either curing the violation of certain covenants and conditions in the lease or giving up possession of the property); and

(2) If the asserted violations are not cured within that first three-day period, a three-day notice to terminate, this time without the option to cure.

Item 9 has been revised to attempt to reflect this double-notice provision.[3] The list of potential notices now includes a "3-day notice to quit under Civil Code, § 1946.2(c)," which also requires

[2] A new item has also been added to item 19 to include recovery of the relocation assistance in the prayer at the end of the complaint.

[3] The committee recognizes that the language of the statute requires, essentially, two notices to quit in these circumstances: the notice to cure or quit under the Code Civil Procedure that is expressly incorporated by reference into § 1946.2(c) and the notice to quit to be provided following that first notice. Although this may not have been the intent of the authors, it is what the statute says. The revisions to the complaint form are intended to allow parties to use it even with this inconsistent language in the statute. The committee may recommend further revisions if the

that the plaintiff state the date when the prior required notice to perform covenants (the first notice that section 1946.2(c) requires be made) was served. (See item 9a6.) In addition, an annotation has been added to the current "3-day notice to perform covenants or quit" (the notice that is regularly used under Code of Civil Procedure section 1161, paragraph 3) stating that it is not to be used if the tenancy at issue is under the Tenant Protection Act. (See item 9a5.)

The instructions in item 9(e) to provide a copy of the termination notice have also been revised to require a copy of both notices when two are required under section 1946.2(c). And the instruction in item 9(f) to complete attachments showing the service of notices not otherwise described in 9 has been expanded to include service of this prior required notice under section 1946.2(c).

In addition to the revisions to reflect the new law, item 3 in the complaint form has been revised to request more information regarding the address of the premises at issue, to make the basis for venue clearer to defendants and courts.

Answer—Unlawful Detainer **(form UD-105)**

New affirmative defenses have been added to the answer form. It is clear from the language of section 1946.2(a) that lack of just cause in the written termination notice is sufficient to block termination of certain tenancies and can be asserted as an affirmative defense to an unlawful detainer action. A violation of the new rent control provisions in section 1947.12 could also block termination under certain circumstances. The committee is recommending that these and other affirmative defenses arising from violations of the Tenant Protection Act be added to item 3 in the *Answer—Unlawful Detainer* (form UD-105).

Policy implications

Although the new Tenant Protection Act has significant policy implications, the recommended forms have none on their own. The revised forms reflect the new statutory provisions to assist parties in making and defending unlawful detainer cases—and courts in adjudicating them.

Comments

Nine comments were received; all either agreed with the proposal, agreed if modified, or did not indicate a position. The comments were from the Orange County Bar Association; Superior Courts of Los Angeles, Orange, and San Diego Counties; four legal service organizations, Disability Rights California, Legal Services of Northern California, Public Law Center, and Western Center on Law & Poverty (on behalf of itself and nine other organizations, all listed on the comments chart); and a private attorney (commenting only on the venue provision). A chart with the text of all the comments and the responses to each from the advisory committee is attached at pages 16–42. The more significant comments are described below.

Legislature revises the statute to clarify this provision or an appellate court interprets the law in a way that the proposed form does not reflect.

Multiple complaint forms

The invitation to comment asked for specific comments on whether, in light of the additional requirements added to UD procedures for certain tenancies by the Tenant Protection Act, a separate complaint form should be developed for cases involving tenancies subject to the act. Seven commenters responded to this question (the private attorney and Superior Court of Los Angeles County did not respond). The majority, including all the legal service commenters, disagreed with the idea of multiple complaint forms. Commenters asserted that having to choose between the forms could be confusing to the parties and, if the wrong form is chosen, could lead to unnecessary demurrers or motions and the necessity to file amended complaints, causing delays in what is intended to be an expedited process. Moreover, commenters pointed out that the question of whether the Tenant Protection Act applied might itself be at issue in the lawsuit, and that issue could be difficult to raise if the wrong complaint form were used. The committee agrees with these commenters and does not plan to develop a complaint form specific only to cases under the new law at this time.

The only commenter who asked for two separate complaints did so on the grounds that it might otherwise be confusing for a clerk to know what had to be alleged if a default judgment was requested. The Superior Court of Orange County suggested that, if a separate complaint form was not developed for cases under the Tenant Protection Act, the request for default form be revised to include an item for plaintiffs to note whether the case is subject to the act. That proposal is beyond the scope of the current proposal, but the committee will consider it as time and resources allow.

Allegations of exemption from new law

Several commenters, including the Superior Court of Los Angeles County and the legal service commenters, proposed that item 7a in the complaint, an assertion that the tenancy at issue is not subject to the Tenant Protection Act, include the factual basis for that assertion, with several commenters suggesting that a checklist be included in the form of all potential grounds for exemption in the statute. They asserted that without such information, the tenant will not know the grounds on which the exemption is claimed and may therefore face the burden of having to prove that none of the many potential exemptions apply.

The committee agrees that a bare statement of exemption could place an unfair burden on the tenant and has revised this item in light of the comments received. Because a list of potential grounds for exemptions would be extensive and detailed, and would make an already complex form even more complicated and difficult to follow, the committee has added instead a requirement that the plaintiff claiming an exemption identify the specific subpart of the statute being relied on. This requirement should provide a defendant with sufficient information to counter the claim, if appropriate.

Allegations of just cause for eviction

Item 8 includes allegations as to whether the tenancy was terminated for at-fault or no-fault just cause. (The distinction is important because if the latter, then the landlord is required to have provided relocation assistance at the time the notice of termination was provided.) Several

commenters asserted that this item should also require the plaintiff to state the factual basis for the termination, to support the allegation of just cause. The committee considered the comments but declined to modify this item. The statutory requirement is not merely that the landlord have just cause to evict, but that the just cause be stated in the written notice to terminate the tenancy. (§ 1946.2(a).) The written notice must be attached to the UD complaint[4] and show whether the required just cause was stated. Including an opportunity in item 8 to plead some basis for just cause that is different from what is in the notice of termination would not provide useful information and could lead to confusion.

Allegations of notice under section 1946.2(c)

As noted above, the committee found the new double-notice requirement for certain terminations under section 1946.2(c)[5] ambiguous, at best, because *both* notices that the landlord is required to serve on the tenant with a curable lease violation may require that the tenant has three days to quit the property. The first notice—the notice to be made under Code of Civil Procedure section 1161, para. 3[6]—must, under that statute, provide an option to cure the violations or give up possession of the property at the end of the three days if the violations are not cured. The second notice, to be given only if the violations are not cured with the first three-day period, is to require the tenant to give up the property in three days, but at the end of a different three-day period.

Legal service commenters assert that the first notice required under that code section is "a notice to cure only" (Western Center for Law and Poverty) and that the notice provisions in item 9 of the complaint are confusing in not making this clear. Although the committee does not agree that the first notice required by § 1946.2(c) is anything other than what is expressly referenced in that statute—i.e., a notice under section 1161 of the Code of Civil Procedure—the committee has further revised the notice listed in item 9a(6) to clarify that any notice terminating a tenancy subject to the Tenant Protection Act that involves a curable lease violation must involve two notices, with a notice to perform covenants served before the three-day notice to terminate. Additionally, item 9a(5), for a three-day notice to perform covenant or quit (without any additional notice to quit) has now been annotated to note that it should not be checked if the property is subject to the Tenant Protection Act (so that notices for curable violations under the

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[4] See Code Civ. Proc., § 1166(d)(1)(A); item 9(e) in form UD-100.

[5] § 1946.2(c):

> Before an owner of residential real property issues a notice to terminate a tenancy for just cause that is a curable lease violation, the owner shall first give notice of the violation to the tenant with an opportunity to cure the violation pursuant to paragraph (3) of Section 1161 of the Code of Civil Procedure. If the violation is not cured within the time period set forth in the notice, a three-day notice to quit without an opportunity to cure may thereafter be served to terminate the tenancy.

[6] Code Civ. Proc., § 1161, para. 3:

> When he or she continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, . . . in writing, *requiring the performance of such conditions or covenants, or the possession of the property,* shall have been served upon him or her. [emphasis added]

act must be addressed by item 9(a)(6)). With these modifications, along with clarification of the language in 9e noting that copies of both notices are required for a termination subject to section 1946.2(c), the committee believes that the form allows plaintiffs to allege that they have met the requirements of section 1946.2(c). As noted above, should the Legislature or a Court of Appeal clarify the meaning of that section, the committee will revisit this part of the complaint to see if further revisions are appropriate.

Allegations of other notices under the Tenant Protection Act

The legal service commenters request that several notice requirements in the Tenant Protection Act beyond those in section 1946.2(c) also be added to the UD complaint form. They assert that a complaint should require that the landlord allege compliance with each of these provisions and attach the required notices. The committee considered each notice identified in the comments and concluded that they were not part of a prima facie UD case and did not need to be added to the complaint form. The individual notices identified are either facts to be considered in determining whether a specific type of just cause existed (§ 1946.2(b)(2)(A)(ii)) or a specific exemption applied (§ 1946.2(e)(8)(B)), or are general notices of a tenant's rights under the act (§ 1946.2(f)). While failure to comply with all statutory requirements relating to a tenancy may be an affirmative defense in a UD case, allegations that the plaintiff has complied with each are not elements of a prima facie case for a UD complaint.

More detailed affirmative defenses

All the legal service commenters requested that more detailed affirmative defenses be included on the form than the single general affirmative defense for violations of the Tenant Protection Act that was included in the answer form circulated for comment. They assert that more detailed allegations are needed in order for self-represented tenants to be able to understand the available affirmative defenses. The committee agrees and has modified item 3h on form UD-105 to include more specific affirmative defenses relating to lack of compliance with the new law.

Alternatives considered

The advisory committee considered not recommending any revisions to the forms, in light of their optional nature, but decided against that option because the forms are so often used by self-represented parties who would, without them, find navigating the technicalities of unlawful detainer litigation very difficult.

As noted above, the committee considered creating a separate UD complaint form to be used for unlawful detainers either for all tenancies subject to this new law or for those subject to the double-notice requirements under section 1946.2(c). The committee concluded that such a form would not necessarily address the issues raised by the double-notice provision and, as confirmed by commenters, was likely to make UD litigation even more complicated.

Fiscal and Operational Impacts

The enactment of the Tenant Protection Act, which went into effect January 1, 2020, has resulted in courts having to update internal procedures and case management systems and train judicial

officers, self-help center staff, and court staff on the new law, including case processing staff who process clerk default judgments. This proposal to revise the forms may result in courts having to update and order additional local form packets.

Attachments and Links

1. Forms UD-100 and UD-105, at pages 9–15
2. Chart of comments, at pages 16–42
3. Link A: Assembly Bill 1482 (Stats. 2020, ch. 597), *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB368&search_keywords*

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: (___) ___-____ FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):		**DRAFT** **03-26-20** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
PLAINTIFF: DEFENDANT: ☐ DOES 1 TO		
COMPLAINT—UNLAWFUL DETAINER* ☐ **COMPLAINT** ☐ **AMENDED COMPLAINT (Amendment Number):**		CASE NUMBER:

Jurisdiction *(check all that apply):*

☐ **ACTION IS A LIMITED CIVIL CASE**
Amount demanded ☐ **does not exceed $10,000.**
☐ **exceeds $10,000 but does not exceed $25,000.**

☐ **ACTION IS AN UNLIMITED CIVIL CASE (amount demanded exceeds $25,000)**

☐ **ACTION IS RECLASSIFIED by this amended complaint or cross-complaint *(check all that apply):***
- ☐ **from unlawful detainer to general unlimited civil (possession not in issue).**
- ☐ **from unlawful detainer to general limited civil (possession not in issue).**
- ☐ **from limited to unlimited.**
- ☐ **from unlimited to limited.**

1. *PLAINTIFF (name each):*

   alleges causes of action against DEFENDANT (name each):

2. a. Plaintiff is (1) ☐ an individual over the age of 18 years. (4) ☐ a partnership.
   (2) ☐ a public agency. (5) ☐ a corporation.
   (3) ☐ other *(specify):*
   b. ☐ Plaintiff has complied with the fictitious business name laws and is doing business under the fictitious name of *(specify):*

3. a. *The venue is the court named above because defendant named above is in possession of the premises located at (street address, apt. no., city, zip code, and county):*

   b. The premises in 3a are *(check one)*
   (1) ☐ within the city limits of *(name of city):*
   (2) ☐ within the unincorporated area of *(name of county):*
   c. The premises in 3a were constructed in *(approximate year):*

4. Plaintiff's interest in the premises is ☐ as owner ☐ other *(specify):*
5. The true names and capacities of defendants sued as Does are unknown to plaintiff.

*** NOTE:** Do not use this form for evictions after sale (Code Civ. Proc., § 1161a).

Form Approved for Optional Use
Judicial Council of California
UD–100 [Rev. September 1, 2020]

Civil Code, § 1940 et seq;.
Code of Civil Procedure, §§ 425.12, 1166
www.courts.ca.gov

PLAINTIFF: DEFENDANT:	CASE NUMBER:

6. a. On or about *(date):*
defendant (name each):

(1) agreed to rent the premises as a ☐ month-to-month tenancy ☐ other tenancy *(specify):*
(2) agreed to pay rent of $ payable ☐ monthly ☐ other *(specify frequency):*
(3) agreed to pay rent on the ☐ first of the month ☐ other day *(specify):*

b. This ☐ written ☐ oral agreement was made with
(1) ☐ plaintiff. (3) ☐ plaintiff's predecessor in interest.
(2) ☐ plaintiff's agent. (4) ☐ Other *(specify):*

c. ☐ The defendants not named in item 6a are
(1) ☐ subtenants.
(2) ☐ assignees.
(3) ☐ Other *(specify):*

d. ☐ The agreement was later changed as follows *(specify):*

e. ☐ A copy of the written agreement, including any addenda or attachments that form the basis of this complaint, is attached and labeled Exhibit 1. *(Required for residential property, unless item 6f is checked. See Code Civ. Proc., § 1166.)*

f. ☐ *(For residential property)* A copy of the written agreement is **not** attached because *(specify reason):*
(1) ☐ *the written agreement is not in the possession of the landlord or the landlord's employees or agents.*
(2) ☐ *this action is solely for nonpayment of rent (Code Civ. Proc., § 1161(2)).*

7. The tenancy described in 6 *(complete (a) or (b))*
a. ☐ is **not** subject to the Tenant Protection Act of 2019 (Civil Code, § 1946.2). The specific subpart supporting why tenancy is exempt is *(specify):*
b. ☐ is subject to the Tenant Protection Act of 2019.

8. *(Complete only if item 7b is checked. Check all applicable boxes.)*
a. ☐ The tenancy was terminated for at-fault just cause (Civil Code, § 1946.2(b)(1)).
b. ☐ The tenancy was terminated for no-fault just cause (Civil Code, § 1946.2(b)(2)) and the plaintiff *(check one)*
(1) ☐ waived the payment of rent for the final month of the tenancy, before the rent came due, under section 1946.2(d)(2), in the amount of $
(2) ☐ provided a direct payment of one month's rent under section 1946.2(d)(3), equaling $ to *(name each defendant and amount given to each)*:

c. ☐ Because defendant failed to vacate, plaintiff is seeking to recover the total amount in 8b as damages in this action.

9. a. ☐ Defendant *(name each):*

was served the following notice on the same date and in the same manner:

(1) ☐ 3-day notice to pay rent or quit
(2) ☐ 30-day notice to quit
(3) ☐ 60-day notice to quit
(4) ☐ 3-day notice to quit
(5) ☐ 3-day notice to perform covenants or quit *(not applicable if item 7b checked)*
(6) ☐ 3-day notice to quit under Civil Code, § 1946.2(c) Prior required notice to perform covenants served *(date):*
(7) ☐ Other *(specify):*

PLAINTIFF: DEFENDANT:	CASE NUMBER:

9. b. (1) On *(date):* the period stated in the notice checked in 9a expired at the end of the day.
(2) Defendants failed to comply with the requirements of the notice by that date.

c. All facts stated in the notice are true.

d. ☐ The notice included an election of forfeiture.

e. ☐ A copy of the notice is attached and labeled Exhibit 2. *(Required for residential property. See Code Civ. Proc., § 1166. When Civil Code, § 1946.2(c), applies and two notices are required, provide copies of both.)*

f. ☐ One or more defendants were served (1) with the prior required notice under Civil Code, § 1946.2(c), (2) with a different notice, (3) on a different date, or (4) in a different manner, as stated in Attachment 10c. *(Check item 10c and attach a statement providing the information required by items 9a–e and 10 for each defendant and notice.)*

10. a. ☐ The notice in item 9a was served on the defendant named in item 9a as follows:

(1) ☐ By personally handing a copy to defendant on *(date):*

(2) ☐ By leaving a copy with *(name or description):* ,
a person of suitable age and discretion, on *(date):* at defendant's
☐ residence ☐ business AND mailing a copy to defendant at defendant's place of residence
on *(date):* because defendant cannot be found at defendant's residence or usual place of business.

(3) ☐ By posting a copy on the premises on *(date):*
☐ AND giving a copy to a person found residing at the premises AND mailing a copy to defendant at the premises
on *(date):*
(a) ☐ because defendant's residence and usual place of business cannot be ascertained OR
(b) ☐ because no person of suitable age or discretion can be found there.

(4) ☐ *(Not for 3-day notice; see Civil Code, § 1946, before using)* By sending a copy by certified or registered mail addressed to defendant on *(date):*

(5) ☐ *(Not for residential tenancies; see Civil Code, § 1953, before using)* In the manner specified in a written commercial lease between the parties

b. ☐ *(Name):*
was served on behalf of all defendants who signed a joint written rental agreement.

c. ☐ *Information about service of notice on the defendants alleged in item 9f is stated in Attachment 10c.*

d. ☐ *Proof of service of the notice in item 9a is attached and labeled Exhibit 3.*

11. ☐ *Plaintiff demands possession from each defendant because of expiration of a fixed-term lease.*

12. ☐ *At the time the 3-day notice to pay rent or quit was served, the amount of* ***rent due*** *was* $

13. ☐ *The fair rental value of the premises is* $ per day.

14. ☐ *Defendant's continued possession is malicious, and plaintiff is entitled to statutory damages under Code of Civil Procedure section 1174(b). (State specific facts supporting a claim up to $600 in Attachment 14.)*

15. ☐ *A written agreement between the parties provides for attorney fees.*

16. ☐ *Defendant's tenancy is subject to the local rent control or eviction control ordinance of (city or county, title of ordinance, and date of passage):*

Plaintiff has met all applicable requirements of the ordinances.

17. ☐ *Other allegations are stated in Attachment 17.*

18. Plaintiff accepts the jurisdictional limit, if any, of the court.

PLAINTIFF: DEFENDANT:	CASE NUMBER:

19. **PLAINTIFF REQUESTS**

a. possession of the premises.

b. costs incurred in this proceeding:

c. ☐ past-due rent of $

d. ☐ reasonable attorney fees.

e. ☐ forfeiture of the agreement.

f. ☐ damages in the amount of waived rent or relocation assistance as stated in item 8: $

g. ☐ damages at the rate stated in item 13 from *date:* for each day that defendants remain in possession through entry of judgment.

h. ☐ statutory damages up to $600 for the conduct alleged in item 14.

i. ☐ other *(specify):*

20. ☐ Number of pages attached *(specify):*

UNLAWFUL DETAINER ASSISTANT (Bus. & Prof. Code, §§ 6400–6415)

21. ☐ *(Complete in all cases.)* An unlawful detainer assistant ☐ did **not** ☐ did for compensation give advice or assistance with this form. (*If declarant has received **any** help or advice for pay from an unlawful detainer assistant, complete a–f.)*

a. Assistant's name:

b. Street address, city, and zip code:

c. Telephone no.:

d. County of registration:

e. Registration no.:

f. Expires on *(date):*

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF PLAINTIFF OR ATTORNEY)

VERIFICATION

(Use a different verification form if the verification is by an attorney or for a corporation or partnership.)

I am the plaintiff in this proceeding and have read this complaint. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF PLAINTIFF)

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		**DRAFT**
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	**03-26-20**
TELEPHONE NO.:	FAX NO.:	
EMAIL ADDRESS:		**Not approved by the Judicial Council**
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
PLAINTIFF:		
DEFENDANT:		
ANSWER—UNLAWFUL DETAINER		CASE NUMBER:

1. Defendant *(each defendant for whom this answer is filed must be named and must sign this answer unless his or her attorney signs):*

   answers the complaint as follows:

2. ***Check ONLY ONE of the next two boxes*:**
   a. ☐ Defendant generally denies each statement of the complaint. *(Do not check this box if the complaint demands more than $1,000.)*
   b. ☐ Defendant admits that all of the statements of the complaint are true EXCEPT
      (1) defendant claims the following statements of the complaint are false (*state paragraph numbers from the complaint or explain below or, if more room needed, on form MC-025*): ☐ Explanation is on MC-025, titled as Attachment 2b(1).

      (2) defendant has no information or belief that the following statements of the complaint are true, so defendant denies them *(state paragraph numbers from the complaint or explain below or, if more room needed, on form MC-025):*
      ☐ Explanation is on MC-025, titled as Attachment 2b(2).

3. AFFIRMATIVE DEFENSES (***NOTE:*** *For each box checked, you must state brief facts to support it in item 3m (page 2) or, if more room needed, on form MC-025.)*
   a. ☐ *(Nonpayment of rent only)* Plaintiff has breached the warranty to provide habitable premises.
   b. ☐ *(Nonpayment of rent only)* Defendant made needed repairs and properly deducted the cost from the rent, and plaintiff did not give proper credit.
   c. ☐ *(Nonpayment of rent only)* On *(date):* before the notice to pay or quit expired, defendant offered the rent due but plaintiff would not accept it.
   d. ☐ Plaintiff waived, changed, or canceled the notice to quit.
   e. ☐ Plaintiff served defendant with the notice to quit or filed the complaint to retaliate against defendant.
   f. ☐ By serving defendant with the notice to quit or filing the complaint, plaintiff is arbitrarily discriminating against the defendant in violation of the Constitution or the laws of the United States or California.
   g. ☐ Plaintiff's demand for possession violates the local rent control or eviction control ordinance of *(city or county, title of ordinance, and date of passage)*:
      (Also, briefly state in item 3m the facts showing violation of the ordinance.)

3. h. ☐ Plaintiff's demand for possession is subject to the Tenant Protection Act, Civil Code section 1946.2 or 1947.12, and is not in compliance with the act. *(Check all that apply and briefly state in item 3m the facts that support each.)*

(1) ☐ Plaintiff failed to state a just cause for termination of tenancy in the written notice to terminate.

(2) ☐ Plaintiff failed to provide an opportunity to cure any alleged violations of terms and conditions of the lease (other than payment of rent) as required under Civ. Code, § 1946.2(c).

(3) ☐ Plaintiff failed to comply with the relocation assistance requirements of Civ. Code, § 1946.2(d).

(4) ☐ Plaintiff has raised the rent more than the amount allowed under Civ. Code, § 1946.12, and the only unpaid rent is the unauthorized amount.

(5) ☐ Plaintiff violated the Tenant Protection Act in another manner that defeats the complaint.

i. ☐ Plaintiff accepted rent from defendant to cover a period of time after the date the notice to quit expired.

j. ☐ Plaintiff seeks to evict defendant based on an act against defendant or a member of defendant's household that constitutes domestic violence, sexual assault, stalking, human trafficking, or abuse of an elder or a dependent adult. *(This defense requires one of the following: (1)* ***a temporary restraining order, protective order, or police report*** *that is not more than 180 days old; OR (2)* ***a signed statement from a qualified third party*** *(e.g., a doctor, domestic violence or sexual assault counselor, human trafficking caseworker, or psychologist) concerning the injuries or abuse resulting from these acts.)*

k. ☐ Plaintiff seeks to evict defendant based on defendant or another person calling the police or emergency assistance (e.g., ambulance) by or on behalf of a victim of abuse, a victim of crime, or an individual in an emergency when defendant or the other person believed that assistance was necessary.

l. ☐ Other affirmative defenses are stated in item 3m.

m. *(Provide facts for each item checked above, either below, or, if more room needed, on form MC-025)*:

☐ Description of facts is on MC-025, titled as Attachment 3m.

CASE NUMBER:

4. OTHER STATEMENTS
   a. ☐ Defendant vacated the premises on *(date)*:
   b. ☐ The fair rental value of the premises alleged in the complaint is excessive *(explain below or, if more room needed, on form MC-025):*
      ☐ Explanation is on MC-025, titled as Attachment 4b.

   c. ☐ Other *(specify below or, if more room needed, on form MC-025 in attachment):*
      ☐ Other statements are on MC-025, titled as Attachment 4c.

5. DEFENDANT REQUESTS
   a. that plaintiff take nothing requested in the complaint.
   b. costs incurred in this proceeding.
   c. ☐ reasonable attorney fees.
   d. ☐ that plaintiff be ordered to (1) make repairs and correct the conditions that constitute a breach of the warranty to provide habitable premises and (2) reduce the monthly rent to a reasonable rental value until the conditions are corrected.
   e. ☐ Other *(specify below or on form MC-025):*
      ☐ All other requests are stated on MC-025, titled as Attachment 5e.

6. Number of pages attached: _____

UNLAWFUL DETAINER ASSISTANT (Bus. & Prof. Code, §§ 6400–6415)

7. *(Must be completed in all cases.)* An **unlawful detainer assistant** ☐ did not ☐ did for compensation give advice or assistance with this form. *(If defendant has received **any** help or advice for pay from an unlawful detainer assistant, state):*
   a. assistant's name:
   b. Telephone number:
   c. Street address, city, and zip code:
   d. County of registration:
   e. Registration number:
   f. Expiration date:

(Each defendant for whom this answer is filed must be named in item 1 and must sign this answer unless his or her attorney signs.)

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF DEFENDANT OR ATTORNEY)

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF DEFENDANT OR ATTORNEY)

VERIFICATION

(Use a different verification form if the verification is by an attorney or for a corporation or partnership.)

I am the defendant in this proceeding and have read this answer. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF DEFENDANT)

W20-03

Unlawful Detainer: Complaint and Answer Forms (Revise forms UD-100 and UD-105)

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

	Commenter	Position	Comment	Committee Response
1.	Disability Rights California By Lucia Choi Staff Attorney	NI	Disability Rights California (DRC), the protection and advocacy system for the State of California, submits this letter in response to the Judicial Council's invitation to comment on the proposed revisions to the unlawful detainer complaint and answer forms (UD-100 and UD-105, respectively). Disability Rights California (DRC), the largest disability rights group in the country, represents Californians with disabilities in matters that further their rights and access to justice. In that broad spectrum of work, DRC represents tenants in securing safe and affordable housing. Our housing advocacy includes promoting affordable, accessible, and equitable housing development, protecting tenants' rights, including defending unlawful detainer actions, and preventing displacement of marginalized communities. These projects allow our organization to assess the impact of the Judicial Council's proposed changes to its forms, especially the impact on tenants with disabilities. I. **Request for Specific Comments** The Judicial Council has asked for specific comments on item 9 of the revised complaint form, and whether the proposed changes appropriately reflect the double notice requirements outlined in Civil Code § 1946.2(c). The Judicial Council has also considered creating a new complaint form to be used for tenancies subject to the double notice. As an initial matter, we support and join in the comments submitted by Western Center on Law and Poverty in response to these comments. We also offer some additional suggestions. **A. The proposed revisions to item 9 in the revised complaint form do not appropriately reflect the two-step notice requirements outlined in Civil Code § 1946.2(c).** Civil Code § 1946.2(c) requires that landlords, before issuing a notice to terminate a tenancy for just cause that is a curable material lease violation, first give notice of the violation to the tenant with an opportunity to cure the violation pursuant to Code of Civil Procedure	The committee appreciates the comments. The committee notes the agreement with the comments from the Western Center on Law and Poverty. The committee has revised item 9 in light of these suggestions from multiple commenters. The committee has attempted to clarify that for terminations under § 1946.2(c) the landlord must provide two notices: a notice under paragraph 3 of Code of Civ. Proc. §1161

	Commenter	Position	Comment	Committee Response
			§ 1161(3). Item 9's proposed language makes it unclear whether the landlord is required to provide an opportunity to cure. Rather, the current language appears to require the landlord serve two sequential notices to quit. The Tenant Protection Act requires that for covered units, first a 3-day notice to cure and then, if the violation has not been cured, a 3-day notice to quit, to be served. The form should be revised accordingly.	(which is, according to that statute, a notice to perform covenants or return possession within three days of the notice) and, if the violation of covenants is not cured within the three days, a notice to quit. Because this provision in the statue is internally inconsistent (essentially requiring two notices to quit, one with the right to cure as an alternative and one without), it has been difficult for the committee to revise the form to reflect the statute as clearly as it would normally like. The committee will further revise the form should the statute be clarified.
			B. **The Judicial Council should not develop a separate complaint form.** The Judicial Council has proposed an alternative to revising item 9 in the revised complaint form. The alternative proposed is a new complaint form for units covered under the Act. This new form will cause additional confusion among litigants and may cause plaintiffs to file the wrong form. Plaintiffs would either have to dismiss their original complaint and refile, or amend the existing complaint. In either case, the refiling or amendment would cause confusion for self-represented tenants, who are mostly unaware of the requirement to answer to amended, or even refiled, complaints. This can lead to tenants waiving important legal defenses or worse, default judgments.	The committee agrees and will not develop a second complaint form at this time.
			II. **Additional Comments** While the Judicial Council has raised specific questions for comment, we respectfully provide the following comments on other sections of the proposed forms.	

	Commenter	Position	Comment	Committee Response
			A. **Item 7 of the Complaint should require the plaintiff to specify the applicable exemption to the Tenant Protection Act**. Currently, Item 7 of the Complaint requires that the plaintiff specify whether or not the tenancy is subject to the Tenant Protection Act. If the plaintiff checks the box claiming that the tenancy is not subject to the Act, the form should also require that the plaintiff provide a basis for claiming the tenancy is not covered. The form could have a checklist of the exemptions, or a blank field requiring the plaintiff to state the exemption. Without a checklist or blank field, the complaint form does not give the defendant any information about the basis for the plaintiff's asserted exemption from the Act. This basic information makes it possible for the defendants to respond to, and for the court to evaluate, the claimed exemption. Failure to require the basis for exemption on the form will lead to confusion, inefficiency, and wrongful terminations of tenancy. B. **Item 8 of the Complaint should require the plaintiff to specify the basis for the termination of tenancy.** Currently, Item 8 of the Complaint requires that the plaintiff specify whether the tenancy was terminated for "at-fault" reasons or "no fault" reasons under the Tenant Protection Act. However, the form does not require that the plaintiff state a specific basis for the termination that are outlined in the Act. Again, the Tenant Protection Act includes a list of "at fault" and "no fault" just cause bases for termination of tenancy that should be listed on the form. Or, the form could provide a blank field that the plaintiff can fill in with their stated cause for termination of the tenancy.	The committee has revised the form to require a landlord who asserts that the tenancy at issue is not subject to the Tenant Protection Act to identify the specific subpart of the act the landlord is relying on. This should provide defendants with sufficient information to know whether to agree with or deny the allegation. The committee has considered but declines to accept this suggestion. Section 1946.2 provides that, for all tenancies covered by the Tenant Protection Act, a landlord" shall not terminate the tenancy without just cause *which shall be stated in the written notice*." That written notice must be attached to all UD complaints for residential property (Code. Civ. Proc. § 1166(d)(2) and item 9e on form UD-100). Therefore, adding an item on the form for asserting just cause is irrelevant—the landlord can only rely on just cause stated in the written notice of termination—and could lead to unnecessary confusion in the litigation.

	Commenter	Position	Comment	Committee Response
			C. **Item 9 of the Complaint should include claims of service of other notice requirements of the Tenant Protection Act.** Section 9 of the Complaint form has been revised to specifically allow the plaintiff to allege service of the prior notice to cure under section 1946.2(c); however, it does not provide a space for the landlord to allege compliance with other notice requirements of the Tenant Protection Act. For example, after July 1, 2020, evictions based on owner/family member move-ins, are only permitted when a tenant has agreed, in writing, to specific lease language. Civil Code § 1946.2(b)(2)(A)(ii). Similarly, a landlord who claims an exemption from the Act must have provided the tenant a notice of exemption using specific language. Civil Code § 1946.2(g)(8)(B). Finally, the landlord must provide tenants with notice of their rights under the Act pursuant to Civil Code § 1946.2(f). The complaint should require that the landlord allege compliance with each of these provisions and attach the required notices.	The committee has considered but declines to accept this suggestion. The notices mentioned here are not part of the prima facie case for and unlawful detainer action. The first is part of a specific basis for "just cause" (§ 1946.2(b)(2)(A)), and will either be contained in the rental agreement to the complaint or not. The second is part of the basis for one type of exemption from the act (§ 1946.2(g)(8)), and the tenant will know if that exemption is being alleged by the plaintiff based on the allegations now required to be made to item 7 in form UD-100. The third is a general notice of rights under the act that the landlord must give to all tenants either as an addendum to the rental agreement or, for tenancies commenced before July 1, 2020, as a written notice signed by the tenant. (§ 1946.2 (f). There is no provision in the act that a termination would be void if this notice is not provided. To the extent that a landlord must comply with all statutory requirements to obtain a judgment of unlawful detainer, failure to provide such notice would, at most, be an affirmative defense.
			D. Item 3(h) of the Answer should include specific allegations of the plaintiff's violation of the Tenant Protection Act. The proposed Answer form includes only a general provision for the tenant to allege noncompliance with the Tenant Protection Act, and it	The committee agrees that more specific affirmative defense allegations will be

	Commenter	Position	Comment	Committee Response
			is unclear what "demand for provision" refers to. This general language should be modified to read "Plaintiff's demand for possession violates the Tenant Protection Act, Civil Code section 1946.2 or 1947.12 because…" and then list specific allegations that include checked boxes. Some examples that can be included are:	helpful to the parties. The *Answer* (form UD-105) has been further modified in light of these comments.
			• Plaintiff has raised the rent more than the amount allowed by the Tenant Protection Act, Civil Code section 1946.12;	The committee notes that there is no provision in section 1946.12 that would void a termination on the grounds that rent was raised beyond the authorized amount. However, an affirmative defense has been added for failure to pay that amount above the amount lawful under the act.
			• Plaintiff fails to state a just cause for termination of tenancy;	A modified version of this affirmative defense has been included in the form.
			• Plaintiff failed to provide a notice of rights as required by the Tenant Protection Act, Civil Code section 1946.2 or 1947.12;	This affirmative defense has not been expressly been included, but can be made in the general affirmative defense for violations of the act added at item 3h(5).
			• Plaintiff failed to provide an opportunity to cure any alleged violations of the lease;	A modified version of this affirmative defense has been included in the form.
			• Plaintiff failed to comply with the relocation assistance requirements of the Tenant Protection Act, Civil Code section 1946.2(d). These more specific statements of affirmative defenses will assist unrepresented tenants in identifying which defense is appropriate to allege for their tenancy.	This affirmative defense has been added.

	Commenter	Position	Comment	Committee Response
			E. References to "Item 3m" or "Attachment 3m" in the Answer create confusion and should be clearly distinguished. The proposed Answer form contains several references to either "Item 3m" or "Attachment 3m." (See specifically items 3(h), 3(l), and 3(m) of the proposed Answer form.) Currently, the self- help centers in the courthouses assisting self-represented landlords and tenants use an attachment created by different legal service agencies. This 7-to-8-page attachment was originally referred to as "Attachment 3k," then subsequently changed to "Attachment 3l" when the Judicial Council last updated its Answer form on September 1, 2019. This attachment includes many detailed affirmative defenses that help the court assess the defendant's specific claims. For example, the attachment provides details of specific habitability conditions that exist on the premises and whether there is a substandard order from a government agency in place. It appears that the Judicial Council may be again changing the name of this attachment from "Attachment 3l" to "Attachment 3m." However, the current references to "3m," are confusing because it's unclear whether the form is referring to paragraph 3, subsection m of the Judicial Council form itself or to the attachment created by legal service agencies. It seems that the form may be differentiating the two by referring to one as "Item 3m," and the other as "Attachment 3m." However, most self-represented litigants will not be able to distinguish the two. The form should clarify so as to prevent confusion for self-represented tenants, especially when they are receiving services from self-help centers.	Item 3m on form UD-105 is for facts supporting the affirmative defenses checked on the form (see corrected instructions at item 3; it was item 3*l* before the new affirmative defense was added). If the statement of facts is too lengthy to fit on the form at item 3m, a party may attach a document to the form containing these fact (usually using form MC-025, a blank form that may be used as an attachment to any Judicial Council form). This attachment is to be titled "Attachment 3m" so that the court knows that it is information related to that item on the form. None of the references in the form are intended to be to documents created by particular legal service agencies. The language on the form has been modified in light of this comment, to explain that the attachment is to be used when more room is needed to provide information.
2.	Legal Services of Northern California (LSNC) by Kate Wardrip, Supervising Attorney and Da Hae Kim, Staff Attorney	NI	Legal Services of Northern California (LSNC) provides the following comments on proposals in Invitation to Comment, W20-03 that revises the Unlawful Detainer Forms UD-100 and UD-105 to reflect changes enacted in the Tenant Protection Act of 2019. LSNC provides free civil legal services in 23 northern California counties to lower income people and seniors. Our service area runs from Sacramento County to the Oregon border and includes larger	The committee appreciates the comments.

	Commenter	Position	Comment	Committee Response
			urban communities as well as smaller and more rural communities. We provide legal services in a variety of issues, including housing, health care, public benefits, and education, but housing is the number one issue for our clients year after year. Every year we provide assistance to thousands of tenants throughout our 23 county service area, many of whom are facing eviction. We provide advice and counsel to tenants who are defendants in unlawful detainers and also represent tenants in unlawful detainers. As just one example, our Yolo County office has a Shriver Project grant, in which we assist in pro per or represent in about 225 unlawful detainers each year. LSNC makes the following comments on the proposed changes to the forms out of our experience responding to complaints and preparing answers. In addition, we support and agree with the comments submitted by Madeline Howard with the Western Center on Law and Poverty. **I. There Should Not Be Two Complaint Forms.** The Judicial Council should not develop two Complaint forms as this will add confusion for both Plaintiffs and Defendants when trying to determine which Complaint is relevant and whether the correct form was used. Further, it is important that Plaintiffs allege whether AB 1482 applies or not for any unlawful detainer as this will be an initial issue to determine if the termination notice is valid and if the reason for the termination is lawful. If there is a Complaint for tenancies not covered by AB 1482 and this form is used in a case in which a Defendant asserts AB 1482 does apply, it may result in significant confusion and delay of the case as there will not be sufficient allegations as to why AB 1482 does not apply. **II. The Complaint Form Should be Revised.**	The committee notes the agreement with the comments from the Western Center on Law and Poverty. The committee agrees and will not develop a second complaint form at this time.

	Commenter	Position	Comment	Committee Response
			A. **Plaintiffs who claim they are exempt from the Tenant Protection Act of 2019 should be required to plead the reason they are exempt in Item 7**. Paragraph 7 of the proposed Complaint should be revised to include specific allegations as to why the tenancy is or is not subject to the Tenant Protection Act of 2019. In an unlawful detainer action, notice to the tenant that they must quit is a prerequisite to filing the Complaint. Strict compliance with the statutory notice requirements is a prerequisite to invoking the summary unlawful detainer procedure. (Lamey v. Masciotra (1969) 273 Cal.App.2d.709; Baugh v. Consumer Associates, Ltd. (1966) 241 Cal.App.2d. 672.) The notice is also a requirement of the complaint because the plaintiff must attach to the complaint "a copy of the notice or notices of termination served on the defendant upon which the complaint is based." (Cal. Code of Civ. Proc.§ 1166(d)(l)(A).) When a plaintiff fails to comply with the notice requirements, the complaint fails to support a cause of action in unlawful detainer and the court lacks both personal and subject matter jurisdiction. (Kwok v. Bergren (1982) 130 Cal. App.3d 596, 599-600). For tenancies covered by the Tenant Protection Act, a Plaintiff will only be able to comply with these pleading requirements if they allege whether the tenancy is or is not subject to the Act. The Tenant Protection Act of 2019 applies to many California tenancies but not all. For example, the just cause protections do not apply when a tenant has not been in property for a certain period of time (see§ 1946.2(a)(l) and (2) and some properties are exempt (see§ 1946.2(e).) The current proposed Complaint does not provide a defendant with any information as to why the Plaintiff may allege the tenancy is exempt from the Act and should be revised to include this information. We believe this change is important because it will provide a statement of the facts necessary in order to provide	This item has been modified in light of suggestions received, to require identification of the statutory basis for a landlord alleging that the premises are not subject to the TPA. See committee response above to the comment on this item by Disability Rights Advocates.

	Commenter	Position	Comment	Committee Response
			defendants with enough information to prepare their case. If the Plaintiff is not required to plead the reason that the Tenant Protection Act does not apply to the tenancy, then the burden is effectively put on the Defendant to guess the grounds that Plaintiff asserts exempts them from the requirements and protections of the Tenant Protection Act. One way the form can be revised is to change Item 7a to read: • The tenancy is not subject to the Tenant Protection Act of 2019 (Civil Code § 1946.2) because (1) The property is exempt under Civil Code, § 1946.2(e) because (or provide a list of the exemptions and Plaintiff checks the appropriate one) (2) Because the property is exempt because of the length of the tenancy (Civil Code § 1946.2(a)(l) and (2)). B. **Item 9 is confusing and should be revised.** Item 9f is extremely confusing. Since plaintiffs are already required to plead that they served a prior required notice under§ 1946.2(c) in Item 9a(6), it is unnecessarily confusing to also have them check box f. Therefore, we suggest that Item 9f be left as it was and instead add below Item 9a(6) "(Check item 1Oc and attach a statement providing the information required by items 9a-e and 10 for the prior notice.)" We also strongly agree with Western Center on Law and Poverty's comments that Item 9 in the proposed form does not correctly address the two-step notice provision under section 1946.2(c), and that the proposed form should be revised to make clear the first notice is a notice to cure (not a notice to cure or quit).	The committee has considered this comment but declines to modify its recommendation on this item. The committee concluded that adding that further information to item 9(a)(6) would make item 9a too confusing. Item 9(a) and 9(e) have been modified in light of suggestions received. See committee response above to the comment on this item by Disability Rights Advocates.

	Commenter	Position	Comment	Committee Response
			We also agree with Western Center on Law and Poverty's comments that the proposed Complaint should be revised to include a place for a Plaintiff to allege compliance with other notice requirements, such as those in sections 1946.2(b)(2(A)(ii), 1946.2(t) and 1946.2(g)(8)(B). For example, on the current answer form, items (3)(j) and (3)(k) summarize defenses tenants may use rather than solely providing citations. III**. The Answer Form Should be Revised to Include More Detailed Allegations Regarding the Tenant Protection Act.** The proposed Answer form should be revised to include more specific allegations as to why Defendant alleges Plaintiff has not complied with the Tenant Protection Act. This is especially important to ensure that unrepresented Defendants may successfully asset their defenses. As an initial matter, we note that "Plaintiffs demand for provision ... " in Item 3h should be changed to "Plaintiffs demand for possession ... " Currently, numerous tenants are unrepresented by attorneys during the unlawful detainer process. However, a hugely disproportional amount of landlords retain attorneys to evict their tenants. Taking Notice, (Feb. 24, 2015) UCLA Luskin School of Public Affairs, Pg. 8-9. It is our organization's experience that while tenants are very likely to represent themselves, they are also more likely to be unfamiliar with the judicial system or tenant protections compared to housing law attorneys that landlords retain. The effect is that many tenants placed in a situation of losing their homes are unequipped with assistance or knowledge to win unlawful detainer cases.	The committee considered this suggestion but declines to follow it. See committee response above to the comment on these further notices by Disability Rights Advocates. This error has been corrected.

	Commenter	Position	Comment	Committee Response
			Item (3)(h) on the proposed answer form offers a glimpse of protections that may be applicable to tenants by alluding to " ... the Tenant Protections Act." However, tenants are unlikely to be aware of the specific protections the Act provides and therefore unlikely to choose that as their defense on the Answer form. The Answer should allow the defendant to allege why the Plaintiff as not complied with the Act. For example, one way this can be accomplished is to revise the Answer to include check boxes that state: "Plaintiffs demand for possession violates the Tenant Protection Act, Civil Code section 1946.2 or 1947.12 for the following reasons (check all that apply):" • Plaintiff unlawfully raised rent by more than the amount allowed by the Tenant Protection Act, Civil Code section 1946.12 • Plaintiff fails to state just cause for the termination of tenancy • Plaintiff alleges the termination of tenancy is for a no-fault reason, but did not provide relocation assistance as required by the Tenant Protection Act, Civil Code section 1946.2(d) • Plaintiff failed to provide a notice of rights as required by the Tenant Protection Act, Civil Code section 1946.2 or 1947.12 • Plaintiffs alleged cause for the termination is not just cause under the Tenant Protection Act, Civil Code section 1946.2(b) The Judicial Council should provide a summary of defenses available to tenants under the Act in the Answer form, just as it has with other defenses.	The *Answer* (form UD-105) has been further modified in light of the suggestions to include more specific affirmative defenses. See committee response above to Disability Rights Advocates' comment on this point to see responses as to each individual affirmative defense suggested.
3.	Mark W. Lomax Attorney Pasadena, CA	AM	This is a proposal to revise form UD-100. In an action subject to C.C.P. section 396a, including an unlawful detainer, the plaintiff or the plaintiff's attorney must state in a verified complaint (or in an affidavit filed and served with the complaint): (1) that the action is an unlawful detainer; and (2) facts showing the action has been commenced in the proper superior court and the proper court	The committee believes that the facts currently to be alleged in the complaint at item 3, the address of the premises at issue, are sufficient to comply with the requirement that a plaintiff plead "facts showing that the action has been

	Commenter	Position	Comment	Committee Response
			location. (C.C.P. §396a(a).) The proper court and court location for trial of an unlawful detainer are prescribed by C.C.P. section 392. The current version of the optional form Complaint-Unlawful Detainer, form UD-100, contains no allegations regarding venue. Since the form does not comply with section 396a, the Judicial Council should use the revisions required by SB 1482 as an opportunity to revise form UD-100 so that it complies with section 396a. The form should be revised to add a provision for the plaintiff to state that the superior court of the county where the case is being filed is the proper court because the real property, or some part of it, is situated in the county, and that the court location where the case is being filed is the proper location because it is the nearest or most accessible location to the property where the court tries unlawful detainer proceedings. I previously notified the council of the need to revise form UD-100 by letter dated Dec. 10, 2013.	commenced" in the proper court. However, in light of this comment, the committee has further amended item 3.
4.	Orange County Bar Association by Scott B. Garner, President Newport Beach, California	A	1. "Does the proposal appropriately address the stated purpose?" The OCBA believes it appropriately addresses the stated purpose. 2. "Do the proposed revisions to [the relevant portion of] the revised complaint form appropriately reflect the double notice requirements[.]?" They do. It might be helpful to annotate Section 9.e. of the form to require that copies of both notices be provided if the "double notice" box in 9.a(6) is checked. 3. "Should a separate complaint form be developed, either for cases involving the double -notice provisions or for all cases subject to the just cause termination provisions of Civil Code section 1946.2?" No. Multiple complaint forms will likely cause confusion among landlords who will try to proceed based on the wrong form. If that happens, the UD process—which is designed to be efficient—will be delayed	The committee appreciates the comment. Item 9(e) has been modified to make it clearer that when section 1946.2(s) applies (the double notice requirement) that both notices must be provided. The committee agrees and will not be developing a second complaint form at this time.

	Commenter	Position	Comment	Committee Response
			significantly because a landlord will have to re-file using the correct form.	
5.	Public Law Center by Leigh E.Ferrin Director of Litigation and Pro Bono Santa Ana, California	AM	Public Law Center (PLC) is a 501(c)(3) not-for-profit organization that provides free civil legal services to low-income individuals and families across Orange County. The civil legal services that we provide include consumer, family, immigration, housing, veterans, community organizations, and health law. PLC appreciates the opportunity to comment on Invitation W20-03, the revision of the unlawful detainer complaint and answer forms (UD-100 and UD-105). **UD-100** **Notice Requirements** We believe that the forms do not adequately represent the changes in the law, particularly under the new California Civil Code section 1946.2. Section 9 of the form incorrectly implies that the landlord must provide two almost identical notices to cure and to quit. However, the two step notice provision instead provides for two different notices, one to cure, and then, if the tenant does not cure, then a second notice to quit. California Civil Code section 1946.2(c) refers to California Code of Civil Procedure section 1161(3) for an explanation of what a landlord must do to cure a material breach of the lease: "(c) Before an owner of residential real property issues a notice to terminate a tenancy for just cause that is a curable lease violation, the owner shall first give notice of the violation to the tenant with an opportunity to cure the violation pursuant to paragraph (3) of Section 1161 of the Code of Civil Procedure. If the violation is not cured within the time period set forth in the notice, a three-day notice to quit without an opportunity to cure may thereafter be served to terminate the tenancy."	The committee appreciates the comments. Item 9a and 9e have been revised in light of suggestions received. See committee response above to the comment by Disability Rights Advocates on the issue of two notices under § 1946.2(c).

	Commenter	Position	Comment	Committee Response
			PLC proposes that Form UD-100 section 9 be revised to clarify that two of the same notices are not required, but that one notice to cure and a second notice to quit are the requirements under the new law.	
			Tenancy not Covered by the Act When preparing a complaint for unlawful detainer, under the Tenant Protection Act (TPA), a landlord must specify when a tenancy is not covered by the TPA. The council has proposed a checkbox option in Section 7 Form UD-100. Because a checkbox does not provide much information on which a tenant and/or his or her advocate can make a determination about the appropriateness of the claim, PLC proposes that if a landlord checks the box alleging that the tenancy is not covered by the TPA, that the landlord should also be required to provide a basis for the claim. The TPA was drafted with a list of specific exemptions that a landlord could claim as reasons why the tenancy is not covered. PLC proposes that those specific exemptions be made into a checkbox list that is included in section 7. Then, if a landlord checks the box stating that the tenancy is not covered by the TPA, the landlord would also be required to check one of the boxes that support the claimed exemption. PLC believes that requiring the additional information will inform not just tenants and their advocates, but also the court which will be reviewing the complaint for compliance, since courts have found that strict compliance with statutes governing the eviction procedures in California is required. (Kwok v. Bergren (1982) 130 Cal.App.3d 597, 599-600.)	Item 7 has been revised in light of suggestions received. See committee response above to the comment by Disability Rights Advocates on item 7.
			Basis for Termination of the Tenancy PLC proposes that Section 8 on Form UD-100 be revised to require the landlord to state a specific basis for termination of the tenancy. The TPA has set forth a specific list of "at fault" and "no fault" bases for termination of tenancy. These bases could form a checkbox list to be included in Section 8 to ensure that all parties and the court have a	The committee considered this comment but declined to follow the suggestion. See committee response above to the comment by Disability Rights Advocates on item 8.

	Commenter	Position	Comment	Committee Response
			clear understanding of why the landlord is justified in terminating the tenancy. In combination with the revision of Section 7 of Form UD-100, PLC also proposes that the following language be included with Secton 9(a)(4): "Only complete if Plaintiff has checked the box in Section 7(a)." This minor revision will clarify the information required, and will help the courts, defendants and counsel better understand why Section 9(a)(4) is checked or left blank, based on the answer provided in Section 7(a). **Additional Miscellaneous Provisions** Additionally, under Section 9, we appreciate that the judicial council revised the form so that the plaintiff may specifically allege service of the initial notice under California Civil Code Section 1946.2(c). However, we propose that there also should be space for a landlord to allege compliance with the other notice requirements contained in the TPA. For example, after July 1, 2020, a tenant must have agreed in writing to specific language in the lease if a landlord later attempts to evict the tenant so that the landlord or a close family member of the landlord may move in to the premises. Cal. Civ. Code §1946.2(b)(2)(A)(ii). Similarly, for a single family home to be exempt from the protections of the TPA, the tenant must have been provided a notice of exemption using specific language. Cal. Civ. Code §1946.2(g)(8)(B). Finally, tenants must be provided with notice of their rights [at the time of signing the lease? Or when?] under the TPA pursuant to Cal. Civ. Code §1946.2(f). Each of these requirements must be met before a landlord may move forward with an unlawful detainer action. To ensure compliance, the judicial council could amend Form UD-100 to reflect these requirements, either in Section 9, or in a newly created section or sections. **UD-105** In Section 3(h) of Form UD-105, PLC proposes that the Judicial Council provide either more space, or even a checklist option (with	The committee considered this comment but declined to follow the suggestion. See committee response above to the comment by Disability Rights Advocates on additional notice requirements in the TPA. The *Answer* (form UD-105) has been further modified in light of the

	Commenter	Position	Comment	Committee Response
			an "other" at the end) allowing the defendant/tenant to specify what the alleged violations of the TPA are. Because such a significant number of defendants/tenants are representing themselves in eviction defense cases, it is particularly important to ensure that the pleadings are thorough and clear. This will not only allow for the most accurate information to be available during the litigation, but will also ensure all parties feel they had access to a fair and just judicial system. PLC believes that the general provision for the tenant to allege noncompliance with the TPA is insufficient. In many cases, it will be in the tenant's best interest to be able to allege specific violations of the TPA, for the landlord's and the court's benefit. Rather than include the statement "demand for provision," PLC proposes that Section [3m] instead state "Plaintiff's demand for possession violates the Tenant Protection Act, Cal. Civ. Code Section 1946.2 or 1947.12. The form can then instruct the defendant to briefly state in section 3m the facts supporting the allegation that the plaintiff/landlord violated the TPA. If simply providing space for the defendant/tenant to allege violations of the TPA is not desirable (and we could see how this could be a problem), PLC proposes a checklist along the following lines: • Plaintiff has raised the rent more than the amount allowed by the Tenant Protection Act, Civil Code section 1946.12. • Plaintiff fails to state a just cause for termination of tenancy. • Plaintiff failed to provide a notice of rights as required by the Tenant Protection Act, Civil Code section 1946.2 or 1947.12. • Plaintiff failed to comply with the relocation assistance requirements of the Tenant Protection Act, Civil Code section 1946.2(d). These more specific statements of affirmative defenses will assist unrepresented tenants in identifying which defense is appropriate to allege for their tenancy. PLC believes strongly that there should only be one form for both the UD-100 and the UD-105. Once additional versions of forms are	suggestions to include more specific affirmative defenses. See committee response above to Disability Rights Advocates' comment on this point to see responses as to each individual affirmative defense suggested.

	Commenter	Position	Comment	Committee Response
			added, it becomes very confusing for self-represented litigants to determine the appropriate form(s) to complete and submit for filing. PLC also believes that the "double" notice requirements are not so complicated as to require a separate form entirely. As clarified above, when properly expressed, the "double" notice requirements are not in fact duplicative; rather they are two separate requirements to ensure the landlord is providing the appropriate notice.	The committee agrees, and will not be developing additional complaint forms at this time.
6.	Superior Court of Los Angeles County By Bryan Borys Director of Research and Data Management	AM	Recommended modifications to Form UD 100: (3) Amend this paragraph to add a requirement that the plaintiff specify which city limits (or unincorporated county) is the location of the property. Add subparagraphs as follows: [check box] The property is within the city limits of [name city] or [check box] The property is within the unincorporated limits of [name county] State the approximate year the property was constructed: It is often important to know where the property is located to properly apply local ordinances that must be consulted to address pre-trial motions as well as mediations and settlement conferences. The plaintiff should be able to provide this information. (6) Delete paragraph 6 f. (2) and combine f. (1) into f. Other than not having possession of the lease, there is no reason for the plaintiff not to attach the lease. A lease is a contract and California law requires that a contract be attached to a complaint or that the material terms of the contract be pleaded. The form does not allow the latter approach and it is not practical in a form pleading. It is also our experience that the lease is often omitted to avoid highlighting defects in plaintiff's cause of action and in some cases to allow the plaintiff to produce the lease later in the litigation (if it prevails and there is an attorney fee clause) or to withhold it from a prevailing tenant who may not have a copy to prevent the tenant from recovering fees.	 The form has been modified to reflect this suggestion. The committee considered this comment but declines to implement this suggestion. Statute expressly provides that plaintiff in an unlawful detainer action does not have to attach a copy of the rental agreement when the action is based solely on the failure to pay rent. Code Civ. Proc. § 1166(d).

	Commenter	Position	Comment	Committee Response
			(7) Require plaintiff's to plead the facts that give rise to an exemption under the TPA. Merely pleading legal conclusions is not sufficient in a fact pleading jurisdiction like California. Re-write the subparagraphs under this paragraph to read as follows: [check box] is subject to the TPA of 2019. [check box] is not subject to the TPA of 2019, allege all facts supporting exemption:	In light of comments received, the form has been revised to require plaintiff to specifically plead what section of the TPA is being relied on to assert that the TPA does not apply.
			(8) Plaintiffs should be allowed to also plead their satisfaction of local ordinance relocation requirements. Add 8 b 3 as follows: (3). [check box] provided a payment satisfying local ordinance requirements. Identify the ordinance and state all facts:	The committee considered this comment but declines to accept the suggestion. Item 8 applies only to premises and tenancies subject to the statewide TPA, so landlord with premises subject to local rent or eviction ordinances would not complete it. Currently item 16 is for facts pertinent to local ordinances. As time and resources permit, the committee will consider whether that item can be amended in a way that would be useful across the state.
			(15) If there is a written agreement between the parties providing for attorney fees (and if it is not in the lease already attached) the agreement should be attached. This paragraph should be amended to require the agreement to be attached. If the agreement is not available or if it is not in writing it is not enforceable.	The committee considered this comment but declines to accept the suggestion. Such attachment is not required in complaints for other situations in which attorneys fees are claimed.
			(16) The last line of this paragraph should be modified to add a check box at the front to require the plaintiff to affirmatively assert that it has met all of the requirements of the applicable ordinances and the	The committee declines this suggestion. The item has a checkbox to choose whether a local ordinance applies. The statement that it has been complied with

	Commenter	Position	Comment	Committee Response
			last word should have '(s)" added since there may be multiple ordinances involved.	is a mandatory assertion and is being made under penalty of perjury. Therefore a checkbox would only provide an option to *not* make that statement.
			The verification form attached to the complaint should require any attorney signing for his or her client to represent that the client is not present in the county where the attorney has his or her offices. See CCP Section 446.	The inappropriate verification above the attorney signature line has been removed. The remaining verification is for a party only (which has not changed from the current form) and instructs attorneys who are signing a verification to create their own verification, using appropriate language
			Recommended changes to Form UD 105	
			(3) h and j. There appears to be a typo – it should be demand for "possession" rather than "provision."	This has been corrected.
			Questions:	
			• Does the proposal appropriately address the stated purpose? Yes	The committee appreciates the response.
			•	
			The advisory committee also seeks comments from courts on the following cost and implementation matters:	The committee appreciates the responses.
			• 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?	

	Commenter	Position	Comment	Committee Response
			Might require document code and configuration in CMS for the second notice and any supporting documents. • Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? No. Would require 6 months for CMS changes and staff training.	The committee notes that the TPA is already in effect, so the committee is recommending that these optional pleading forms be implemented as soon as council process permits.
7.	Superior Court of Orange County Civil and Appellate Division Management and Analyst Team	NI	• Does the proposal appropriately address the stated purpose? Although the proposal does address the stated purpose of the revised forms, it does not provide clear guidance on the double notice requirement. • Does the proposed revisions to item 9 in the revised complaint form appropriately reflect the double notice requirements in new Civil Code section 1946.2(c)? The double notice does present challenges and additional guidance would be helpful. For example, the language references the word notice in the singular. But it is highly possible that a court user would check both box 9.a.(1) and 9.a.(6). Also, it is not clear what date court users would need to write in 9.b(1). Then as noted, 9.e. states "If two notices are required…" adding to the confusion. Any further clarification or guidance that can be provided would be helpful.	The committee appreciates the comments. As discussed in the committee response above to the Disability Rights Advocates comment on the notice issue under § 1946.2(c), the statute itself is internally inconsistent, making it difficult for the committee to provide as clear guidance on this issue as it would hope to do. See above. The committee has further modified item 9a, 9b, and 9e in light of comments received. See committee response above to comment of Disability Rights Advocates comment on the issue of notice under section 1946.2(c).

	Commenter	Position	Comment	Committee Response
			• Should a separate complaint form be developed, either for cases involving the double-notice provisions or for all cases subject to the just cause termination provisions of Civil Code section 1946.2? A new complaint form may be the best way to clarify the confusion noted above. So, if clarity cannot be achieved in a single form, then a separate form should be considered when CC §1946.2 applies. • 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? This will impact court staff as it will require training of case processing staff who process clerk default judgments for unlawful detainer cases. The approximate level of effort is estimated at 16 hours FTE by a Program Coordinator Specialist over approximately one month to revise procedures, approve through workflow, train staff and implement. • Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes, that should be sufficient time.	The committee has concluded that a second complaint form just for TPA covered tenancies should not be developed, primarily because whether a unit or tenancy is subject to the TPA requirements may be one of the issues in dispute in an unlawful detainer. In addition, if the wrong form is inadvertently chosen, a party may have to amend or face a demurrer, etc., causing unnecessary work for both parties and courts. The committee appreciates the court's responses.
8.	Supeior Court of San Diego County by Mike Roddy Executive Officer	A	**Does the proposal appropriately address the stated purpose?** Yes; however, there is a potential issue with the request for default form if the revised complaint form is adopted.	The committee appreciates the court's responses.

	Commenter	Position	Comment	Committee Response
			Do the proposed revisions to item 9 in the revised complaint form appropriately reflect the double notice requirements in new Civil Code section 1946.2(c)? Yes. **Should a separate complaint form be developed, either for cases involving the double - notice provisions or for all cases subject to the just cause termination provisions of Civil Code section 1946.2?** Yes, a separate complaint for cases involving the double - notice provisions or for all cases subject to the just cause termination provisions of Civil Code section 1946.2 would be preferred. There is a concern with the increased amount of time needed by staff to review the complaint when processing a default. Having a separate form would alleviate this concern. However, if the Judicial Council is not inclined to create an additional UD Complaint form, in the alternative, we would request that CIV-100 be amended to include the following checkbox: □ The complaint filed is subject to the Tenant Protection Act of 2019 (Civil Code §1946.2). **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?** Updating internal procedures and case management system, training affected staff, updating and ordering local forms packets. **Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?**	The committee agrees, but in light of other comments received has further modified item 9. The committee has concluded that a second complaint form just for TPA covered tenancies should not be developed, primarily because whether a unit or tenancy is subject to the TPA requirements may be one of the issues in dispute in an unlawful detainer. In addition, if the wrong form is inadvertently chosen, a party may have to amend or face a demurrer, etc., causing unnecessary work for both parties and courts. The committee will consider in the future, as time and resources allow, whether the request for default form should be revised to reflect whether the TPA applies. The committee appreciates the court's responses to these questions.

	Commenter	Position	Comment	Committee Response
			Yes, provided the final version of the forms are provided to the courts at least 30 days prior to the effective date. This will give courts sufficient time to update their procedures, configure local packets, and order printed stock.	Final versions of the forms should be approved by council in May, with an effective date of September 1.
9.	Western Center on Law & Poverty By Madeline Howard, Sr. Attorney Also signed by: Carolyn Gold Eviction Defense Collaborative Sara Hedgpeth-Harris Central California Legal Services Eric Post BASTA Jason Tarricone Community Legal Services of East Palo Alto Ugochi Anaebere-Nicholson Public Law Center Michael Rawson Public Interest Law Project	NI	Western Center on Law & Poverty and the undersigned housing rights organizations submit this letter in response to the Judicial Council's invitation to comment on the unlawful detainer complaint and answer forms. Western Center represents low-income Californians in securing housing, health care, racial justice, public benefits and access to justice. Our housing advocacy incorporates promotion of affordable and equitable housing development, protection of tenants' rights, and preventing displacement of low-income communities and communities of color. We also work to ensure equal access to courts for people with disabilities, people with limited English proficiency, low-income people and other groups. As a legal services support center, we collaborate with housing rights organizations including those that have signed this comment letter, and learn of trends impacting tenants around the state. We are therefore uniquely positioned to assess the impact of the Judicial Council's proposed changes to the unlawful detainer forms. Western Center is also one of the sponsors of AB 1482, the Tenant Protection Act. Below we respond to the Judicial Council's questions and provide additional comments. **I. The proposed revisions to item 9 of the complaint form do not appropriately reflect the two- step notice requirements in new Civil Code section 1946.2(c).** The form does not correctly address the two-step notice provision, which requires that the landlord first serve a notice to cure (*not* cure or quit) and then, if the tenant does not cure, allows for service of a notice to quit. The new law, section	The committee appreciates the comments. In light of comments received, item 9 has been further modified. See committee's response above to the comments of

	Commenter	Position	Comment	Committee Response
	Taylor Campion Family Violence Appellate Project Monique Berlanga Centro Legal de la Raza Sabyl Landrum East Bay Community Law Center		1946.2(c)[1], refers to Code of Civil Procedure section 1161(3) for what it means to cure a material breach of the lease. This language should not be interpreted to require two sequential notices to *quit* but, rather, one notice to *cure* and a subsequent notice to quit. Civil Code section 1946.2, the just cause portion of the Act, begins with "Notwithstanding any other law…", and then goes on to describe the requirement for just cause, the allowable just cause reasons for eviction, and the relevant notice requirements. The statute is clear that for covered units, a notice to cure and additional notice to quit are required before there is a valid cause of action. The reference is intended to spell out that a tenant should be given the opportunity to cure that is provided for in 1161(3): "(c) Before an owner of residential real property issues a notice to terminate a tenancy for just cause that is a curable lease violation, the owner shall first give notice of the violation to the tenant with an opportunity to cure the violation pursuant to paragraph (3) of Section 1161 of the Code of Civil Procedure. If the violation is not cured within the time period set forth in the notice, a three-day notice to quit without an opportunity to cure may thereafter be served to terminate the tenancy." Requiring that sequential notices to quit be listed in the complaint does not conform to the law and will cause confusion among tenants and landlords, thwarting the intention of the Act. The first notice required by Civil Code § 1946.2(c) is a notice to cure only. The form should be revised accordingly. II. **The Judicial Council should not develop a separate complaint form.** The Judicial Council should not develop a separate form for	Disability Rights Advocates on the issue of notice under § 1946.2(c).

	Commenter	Position	Comment	Committee Response
			covered tenancies, because this will cause additional confusion among litigants and create more work for courts. Furthermore, whether a unit or tenancy is subject to the requirements of the Act may be one of the issues in dispute in an unlawful detainer. This issue should be resolved by the court. III. **The forms should be revised to add clarity regarding compliance with the Tenant Protection Act** **A. Revisions to the proposed Complaint form** The proposed forms should be revised to include more specific allegations regarding compliance or non-compliance with the Tenant Protection Act. Specifically, complaint checkbox 7 for "tenancy not covered" should include a space or checkbox for the landlord to provide a basis for alleging the tenancy is not covered. The Tenant Protection Act has a specific list of exemptions which could be converted into a checklist, or the form could include a blank field for the plaintiff to reference the exemption. As currently structured, the complaint form does not give the defendant any information about the basis for the landlord's asserted exemption from the Act. This will make it difficult for the defendant to include information relevant to any claimed exemption in the responsive pleading. Including this basic information in the complaint will also assist the court in evaluating application of the Tenant Protection Act. Similarly, check box 8 on the Complaint should state a specific basis for termination. Again, the Tenant Protection Act includes a list of "at fault" and "no fault" just cause bases for termination of tenancy which could be converted into a check list. Section 9 of the Complaint form has been revised to specifically allow the plaintiff to allege service of the prior notice under	The committee agrees and will not be developing a second complaint form at this time. This item has been further modified in light of comments received. See committee's response above to the comments of Disability Rights Advocates on item 7. The committee considered this comment but declined to implement this suggestion. See committee's response above to the comments of Disability Rights Advocates on item 8. The committee considered this comment but declined to implement this

	Commenter	Position	Comment	Committee Response
			section 1946.2(c), however it does not provide a space for the landlord to allege compliance with other notice requirements of the Tenant Protection Act. For example, after July 1, 2020, for owners to evict a tenant in order to move into the unit or have a close family member move in, the tenant must have agreed in writing to specific lease language. §1946.2(b)(2)(A)(ii). Similarly, for a single family home to be exempt from the protections of the Act, the tenant must have been provided a notice of exemption using specific language. §1946.2(g)(8)(B). Finally, tenants must be provided with notice of their rights under the Act pursuant to section 1946.2(f). The complaint should require that the landlord allege compliance with each of these provisions and attach the required notices. **B. Revisions to the proposed Answer form** The proposed Answer form includes only a general provision for the tenant to allege non-compliance with the Tenant Protection Act, and it is unclear what "demand for provision" refers to. This general language should be modified to read "Plaintiff's demand for possession violates the Tenant Protection Act, Civil Code section 1946.2 or 1947.12. (briefly state in item 3m the facts showing violation of the statute.)" The Answer form should also allow the tenant to specifically allege a type of violation of the Act. For example, the Answer should include check boxes that state: • Plaintiff has raised the rent more than the amount allowed by the Tenant Protection Act, Civil Code section 1946.12; • Plaintiff fails to state a just cause for termination of tenancy; • Plaintiff failed to provide a notice of rights as required by the Tenant Protection Act, Civil Code section 1946.2 or 1947.12; • Plaintiff failed to comply with the relocation assistance requirements of the Tenant Protection Act, Civil Code section 1946.2(d).	suggestion. See committee's response above to the comments of Disability Rights Advocates on the issue of additional notices under TPA The *Answer* (form UD-105) has been further modified in light of the suggestions to include more specific affirmative defenses. See committee response above to Disability Rights Advocates' comment on this point to see responses as to each individual affirmative defense suggested.

W20-03

Unlawful Detainer: Complaint and Answer Forms (Revise forms UD-100 and UD-105)

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

	Commenter	Position	Comment	Committee Response
			These more specific statements of affirmative defenses will assist unrepresented tenants in identifying which defense is appropriate to allege for their tenancy.	

Item number: 13

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Practice and Procedure: Confidential Information Form Under Code of Civil Procedure Section 367.3; adopt form SH-001

Committee or other entity submitting the proposal:
Civil and Small Claims Advisory Committee

Staff contact (name, phone and e-mail): Eric Long, 415-865-7691, eric.long@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Assembly Bill 800 allows active participants in the Safe at Home address-confidentiality program to participate in civil proceedings, as plaintiffs or defendants, under a pseudonym and provides other protections when that person is a party to the proceedings. Current forms will be revised or new forms or rules developed as appropriate to implement this bill.

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

Item No.: 20-125
For business meeting on: May 14–15, 2020

Title
Civil Practice and Procedure: Confidential Information Form Under Code of Civil Procedure Section 367.3

Rules, Forms, Standards, or Statutes Affected
Adopt form SH-001

Recommended by
Civil and Small Claims Advisory Committee
Hon. Ann I. Jones, Chair

Agenda Item Type
Action Required

Effective Date
September 1, 2020

Date of Report
March 24, 2020

Contact
Eric Long, 415-865-7691
eric.long@jud.ca.gov

Executive Summary

The Civil and Small Claims Advisory Committee proposes a new form for Judicial Council adoption, *Confidential Information Form Under Code of Civil Procedure Section 367.3* (form SH-001). This mandatory form implements Assembly Bill 800 (Stats. 2019, ch. 439), which provides that a party who is participating in the Safe at Home program (an address confidentiality program run by the Secretary of State) may appear pseudonymously in a civil action, and that the true name of the party as well as any other identifying characteristics are to be kept confidential by the court and other parties in the case. The new form allows pseudonymous parties to provide their true names to the courts and the other parties to the action, and to attest to the party's active participation in the Safe at Home confidential address program. The form also allows all parties to such a case to list any identifying characteristics that have been redacted from a pleading or other document filed with the court.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council adopt *Confidential Information Form Under Code of Civil Procedure Section 367.3* (form SH-001), effective September 1, 2020.

The new form is attached at pages 7–8.

Relevant Previous Council Action

This is a new legislative requirement and as such, the Judicial Council has not taken any previous action on this matter.

Analysis/Rationale

The Safe at Home address confidentiality program administered by the Secretary of State is intended to protect the privacy and safety of individuals who have been subject to domestic violence, sexual assault, stalking, human trafficking, or elder or dependent abuse. (Gov. Code, § 6205.) It provides participants with the ability to maintain a confidential mailing address in order to shield their location from abusers. Assembly Bill 800[1] adds section 367.3 to the Code of Civil Procedure, effective January 1, 2020, providing that a party who is an active participant in the Safe at Home address confidentiality program (defined as a "protected party") may appear in a civil action under a pseudonym (Jane Doe, John Doe, or Doe) and may exclude or redact—from all documents the party files—any identifying characteristics, including name, addresses (physical or online), age, or marital status. (See full list at Code Civ. Proc., § 367.3(a).)

Under the new law, a protected party who files pseudonymously must file with the court and serve all other parties to the proceeding with a confidential information form that includes the protected party's true name and other identifying characteristics that have been redacted from the document. The court must keep the information, including the protected party's true name, confidential. (§ 367.3(b)(1).)

Once a party to a proceeding has been served with this confidential information form, that party and that party's attorneys must use the protected party's pseudonym in all pleadings and other documents filed or served in the action, and must redact or exclude any identifying characteristics of the protected party from any documents filed in the case, serving and filing with such redacted documents a confidential information form containing the factual information. (§ 367.3(b)(2).)

Form SH-001 would implement section 367.3's *confidential information form* requirement. The form is to be served and filed by a party who is an active participant in the Safe at Home program and who decides to proceed in a civil action pseudonymously. The form is to inform the court and the other parties of the protected party's true name and of any other identifying characteristics (such as address) that have been redacted (or blacked out) from any document filed with the court. There is a declaration included on the form in which a protected party must assert the required active participation in the Safe at Home program and agree to provide evidence of that participation if required by the court. Participants in the program who want to

[1] A copy of AB 800 (Stats. 2019, ch. 439) bill is available online at *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB800*.

proceed in a civil action using a pseudonym must file and serve SH-001 every time they file a document under a *Doe* name.

The form will also provide notice to the other parties in the case that the protected party is invoking this new law to keep all identifying characteristics, including a name, an address, and other contact information, confidential, and it will inform the court of the true name of the protected party filing a document using a *Doe* name. Finally, the form allows all parties to such a case to list any identifying characteristics that have been redacted from a pleading or other document filed with the court, as required by section 367.3(b)(1).

Policy implications

The policy implication of proceeding under a pseudonym and redacting identifying information arises from the legislation, not from the proposed form, because the legislation requires that a protected person's true name and other identifying characteristics be excluded or redacted. The law requires a *confidential information form* to be filed with the court and served upon all other parties to the proceeding. The law took effect January 1, 2020, so the committee has proposed a September 1, 2020 effective date for the new form.

Comments

This proposal was circulated for public comment from December 11, 2019, to February 11, 2020, as part of the winter public comment cycle. The committee received comments from eight entities including three courts, the Superior Courts of San Diego, Los Angeles, and Orange Counties, with two divisions of the Orange County court commenting separately; the Public Law Center; and the Orange County Bar Association. The committee also received informal comments, reported orally to staff, from the Family and Juvenile Law Advisory Committee. The commenters that answered the questions posed in the proposal all indicated that the proposal appropriately addressed the stated purpose. The committee considered all comments; discussed below are the primary issues raised by the comments. A chart with the full text of the comments received and the committee's responses is attached at pages 9–23.

Form prefix

The proposed form circulated for public comment with prefix MC (standing for Miscellaneous), but at the suggestion of several commenters, the committee concluded that a new form category should be assigned: SH (standing for Safe at Home). The SH prefix is intended to make the form easier for Safe at Home participants to locate, and in addition to convenience, the committee favored creating a new form category because the committee anticipates developing new forms relating to motions to seal and redact for protected parties to use after an action has commenced.

Establishing active participation in the Safe at Home program

Overwhelmingly, the commenters agreed that a person's declaration under penalty of perjury that the person is an active participant in the Safe at Home program was sufficient to establish

eligibility for confidentiality.[2] One commenter suggested that some proof should be required because individuals may be terminated from the program, and another commenter offered that filers could bring their identification cards with them at the time they are filing the form.

The proposed form retains use of a declaration to avoid delays that would arise from requiring a filer to establish proof of active participation at the time of filing. The committee considered the alternative of including a requirement in this form, or by rule of court, that a party must establish this active participation before being allowed to file pseudonymously. However, because there is no express provision in the new law requiring a protected party to establish active participation in the program before filing pseudonymously, and because the time involved in establishing such proof in advance of filing a complaint might impact statute of limitations or discovery deadlines, the committee decided not to mandate proof of participation prior to filing, but to instead include a declaration under penalty of perjury in the new form asserting active participation in the program. The declarant also is asked to agree to provide proof of active participation if required to do so by the court. Based on informal input from the Family and Juvenile Law Advisory Committee, the committee revised the form to ask the declarant to provide their program participant number (ID), if available, which may assist the Secretary of State in directing mail to a protected party at their confidential substitute address.

Multiple pseudonymous parties

The committee revised item 3 on the form in response to comments from the Family and Juvenile Law Advisory Committee that the form should take into consideration the potential for multiple participants in the Safe at Home program appearing in an action and choosing to proceed under pseudonyms. The committee agreed but concluded that each participant in the program would have to file a confidential information form. As revised, item 3 seeks the same information as the draft that was circulated for comment with one addition. The information sought has been reordered to ask first for the true name of the party, then the party type, and then the pseudonym used: Jane Doe, John Doe, or Doe. If multiple parties are proceeding under pseudonyms, the form now solicits an identifying number for the *Doe* name (e.g., Jane Doe #2).

Form as a cover sheet for filings by pseudonymous parties

To ensure that filings by parties proceeding pseudonymously under section 367.3 are properly handled by courts, the committee changed instruction 2 on page 2 and added a parenthetical instruction to item 3 that tells parties to complete the form each time a party using a pseudonym files a document. This change was suggested in part by the Superior Court of Los Angeles County, because the instruction had stated that the form must be filed the "first time" the pseudonym is used. However, the third sentence stated that the form must be submitted with each document that has been redacted. The committee initially conceived of the form being used

[2] The new law provides that "protected persons" may file pseudonymously and defines a protected person as "a person who is an active participant in the address confidentiality program created pursuant to Chapter 3.1 (commencing with Section 6205) of Division 7 of Title 1 of the Government Code." (§ 367.3(a)(3).)

the first time a party appears to declare an intention to proceed pseudonymously and then only if a document contains redactions. Based on the comments received, the committee determined that the form should be used as a cover sheet for filings by *Doe* parties, which may be helpful to courts in processing pseudonymous filings. The Joint Rules Subcommittee (JRS) of the Trial Court Presiding Judges Advisory Committee (TCPJAC) and the Court Executives Advisory Committee (CEAC) advised that there are courts that have case management systems that may not able to create pseudonym case types or case categories. Until the superior courts have a uniform system in place for managing pseudonymous filings under section 367.3, the committee decided to err on the side of caution and to treat form SH-001 as a cover sheet for any document filed by a pseudonymous party. When used by parties who are not proceeding under a pseudonym, however, the form is required only when information has been redacted from a document.

Alternatives considered

The committee notes that the statute requires the Judicial Council to adopt or revise, as appropriate, rules and forms, and expressly contemplates a *confidential information form*. The committee decided that the proposed new form for proceeding under a pseudonym and identifying all redacted confidential information would be useful. The committee also considered whether any changes to rules or the creation of additional forms were needed at this time.

As noted above, this new law allows not only plaintiffs, but all parties, including defendants and respondents, to proceed pseudonymously and to avail themselves of the confidentiality provisions of section 367.3. However, there is nothing in the new statute that addresses what is to be done with a publicly filed complaint or petition that already has a party's true name and other identifying information in it. The statute requires parties going forward to use a designated pseudonym and to keep identifying information confidential, but it does not require any party to withdraw or amend pleadings already on file that contain a protected party's true name. Courts are also not authorized to redact or change the register of action or the original pleading in any way based on the filing of a confidential information form.

Ultimately, the committee concluded that a protected party could obtain the desired confidentiality of information in prior-filed documents and court records, so long as that party takes further steps. In addition to allowing pseudonymous filing, the statute allows the court, upon motion of the protected party, to seal all or part of a record, under the California Rules of Court regarding sealing (rules 2.550 and 2.551). (See § 367.3(b)(4).) Under this provision, a pseudonymous defendant, for example, could move to have the original complaint containing the defendant's true name and potentially other identifying characteristics sealed, lodging with the motion a redacted copy of the complaint which could be placed in the public record in place of the original. A sealing order may include the sealing not only of the original complaint but of any other information in court records (including the register of action) found to be confidential. (See Cal. Rules of Court, rule 2.551(e)(2).)

The committee included in the instructions on the new form a warning to pseudonymous parties that the requirement that the other side use the pseudonym and redact or exclude other

identifying characteristics is prospective only. (See form SH-001, at Instruction 3.) The instruction also notes that if the protected party wants to protect the name and identifiers in a publicly filed document, a motion to seal will be necessary. The committee will consider in the next rule-making and forms cycle new forms for use by protected parties who want to seal and/or redact records that are already on file with identifying information included in them.

Fiscal and Operational Impacts

A confidential information form is expressly required in AB 800. As a result of the enactment of that law, clerks, judicial officers, and court legal services and self-help offices will require training on the new pseudonymous filing process permitted for participants in the Safe at Home program, and on the level of confidentiality to be accorded to certain information relating to such parties. New training materials and internal procedures will need to be developed.

Several commenters indicated that the confidentiality requirements of the law could affect the courts' case management systems. JRS stated that while some court systems were equipped to handle pseudonymous filings, other courts had expressed concern about their systems' ability to create a pseudonym type and to manage such filings. The committee is aware of these potential operational impacts. They are the result of the new law, rather than the proposed form. The new form is intended to assist both the parties and the courts in complying with the law's confidentiality procedures, but the form cannot resolve the operational concerns raised by some courts.

Attachments and Links

1. Form SH-001, at pages 7–8
2. Chart of comments, at pages 9–23
3. Link A: AB 800 (Stats. 2019, ch. 439) at *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB800*

CONFIDENTIAL

SH-001

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*party name or pseudonym*):	**DRAFT** **03-24-2020** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
SHORT TITLE:	
CONFIDENTIAL INFORMATION FORM UNDER CODE OF CIVIL PROCEDURE SECTION 367.3	CASE NUMBER:

TO COURT CLERK: THIS FORM IS CONFIDENTIAL

TO PARTIES: USE THIS FORM ONLY IF A PARTY IS AN ACTIVE PARTICIPANT IN THE SAFE AT HOME PROGRAM

(Instructions for filer and recipient are on the back of this form.)

1. This case includes a party who is enrolled in the Safe at Home address confidentiality program with the Secretary of State, and who is filing using a pseudonym (Jane Doe, John Doe, or Doe) under Code of Civil Procedure section 367.3.
2. The document that this form is being filed with is a *(check one)*:
   a. ☐ Complaint, cross-complaint, or petition.
   b. ☐ Answer, response, objection, or other first paper.
   c. ☐ Discovery document.
   d. ☐ Other *(describe)*:
3. **True Name and Pseudonym of Party** *(Complete for any pleading or document filed by a participant in the Safe at Home program.)*
   a. True name of party:
   b. Party type *(check one):*
      ☐ Plaintiff/petitioner
      ☐ Defendant/respondent/objector
      ☐ Other *(describe):*
   c. Pseudonym used *(check one):* ☐ Jane Doe ☐ John Doe ☐ Doe
   d. If more than one party is using the same pseudonym, add an identifying number (such as Jane Doe #2): ___
4. **Redacted Information** *(Complete for any pleading or document that includes redactions or blacked-out information.)*

	LOCATION OF REDACTED INFORMATION *(page, and item or line number where the redaction occurs)*	INFORMATION REDACTED *(text of identifying characteristics that has been redacted or blacked out; see Instruction No. 5 on page 2)*
a.		
b.		
c.		

☐ Check here if there is not enough space for all the redacted material, and continue on an attached sheet titled Attachment 4.

SHORT TITLE:	CASE NUMBER:

5. Number of pages attached: _____

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE)

Declaration by Pseudonymous (Doe) Party

I *(true name)* _____ declare under penalty of perjury under the laws of the State of California that I am an active participant in the Safe at Home confidential address program with the California Secretary of State. My Safe at Home Authorization Card (ID) No. (if available) is: _____. I agree to provide proof of my active participation if required to do so by the court.

Date:

_____ ▶ _____

(TYPE OR PRINT TRUE NAME) (SIGNATURE)

INSTRUCTIONS

*(**Note**: This form may be used only in cases in which one or more parties is enrolled in the Safe at Home program and using a pseudonym under Code of Civil Procedure section 367.3.)*

1. The Safe at Home program is an address confidentiality program run by the Secretary of State. Parties who are active participants in that program may use a pseudonym (Jane Doe, John Doe, or Doe) in place of the party's true name in a civil action. (Plaintiffs or petitioners who do this must state on the front of the complaint "ACTION BASED ON CODE OF CIVIL PROCEDURE SECTION 367.3.") Pseudonymous parties may also exclude or redact (black out) other identifying characteristics (defined below) from all pleadings and documents they file, and instead provide that information confidentially to the court and other parties using this form. (See Code Civ. Proc., § 367.3(b)(1).) In such cases, papers filed by other parties in the case also **must** be worded so as to protect the name or other identifying characteristics of the *Doe* party from public revelation, or have that information redacted (blacked out on the document). Any intentional violations of this law are subject to sanctions. (See Code Civ. Proc., § 367.3(b)(2).)
2. **This form must be served and filed each time a party uses a pseudonym (a *Doe* name) in place of that party's name in a court document, with items 2 and 3 completed to provide the court and other parties with the *Doe* party's true name, and item 4 completed if there are other identifying characteristics redacted or blacked out from the document.** A party using a pseudonym must also sign and date the declaration above, confirming active participation in the Safe at Home program. All parties and other persons must also serve and file this form any time they file a document in a case with identifying characteristics redacted or blacked out. Counsel for a party filing under a pseudonym may use the pseudonym for the name of the represented party in the attorney or party information box at the top of this form and any documents filed later.
3. **Warning to pseudonymous (Doe) party:** If a pseudonymous party initially files using a *Doe* name after another party has already filed something with the court (for example, if the pseudonymous party is a defendant, respondent, or objector), the statute does not automatically require that first party or the court to redact the true name or other identifying characteristics from documents or records already in the public files. A pseudonymous party who wants to restrict access to the party's name or other identifying characteristics in a document that has already been filed must make a motion (request) that the court seal the record or part of it under rules 2.550 and 2.551 of the California Rules of Court. (See Code Civ. Proc., § 367.3(b)(3).)
4. **Warning to recipient of this form:** A party who is served with this form is subject to Code of Civil Procedure section 367.3 and required to keep the information on the form, including the pseudonymous (*Doe*) party's true name, confidential. In addition, a party served with this form is required to use the *Doe* party's pseudonym in all pleadings and documents in the case from that point forward, to redact (black out) any other identifying characteristics from any pleading or document filed with the court after that point, and to use this form to provide to the court and other parties any information that has been redacted. A completed form SH-001 must be served and filed together with any redacted document.
5. "Identifying characteristics" that the party using the pseudonym may and all other parties **must** redact include name or any part thereof, address or any part thereof, city or unincorporated area of residence, age, marital status, relationship to any other party, race or ethnic background, telephone number, email address, social media profiles, online identifiers, contact information, or any other information from which that party's identity can be discerned, including images of the party using a pseudonym. (Code Civ. Proc., § 367.3(a)(1).) (See Code Civ. Proc., § 367.3(a)(2) for a list of "online identifiers.")

W20-04

Civil Practice and Procedure: Confidential Information Form Under Code of Civil Procedure Section 367.3 (Adopt form SH-001)

All comments are verbatim.

	Commenter	Position	Comment	Committee Response
1.	Joint Rules Subcommittee (JRS) Trial Court Presiding Judges Advisory Committee (TCPJAC), and the Court Executive Advisory Committee (CEAC)	A	The JRS notes the following impact to court operations: • Impact on existing automated systems (e.g., case management system, accounting system, technology infrastructure or security equipment, Jury Plus/ACS, etc.) • Requires development of local rules and/or forms. • Results in additional training, which requires the commitment of staff time and court resources. • Other major fiscal or operational impacts The JRS notes that the proposal is required to conform to a change of law. In order to determine the possible impact on existing case management systems, the JRS team sent a questionnaire to the CEO listserv asking the following questions. Nine courts responded to the survey and the impact comment is based on those responses. 1. For civil cases can your case management systems create a "party" type or category that specifies that the person is filing under a pseudonym authorized under CCP 367.3? • 6 of the courts that responded believe that their case management systems (CMS) would be able to create a party type or category that could be used as a pseudonym. The courts indicating that they could create a pseudonym party type or category had both new and old CMS's. Three courts indicated they could not do the fundamental requirement of CCP 367.3 by creating a pseudonym type in their CMS. Two	The committee appreciates the comments, and notes the commenter's support for the proposal. The committee thanks the commenter for responding to the question.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

			of the courts that were incapable had relatively new CMS's, installed in the last 5 years that would require reconfiguration to comply with CCP 367.3. 2. For civil cases, can your case management system insert an CCP 367.3 required pseudonym on all future filings? • Four courts believe their current CMS can insert a pseudonym into future civil filings. 3. For civil cases, can your case management system change a defendant or respondent's name to a pseudonym after the case is underway? • Six courts indicated that their current CMS could change a party's name to pseudonym after the case was already underway. 4. For civil cases, can your case management system create a confidential location within the case management system for the true name, address of the party and other identifier information for the person who requested the benefit of CCP 367.3 ? • Five courts indicated that their current CMS could create a confidential location for the true name and other information or party requesting a pseudonym. 5. For civil cases, if your case management system can create a CCP 367.3 pseudonym, would it be possible for the case management system to cross reference a person with a CCP 367.3 pseudonym in their civil case filings across all of non-civil case types and filings? • Only one court indicated that their case management system could cross reference the party using a pseudonym with non-civil case	The committee thanks the commenter for responding to the question. The committee thanks the commenter for responding to the question. The committee thanks the commenter for responding to the question. The committee thanks the commenter for responding to the question.

			filings. One court indicated they were not sure if they could cross reference and seven indicated it was not possible. Even though the number responses to the survey are not enough for the findings to be statistically valid, the responses are enlightening to what the potential challenges could be for courts to implement requirements of CCP 367.3. There is the likelihood that a substantial number of courts, possibly up to one third of the courts in the state, could have difficulty with their current case management systems to comply with CCP 367.3. The inability to comply is not limited to only courts with older legacy systems but also with courts that have newer case management systems. Compliance could be possible with reconfiguration of the courts case management system. However, that will take time and the ability to pay for the reconfiguration. It is very likely that the Judicial Council will develop state Rules of Court and forms to be used by parties requesting the use of a pseudonym. However, local courts often need to adapt forms that be to local needs and promulgate local rules. Court staff are familiar with pseudonyms being used in other case types. Training staff regarding the use of case types in civil matters pursuant to CCP 367.3 will be necessary but should not be a major challenge. For courts who have case management systems then are not able to create pseudonym case types or case categories, there will be cost for CMS reconfiguration. These costs may be difficult to estimate, since they can vary with	

			the type of case management system and the technical ability to configure the system.	
2.	Orange County Bar Association by Scott B. Garner, President Newport Beach, California	AM	***Specific Comments:*** *1)* **Does the proposal appropriately address the stated purpose?** Yes. The proposal provides clear information about the purpose of the form, the confidential nature of the form, and for how to fill it out. *2)* **Should an alternative to the required declaration that the participant is part of the Safe at Home Program be used to ascertain eligibility?** No. The declaration seems to be a sufficient way to establish eligibility; requiring proof of status before filing the form could create delays potentially affecting the statute of limitations and/or deter participants at risk from seeking confidentiality. The proposed method requires the participant provide proof of being in the program should the court require it. *3)* **In a case where a protected party invokes the confidentiality protection after an initial pleading, can a motion to seal under rule 2.551 provide sufficient protection?** It seems to offer the best alternative where the information has already been publicly filed, since it allows the participant to request the pleadings containing confidential information be sealed.	The committee appreciates the comments. The committee thanks the commenter for responding to the question. The committee agrees that requiring additional proof would create delays, and has recommended retaining the form's declaration of active participation. The committee agrees that a motion under rule 2.551 is an available option, but is considering in the next rule-making cycle additional forms to assist filers in this process.

			4) **Should all Judicial Council forms to be used by participants in the Safe at Home program be maintained in a single category and given the same identifying form prefix?** Yes. A uniform prefix (e.g., SH or SAH?) would immediately alert the court and court clerk the basis for the request, and also potentially facilitate finding and filling out the forms for the Safe at Home participants. **Two small edits to the form:** *1)* Page 2 in the Declaration box: The spacing is slightly off between the first and second lines of the declaration; it should be consistent. *2)* Page 2 of form, number 2., line 5: "file this form anytime, " should be "file this form any time."	The proposed form will be modified in accordance with this suggestion, as SH-001. The committee thanks the commenter for these edits, and has revised the proposed form accordingly.
3.	Public Law Center by Leigh E. Ferrin Director of Litigation and Pro Bono Santa Ana, California	AM	Public Law Center (PLC) is a 501(c)(3) not-for-profit organization that provides free civil legal services to low-income individuals and families across Orange County. The civil legal services that we provide include consumer, family, immigration, housing, veterans, community organizations, and health law. PLC appreciates the opportunity to comment on Invitation W20-04, the proposal to adopt a new form, MC-130. PLC appreciates the need for this form and applauds the judicial council for proposing it. PLC regularly represents individuals who utilize the Safe at Home	The committee appreciates the comments.

			program and who need to be able to withhold their information for their safety. During this representation we sometimes see these requests to withhold information declined, and we believe that the introduction of form MC-130 will be instrumental in making this a more regular practice.	
			PLC believes that the declaration provided for on the form should be sufficient for proof of participation in Safe at Home. If the Court or others feel that there is a high likelihood of abuse of this process, especially since it is a form that can be used throughout the court system, then PLC would support exploring the burden it would put in litigants to have to attach proof of participation in the Safe at Home program. PLC would suggest that before implementing requiring a specific type of proof, advocates or proponents consult with representatives of the Safe at Home program and survivor advocates to determine how burdensome it is to obtain the proposed required evidence.	The committee agrees, and has recommended retaining the form's declaration of active participation.
			We agree that a motion to seal under rule 2.551 would be sufficient, but that such a motion should include an order also amending the Register of Actions. When we do see the requests to invoke the confidentiality protection, we often see it done moving forward, but not on the register of actions itself.	The committee is considering a proposal in the next rule-making cycle that addresses the register of actions.
			We support the creation of a form motion to seal specifically for parties who are responding to previously filed cases and need the	The committee is considering this proposal in the next rule-making cycle.

			confidentiality provisions to be retroactive. The accompanying order can then clearly specify that the order covers the prior documents, but also the register of actions. PLC also believes one option might be an optional attachment to the proposed MC-130, so that the motion to seal could be filed at the same time as the MC-130 form, thereby streamlining the process for the filer and for the court. This will also make it easier for defendants and other responsive participants to understand the need for multiple filings to completely seal a record. PLC strongly encourages the Judicial Council to create its own form category for these particular forms. They are sufficiently important and would benefit from a separate identification rather than "Miscellaneous."	The proposed form will be modified in accordance with this suggestion, as SH-001.
4.	Superior Court of Los Angeles County By Bryan Borys Director of Research and Data Management	AM	We recommend a change in the name of the form to make it clearer for self-represented litigants. Suggestion is "Confidential Information Form for Use of a Pseudonym under Code of Civil Procedure Section 367.3." Page 1, #4-For consistency to other references throughout the form, we recommend using "blacked out" instead of "blanked-out." Page 1, #4-For clarity to litigants, we recommend including underneath "redacted information," a line that reads "See Paragraph 5 under the instructions on page 2, for a list of items that may be redacted."	The committee appreciates the comments. The committee declined to recommend changing the form's name as suggested because the form is to be used when other identifying information, as defined in the statute, has been redacted. The use of a pseudonym is just one use of the form. The committee has revised the form to make these terms consistent. The committee has revised the form to include an instruction to this effect in the *Information Redacted* box.

			Page 2, Instruction 2, It is unclear as it appears that it has contradictory statements. The first sentence states that the form must be filed the "first time" the pseudonym is used, however, the third sentence states that the form must be submitted with each document that has been redacted. We recommend replacing "first time" with "each time."	The committee has revised the form to require that it be filed each time a document if filed by a party using a pseudonym. The committee has proposed revisions to item 3 and instruction 2 that should clarify that the form is required every time a document is filed by a party using a pseudonym and each time a document with redacted content is filed by any party.
			In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:	
			• Does the proposal appropriately address the stated purpose? Yes	The committee thanks the commenter for responding to the question.
			• The proposed form includes a declaration by the protected party to establish, at least initially, a party's status as an active participant of the Safe at Home program. Should an alternative procedure should be used and, if so, what would that alternative be? No alternative procedure is needed.	The committee thanks the commenter for responding to the question.
			• In a case where a protected party invokes the confidentiality protection of section 367.3 after an initial pleading has been filed by another party, can a motion to seal under rule 2.551 provide sufficient protection of the protected party's confidential information, or should an	The committee agrees that a motion under rule 2.551 is an available option, but is considering recommending in the next rule-making cycle additional forms to assist filers in this process.

			alternative be considered? If an alternative is appropriate, describe what that should be. A motion to seal under CRC 2.551 is sufficient.	
			• Should all Judicial Council forms to be used only by participants in the Safe at Home program be maintained in a single category and given the same identifying form prefix? JC forms used only by Safe at Home participants should be maintained in a single category and be given the same identifying prefix.	The proposed form will be modified in accordance with this suggestion, as SH-001.
			The advisory committee also seeks comments from courts on the following cost and implementation matters:	
			• 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? CMS configuration may be needed to address new/revised forms and sealing. Training for staff approximately 8 hours.	The committee thanks the commenter for responding to the question.
			• Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?	The committee thanks the commenter for responding to the question.

			No. Training will likely be needed for clerical and courtroom staff if current procedures are revised. Implementation will likely take six months if configuration is not needed and at least 6 months if both are needed.	
5.	Superior Court of Oange County Family Law and Juvenile Court by Fen-Ru Chen Administrative Analyst	NI	**Request for Specific Comments** • **Does the proposal appropriately address the stated purpose?** Yes. • **The proposed form includes a declaration by the protected party to establish, at least initially, a party's status as an active participant of the Safe at Home program. Should an alternative procedure be used, and, if so, what would that alternative be?** Recommend to require the applicant to bring to court the Identification Card that is given to active members of the program as the alternative procedure to be used. • **In a case where a protected party invokes the confidentiality protection of section 367.3 after an initial pleading has been filed by another party, can a motion to seal under rule 2.551 provide sufficient protection of the protected party's confidential information, or should an alternative be considered? If an alternative is appropriate, describe what that should be.** Yes.	The committee appreciates the comments. The committee thanks the commenter for responding to the question. The committee agrees that bringing an identification card to court may be one way to establish participation in the program, but doing so may not be adequate to establish active participation. (According to the Secretary of State, a party's participation in the program could be terminated before the expiration date on the card.) For this reason, the committee has declined to require filers to bring the card with them at the time of filing this form. The committee is considering the treatment of past filings and the Safe at Home program in the next rule-making and forms cycle.

			Rule 2.551 does not address the past filings. To prevent the disclosure by the pre-existing filings, recommend to have an expediated process for the previous filings once the request is granted. • **Should all Judicial Council forms to be used only by participants in the Safe at Home program be maintained in a single category and given the same identifying form prefix?** Yes, it would be beneficial for the participants to find the forms. • **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?** Implementation would require staff training, procedure revision, and updates to the case management system. • **Would three (3) months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation:** Yes.	The proposed form will be modified in accordance with this suggestion, as SH-001. The committee thanks the commenter for responding to the question. The committee thanks the commenter for responding to the question.
6.	Superior Court of Orange County Civil and Appellate Division Management and Analyst Team	NI	Does the proposal appropriately address the state purpose?	The committee appreciates the comments, and thanks the commenter for responding to the question.

			The proposal appropriately addresses the stated purpose. Creating this new form will help the public as well as the court identify cases that require special handling under this new law. The proposed form includes a declaration by the protected party to establish, as least initially, a party's status as an active participant in the Safe at Home program. Should an alternative procedure be used, and, if so, what would that alternative be? The declaration is signed under penalty and perjury, which is a standard way for holding parties accountable and should be sufficient. The court can always inquire further as to active participation, either on its own motion or if brought by the opposing party. In a case where a protected party invoked confidentiality protection of section 367.3 after an initial pleading has been file by another party, can a motion to seal under rule 2.551 provide sufficient protection of the protected party's confidential information, or should an alternative be considered? If an alternative is appropriate, describe what that should be. If the request comes in after an initial pleading, a motion to seal is sufficient; however, the motion should be expedited, via ex parte. The court can then decide based on proof of participation provided or other representations made regarding participation. In order to address the protection of the requesting party, the motion to seal should be heard fairly quickly. Courts may handle such	The committee has recommended retaining the form's declaration of active participation. . The committee is considering this suggestion in the next rule-making cycle.

			motions differently; however, it should be the party's responsibility to bring it to the court's attention in order to expedite hearing the motion.	
			Should all Judicial Council forms to be used only by participants in the Safe at Home program be maintained in a single category and given the same identifying form prefix? Creating a single category and identifying prefix would be helpful for participants in the Safe at Home program to understand specifically what forms are to be used and in what legal actions.	The proposed form will be modified in accordance with this suggestion, as SH-001.
			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? Implementation of this new form would have minimal impact. A similar process related to other confidential information forms is already in place. Training would not be needed, drafting and posting a new procedure would be enough. The approximate level of effort is estimated at 2 hours FTE by a Program Coordinator Specialist over approximately two weeks to revise procedures, approve through workflow and post.	The committee thanks the commenter for responding to the question.
			Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes, three months would be sufficient.	The committee thanks the commenter for responding to the question.

			How well would this proposal work in courts of different sizes? Larger courts may be impacted with more of these filings, but workload is estimated to be low.	The committee thanks the commenter for responding to the question.
7.	Superior Court of San Diego County By Mike Roddy Executive Officer	A	Does the proposal appropriately address the stated purpose? Yes. The proposed form includes a declaration by the protected party to establish, at least initially, a party's status as an active participant of the Safe at Home program. Should an alternative procedure should be used and, if so, what would that alternative be? Yes, the protected party should provide proof that they are an active participant in the Safe at Home program. Individuals may be terminated from the Safe at Home program, for reasons listed on the Secretary of State's website, and no longer covered by the program's protections. In a case where a protected party invokes the confidentiality protection of section 367.3 *after* an initial pleading has been filed by another party, can a motion to seal under rule 2.551 provide sufficient protection of the protected party's confidential information, or should an alternative be considered? If an alternative is appropriate, describe what that should be. A motion under rule 2.551 is sufficient. Should all Judicial Council forms to be used only by participants in the Safe at Home program be maintained in a single category and	The committee appreciates the comments, and notes the commenter's support for the proposal. The proposed form asks filers to certify their *active* participation in the program. The committee has recommended retaining the form's declaration of active participation, and requiring proof of participation only by court order. The committee agrees that a motion under rule 2.551 is an available option, but is considering recommending in the next rule-making cycle additional forms to assist filers in this process. The proposed form will be modified in accordance with this suggestion, as SH-001.

			given the same identifying form prefix? Yes, it would benefit both the parties and court personnel. General Comment: Page 3 of the Invitation provides that "Receipt of this form is therefore likely to be the primary way plaintiffs and petitioners will learn that a defendant or respondent, *or an objector in a probate proceeding, is acting under section 367.3*." Is it this committee's position that that CCP 367.3 also applies to probate proceedings? Is the committee interpreting "civil proceeding" under 367.3(b)(1) to include the broader definition of civil (i.e. including family and probate actions)?	Yes, the committee is not aware of any limitation with respect to the scope of civil proceedings to which Code Civ. Proc., § 367.3 applies.
8.	The Executive Committee of the Family Law Section of the California Lawyers Association (FLEXCOM) by Justin M. O'Connell FLEXCOM Legislation Chair California Lawyers Association and Saul Bercovitch Director of Governmental Affairs California Lawyers Association	A	No specific comments provided.	The committee notes the commenter's support for the proposal.

Item number: 14

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Practice and Procedure: Enforcement of Judgment Forms—Exemptions (revise forms EJ-130, EJ-150, EJ-155, and EJ-156; adopt forms EJ-157, EJ-157-INFO, EJ-158, and EJ-159)

Committee or other entity submitting the proposal:
Civil and Small Claims Advisory Committee

Staff contact (name, phone and e-mail): Sarah Abbott, 415-865-7687, Sarah.Abbott@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Exemptions to Enforcement of Money Judgments: Senate Bill 616 expands and revises certain exemptions available to judgment debtors and the process under which they may claim exemptions. Current forms will be revised, or new forms or rules developed as appropriate to implement this bill

If requesting July 1 or out of cycle, explain:

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

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.: W20-05
For business meeting on: May 14–15, 2020

Title
Civil Practice and Procedure: Enforcement of Judgment Forms—Exemptions

Rules, Forms, Standards, or Statutes Affected
Revise forms EJ-130, EJ-150, EJ-155, and EJ-156; approve forms EJ-157, EJ-157-INFO, EJ-158, and EJ-159

Recommended by
Civil and Small Claims Advisory Committee
Hon. Ann I. Jones, Chair

Agenda Item Type
Action Required

Effective Date
September 1, 2020

Date of Report
March 25, 2020

Contact
Sarah Abbott, 415-865-7687
sarah.abbott@jud.ca.gov

Executive Summary

The Civil and Small Claims Advisory Committee proposes that the Judicial Council revise four enforcement of judgment forms and approve four new forms to implement the provisions of Senate Bill 616, which recently amended several laws regarding exemptions to enforcement of civil money judgments. The amendments have two primary purposes: extending the time for making and opposing claims of exemption, and creating a new automatic exemption for deposit accounts. The amendments also create a new automatic exemption for Federal Emergency Management Agency funds provided to a judgment debtor, as well as a "hardship exemption" for deposit accounts.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council, effective September 1, 2020:

1. Approve *Ex Parte Application for Order on Deposit Account Exemption* (form EJ-157), *Instructions for Ex Parte Application for Order on Deposit Account Exemption* (form EJ-

157-INFO), *Declaration Regarding Notice and Service for Ex Parte Application for Order on Deposit Account Exemption* (form EJ-158), and *Order on Application for Designation of Deposit Account Exemption* (form EJ-159) to implement the new ex parte process established in section 704.220(e) of the Code of Civil Procedure.

2. Revise *Writ of Execution* (form EJ-130), *Notice of Levy* (form EJ-150), *Exemptions From the Enforcement of Judgments* (form EJ-155), and *Current Dollar Amounts of Exemptions From Enforcement of Judgments* (form EJ-156) to reflect new provisions enacted in Senate Bill 616 and modify existing statutory citations as appropriate, and to authorize the committee to correct the amount of the automatic exemption for deposit accounts, set by the California Consumer Price Index for All Consumers, on form EJ-156 before the form's effective date.

The new and revised forms are attached at pages 16–32.

Relevant Previous Council Action

The Judicial Council first approved *Writ of Execution* (form EJ-130) in January 1978 and the form has been revised several times since then, most recently in 2018. *Notice of Levy* (form EJ-150) was most recently revised in 2014. *Exemptions From the Enforcement of Judgments* (form EJ-155) was adopted in 1983 to implement Code of Civil Procedure[1] section 681.030(c), which requires that the council prepare a form listing each state and federal exemption from enforcement of a money judgment against a natural person, and was most recently revised in 2018. *Current Dollar Amounts of Exemptions From Enforcement of Judgments* (form EJ-156) is revised by the council at three-year internals pursuant to section 703.150(d) and (e) to adjust the dollar amounts of several exemptions provided in sections 703.140(b) (for cases under title 11 of the United States Code) and 704.010 et seq. (for other cases) to reflect changes in the California Consumer Price Index for All Consumers (CCPI).[2] Form EJ-156 was recently revised effective April 1, 2019, but must be revised again at this time to include the dollar amount of the new automatic deposit account exemption created by section 704.220.[3]

[1] All statutory references herein are to the Code of Civil Procedure unless otherwise noted.

[2] In 2004, the Judicial Council authorized the Administrative Office of the Courts to prepare a list of the amounts of certain exemptions from enforcement of judgments and to periodically update the list as required by statute. Pursuant to this authorization, a list entitled *Current Dollar Amounts of Exemptions From Enforcement of Judgments* was prepared and posted on the California Courts website in April 2004. The list contained the dollar amounts of exemptions effective as of April 1, 2004, and indicated that further adjustments would be made every three years. As statutorily mandated, the exemption amounts on the list were adjusted in 2007, 2010, 2013, 2016, and 2019. The council, rather than the Administrative Director, began approving the revisions to the form in 2013.

[3] As discussed further below, unlike the other amounts listed on form EJ-156 which are to be adjusted triennially, the amount of the new automatic exemption for a deposit account under section 704.220(a) is to be adjusted *annually* effective July 1 by the Department of Social Services pursuant to Welfare and Institutions Code section 11453 to reflect the minimum basic standard of adequate care for a family of four as established by section 11452. Thus, going forward, form EJ-156 will need to be revised annually to reflect changes in the amount of the automatic exemption due to changes in the CCPI.

Analysis/Rationale

The Civil and Small Claims Advisory Committee recommends the following proposed revisions to existing forms and the adoption of new forms to implement the provisions of Senate Bill 616.[4]

Change in time frame for making or opposing claims of exemption (revised form EJ-150)

SB 616 amends section 703.520(a) of the Code of Civil Procedure, effective September 1, 2020, to provide that a judgment debtor may make a claim of exemption by filing it with the levying officer within 15 days after the date the notice of levy has been served, or within 20 days if service is by mail. (Under current law, the time frame is within 10 days or 15 days if service is by mail.) This section has also been amended to provide that the date of filing is either (1) the date the levying officer receives the claim; or (2) the postmark date, if the claim was given a tracking number and mailed by the U.S. Postal Service or another common carrier. The proposed *Notice of Levy* (form EJ-150) has been revised to reflect these changes.[5]

New exemptions to enforcement of civil money judgments

SB 616 creates two new automatic exemptions: section 704.220 creates an automatic exemption for deposit accounts generally, and section 704.230 creates an automatic exemption for money provided to the judgment debtor by the Federal Emergency Management Agency. The statute directs the council to adopt or revise forms to implement the new provisions regarding the automatic exemption for deposit accounts.[6] SB 616 also creates a "hardship exemption" for money in a judgment debtor's deposit account that is not otherwise exempt "to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor."[7]

Existence and amount of new exemptions (revised forms EJ-155 and EJ-156)

The Judicial Council is required to maintain a list of the state and federal exemptions from enforcement of a money judgment, with citations to the relevant statute and information on how to find the amount of the exemptions.[8] This list is set out in *Exemptions From the Enforcement of Judgments* (form EJ-155). The committee proposes revising form EJ-155 to reflect the new laws by adding "Deposit Accounts (generally)" and "Deposit Accounts (hardship)" with appropriate citations under the existing category for deposit accounts, which has, until now, been limited to

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[4] Sen. Bill 616 (Stats. 2019, ch. 552), *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB616*.

[5] See form EJ-150, page 2, item 3 of the "Information for Judgment Debtor" section. Other clarifying changes have been made to item 3 based on public comments received, and these additional changes to form EJ-150 are discussed below. Parallel amendments were made to the statutory provisions relating to the judgment creditor's opposition (if any) to the claim of exemption (see § 703.550), but because information about such opposition is not included on any Judicial Council forms, no revisions are needed to reflect those statutory changes.

[6] § 704.220(g).

[7] § 704.225.

[8] § 681.030(c).

specific types of accounts for which exemptions have been available. An item has also been added to this form for the new exemption for money provided to the judgment debtor by the Federal Emergency Management Agency.[9] Form EJ-155 is also being revised, postcirculation, to correct citations for certain federal exemptions that have changed over the years[10] and to add the exemptions for Supplemental Security Income (both generally under the federal code and when held in direct deposit accounts under state law), and for directly deposited public benefits that were inadvertently omitted previously.[11]

The dollar amounts of certain exemptions are set out in *Current Dollar Amounts of Exemptions From Enforcement of Judgments* (form EJ-156). By statute, the Judicial Council is responsible for adjusting the dollar amounts of these exemptions in April of every third year based on changes in the CCPI and for publishing the revised amounts.[12] Although the new automatic deposit account exemption will, by the terms of the statute, be adjusted annually by the Department of Social Services,[13] rather than triennially by the council, the committee proposes adding the amount of the new automatic deposit account exemption to form EJ-156, along with an explanation that this exemption amount will be adjusted annually. The current amount of the exemption is $1,724.[14] However, changes to the CCPI are scheduled to be made effective July 2020, before proposed revised form EJ-156 becomes final in September. These changes will likely affect the current dollar amount of the automatic exemption for deposit accounts currently included on proposed revised form EJ-156. The Civil and Small Claims Advisory Committee therefore requests that the council authorize the committee to correct the amount of this exemption on form EJ-156 as needed for consistency with section 704.220(a) after council

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[9] This is the only proposed form revision relating to new section 704.230.

[10] For example, Lighthouse Keepers Widows Benefits are now titled Lighthouse Keepers Surviving Spouses Benefits, and the code citations for exemptions for Veterans Benefits, Veterans Medal of Honor Benefits, and Railroad Retirement Benefits have all been revised.

[11] There has also been one item deleted from the form, a reference to Code of Civil Procedure section 704.210, which simply states that property that is not subject to enforcement of judgment is exempt without making a claim. That section does not itself provide for an exemption, and thus need not be on this list.

[12] § 703.150; see also form EJ-156.

[13] The amount of the new deposit account exemption is not stated as a dollar amount, but defined in section 704.220(a) as:

> an amount equal to or less than the minimum basic standard of adequate care for a family of four for Region 1, established by Section 11452 of the Welfare and Institutions Code and as annually adjusted by the State Department of Social Services pursuant to Section 11453 of the Welfare and Institutions Code.

Welfare and Institutions Code section 11453 provides that the amounts in section 11452 are to be adjusted annually, effective July 1, by the Department of Social Services.

[14] See Dept. of Social Services, All County Letter No. 19-47 (issued May 15, 2019), available at *http://www.cdss.ca.gov/Portals/9/ACL/2019/19-47.pdf?ver=2019-05-15-133708-453*.

approval and before the form is published and distributed to the public. Form EJ-156 will need to be revised annually after that point.

A new footnote has also been added to form EJ-156, stating that although the new automatic exemption does not preclude or reduce any other exemption applicable to deposit accounts, if the exemption amount for the deposit account applicable under other automatic exemptions—such as those applicable for direct deposit of social security benefits or public benefits—is greater under the other exemptions, then those apply instead of this one.[15]

Exceptions to the deposit account exemption (revised form EJ-130)

Although the new deposit account exemption is automatic and does not require a party to make a claim for the exemption to be applied by a financial institution, the exemption does not apply in all cases. Enforcement of judgments for wages owed, child or spousal support, or liability to the state government are not subject to the exemption.[16] In order to ensure that financial institutions are aware of whether a levy is based on a judgment to which this exemption does or does not apply, the new law amends section 699.520 to mandate that the content of a writ of execution now include information as to whether the underlying judgment is for wages owed or child or spousal support.[17]

This information has been added to the revised *Writ of Execution* (form EJ-130; see the instruction following item 5 and new item 22). The instruction is on the front of the form (the complete item could not fit there) so that it will be seen when a party completing the form would otherwise only complete the first page.

Notice of Levy (form EJ-150)

Senate Bill 616 expressly requires that a levy against a deposit account include a written description of the requirements of new section 704.220.[18] The information provided on the back of the revised *Notice of Levy* (form EJ-150) has been expanded to include this information, as follows:

- Information for Judgment Debtor—New item 2 notes that there are automatic exemptions that financial institutions should apply to a deposit account before providing funds to a levying officer, and directs the reader below for more information.
- Information for Person Other Than Judgment Debtor—New item 2 provides a similar advisement to those who have received the levy, stating that financial institutions are

[15] § 704.220(b).

[16] § 704.220(c).

[17] The new law does not mandate that the writ of execution include whether the underlying action is based on a state claim. Because the state has a separate set of levy forms that, by their use, will indicate to the financial institution that the underlying judgment is for liability to the state, identifying whether the exemption applies to such judgments should not be a problem.

[18] § 704.220(d).

required to apply applicable exemptions to deposit accounts. Item 3 also now specifies that a Memorandum of Garnishee must be completed within 10 days.

- Information About Deposit Accounts—This section has been added to:
    - Describe the new automatic exemption and list the exceptions thereto, noting that no claim is required (§ 704.220(a));
    - Note that if there are other applicable automatic exemptions, the larger of the exemptions should be applied (§ 704.220(b)) and give examples of such other exemptions; and
    - Advise both judgment debtor and judgment creditor that if they want to designate to which of multiple accounts the automatic exemption should apply, they should file an ex parte application with the court, as provided in section 704.220(e). It also advises that they do so promptly, because nothing in the new section requires the financial institution to delay in determining to which of multiple accounts to apply the exemption.

In addition, an item identical to new item 22 on the *Writ of Execution* (form EJ-130) has also been added to form EJ-150 (see new item 2), to communicate clearly to the financial institution that receives the levy whether the judgment is excepted from the automatic exemption for deposit accounts.

New ex parte application process (new forms EJ-157, EJ-157-INFO, EJ-158, and EJ-159)
Senate Bill 616 adds provisions for determining to which deposit account the new automatic exemption should be applied in situations where a judgment debtor has more than one deposit account. Subparagraph (e)(2) of section 704.220 addresses the situation where a judgment debtor has multiple accounts at a single financial institution, while subparagraph (e)(3) addresses the situation where a judgment debtor has multiple accounts at two or more financial institutions. If the former (multiple accounts in a single institution), either party *may* apply for a determination as to how and to which account the exemption should be applied. If the latter (multiple accounts in multiple financial institutions), the judgment creditor *must*, and the judgment debtor *may*, apply for a determination as to how and to which account the exemption should be applied. If no order is served on a financial institution designating the specific account, each institution is to apply the exemption.

The statute provides that the parties may obtain a determination by filing "an ex parte application . . . for a hearing to establish how and to which account the exemption should be applied." This language is somewhat unclear because generally a party either (1) makes an ex parte application for an order and no hearing is held, or (2) moves for an order with a noticed hearing date. The committee understands the statute to create a new process allowing either a hearing on shortened time or a true ex parte order, with no further hearing, if the circumstances warrant (i.e., the applicant can show irreparable harm to the property being levied if immediate action is not

taken).[19] The committee recommends new forms to implement this new process, and the proposed forms reflect its understanding of the process.

Form EJ-157

The proposed *Ex Parte Application for Order on Deposit Account Exemption* (form EJ-157) is to be signed under penalty of perjury, and includes the following:

- Check boxes at the top to indicate whether the application is being made for an ex parte order or for a hearing on shortened time at which the court can make the requested designation;
- A pointer to the new information sheet (form EJ-157-INFO), noting that it describes the notice requirements;
- A statement explaining why the party is making the application;
- Identification of the writ of execution and notice of levy that the application pertains to, and instructions to attach copies or provide an explanation as to why a copy is not attached;
- Designation of how and to which account(s) the applicant is requesting that the exemption be applied; and
- The factual basis for the request that an order be issued without any further hearing, if there is such a request.

Form EJ-157-INFO

Because the committee expects self-represented parties to be among those making the applications, a detailed *Instructions for Ex Parte Application for Order on Deposit Account Exemption* (form EJ-157-INFO) has been created along with the new proposed forms. The instructions are intended to help a party understand the requirements of an ex parte application, in general, as well as the new application, in particular. The party is directed to check with the court regarding scheduling of ex parte applications and any applicable local rules, and to review the statewide rules of court relating to ex parte applications—particularly rules 3.1203 through 3.1207 governing notice, service, and appearance. The rules are also summarized in the instructions. The instruction sheet also includes a warning that a judgment debtor applicant should act promptly, because nothing in the new law instructs a financial institution to defer complying with a notice of levy to await a court order.

Form EJ-158

Because the requirements of notice and service of ex parte applications are complex, the proposal includes a *Declaration Regarding Notice and Service for Ex Parte Application for Order on Deposit Account Exemption* (form EJ-158). This form is based on a similar Judicial Council form declaration regarding notice and service of ex parte applications in family law

[19] The applicant need not show irreparable harm or immediate danger to file the application because the new statute expressly allows for an ex parte application. (See Cal. Rules of Court, rule 3.1202(c).) But because the new statute provides for a hearing on the application, a factual showing is necessary if a party is seeking to avoid the hearing.

cases (form FL-303). It contains all of the content required for notice and service in compliance with rules 3.1203 and 3.1204.

Form EJ-159

The proposed new forms also include an *Order on Application for Designation of Deposit Account Exemption* (form EJ-159) designed to be used by the court for several alternative rulings:

- To deny the application;
- To set a hearing on shortened time, with an item for setting the hearing, plus items for time for service and time for filing any opposition;
- To rule on the application ex parte without a further hearing; or
- To rule on the application after the hearing.

Each type of ruling is a separate item (see items 3, 4, 5, and 6), with a check box to indicate which ruling the court is making. If the court were making a substantive ruling (checking item 5 or 6), the court would then proceed to items 7 (findings) and 8 (designating the account or accounts to which the exemption is to apply).

Policy implications

Because the proposal is intended only to implement new section 704.220 by developing new forms, as mandated in that law, and revise existing enforcement of judgment forms to reflect the amendments to other statutes made in SB 616, no policy implications relating to this proposal were raised during the comment period or related committee discussions.

Comments

The proposal was circulated for public comment between December 13, 2019, and February 11, 2020, as part of the regular winter comment cycle, and the committee received nine comments. Five commenters agreed with the proposal if modified, including one individual,[20] two professional organizations (Orange County Bar Association (OCBA) and Public Law Center (PLC)), one court (Superior Court of San Diego County), and one internal body (Trial Court Presiding Judges Advisory Committee/Court Executives Advisory Committee Joint Rules Subcommittee (JRS)). Four commenters did not indicate a position on the proposal but provided substantive comments, including two divisions of a superior court (Superior Court of Orange County's Family Law and Juvenile Court and Civil and Appellate Division Management and Analyst Team), a professional organization (California Association of Judgment Professionals (CAJP)), and a group of professional organizations commenting collectively (East Bay Community Law Center, Bet Tzedek, Public Counsel, and UCI Law (EBCLC)). A chart with the

[20] Because the individual commenter's comments do not appear to relate to this proposal, the committee believes they may have been intended for a different proposal before the council this cycle, or perhaps as general public comments to the council.

full text of the comments received and the committee's responses is attached at pages 33–79. The main comments and the committee's responses thereto are discussed below.

Writ of Execution (form EJ-130)

Comments relating to the proposed revisions to form EJ-130 primarily addressed minor formatting and word change suggestions intended to improve the consistency and clarity of the form, and the committee agreed with most of these suggestions. In particular, based on public comment, the committee further revised form EJ-130 to (1) conform the format and wording of the caption to other similar forms; (2) change the reference in the caption from "Plaintiff:" and "Defendant:" to "Plaintiff/Petitioner:" and "Defendant/Respondent:" on this and all of the revised and new forms to account for family law and other types of cases; (3) correct typographical issues relating to statutory citations (item 19b) and update cross-references to other items (item 24c, 25a(4), 25b, 25e); and (4) add a text box in item 22c.

However, some suggestions relating to form EJ-130 were not incorporated. For example, CAJP suggested that new items be inserted after items 4 and 22 to reference additional names on an "affidavit of identity," and that item 24c be condensed into a single sentence and require the use of an attachment. The committee decided not to implement these more substantive suggested revisions to form EJ-130 at this time, though it may consider them in the future.

Notice of Levy (form EJ-150)

As above, several of the comments relating to the proposed revisions to form EJ-150 were directed to minor formatting and word change suggestions intended to improve the consistency and clarity of the form, and the committee incorporated many of these suggestions. In particular, the committee further revised form EJ-150 based on public comment to: (1) conform the format and wording of the caption to other similar forms, (2) add a text box in item 2, (3) remove the term "(defendant)" from item 3 of the "Information About Deposit Accounts" section on page 2, and (4) make other minor suggested word changes throughout.

However, the committee declined to incorporate other suggested revisions to form EJ-150. For example, on page 1, CAJP suggested that item 1b be modified to refer to a new "Attachment 1b" but the committee declined to implement this suggestion because it would be more than a technical change and could require a request for further public comment, though it may be considered in the future. The committee also declined to implement suggestions that items 3 and 4 on page 1, and items 2 and 3 of the "Information About Deposit Accounts" section on page 2, be revised to include specific statutory references, as this level of statutory specificity is not typical on a form of this type.

EBCLC made some specific suggestions to the "Information for Judgment Debtor" section on page two of form EJ-150 intended to make the form less confusing for debtors. The committee agreed with the suggestion that the new item in this section—circulated for comment as item 3, referencing the new automatic exemptions that financial institutions are to apply—be moved above existing item 2, and that various word changes be made to existing item 2.

However, the committee concluded that the new item in the "Information for Judgment Debtors" section does not require the additional further revision suggested by EBCLC. The suggested language appears to be similar but more verbose than the language of the item as circulated for comment, and may also be duplicative of the new "Information About Deposit Accounts" section at the bottom of the page.

Moreover, PLC suggested adding an item addressing the newly created "hardship exemption" of section 704.225 to the "Information About Deposit Accounts" section at the bottom of form EJ-150, page 2, such as: "A debtor may also claim that the funds in a deposit account are exempt from levy because such levy would cause the debtor a hardship under § 704.225." The committee decided not to add this item because nonautomatic exemptions such as this one are already addressed in the "Information for Judgment Debtor" section above.

Exemptions From The Enforcement of Judgments (form EJ-155)

There were very few comments specific to the revisions to form EJ-155. The committee incorporated a suggestion to revise the fourth sentence to refer to a claim of exemption form received "with the Notice of Levy" packet, rather than "from the levying officer," to reduce any confusion about where one may obtain a claim of exemption form. The committee also incorporated suggestions that the new "hardship exemption" created by section 704.225 also be listed under "Deposit Accounts."

Current Dollar Amounts of Exemptions From Enforcement of Judgments (form EJ-156)

There were very few comments specific to the revisions to form EJ-156. The committee agreed with a suggestion to add the following phrase to the first sentence of page 1: "for cases under Title 11 of the U.S. Code (i.e., Bankruptcy)" for clarity, and revised the sentence accordingly. In response to a comment from CAJP, the committee also revised the second sentence of page 2 to provide further specificity about how the amount of the automatic deposit account exemption is calculated by adding: "pursuant to Welf. & Inst. Code, § 11453 to reflect the minimum basic standard of adequate care for a family of four as established by § 11452.*"

However, the committee decided not to further revise form EJ-156 to include a reference to the "hardship exemption" of section 704.225, as suggested by two commenters. This form is the published list of exemptions in the article beginning with section 704.010 that have dollar amounts that are adjusted every three years.[21] Because the hardship exemption does not have a set dollar amount, it would be inappropriate to include it on form EJ-156.

Ex Parte Application for Order on Deposit Account Exemption (form EJ-157)

Comments relating to proposed new form EJ-157 were directed primarily to minor formatting and word change suggestions intended to improve the consistency and clarity of the form, and the committee accepted most of these suggestions. Among others, the committee agreed with suggestions to (1) conform the format and wording of the caption to other similar forms; (2) change the reference in the caption from "Plaintiff:" and "Defendant:" to "Plaintiff/Petitioner:"

[21] § 703.150.

and "Defendant/Respondent:"; (3) remove parenthetical references to "plaintiff" and "defendant" in item 1, as those terms are inapplicable in some cases; (4) update a cross-reference in item 4; (5) remove the unnecessary space in the "Declaration by Applicant" section; and (6) add the word "original" to judgment creditor under the signature line.

Additionally, the committee gave significant consideration to comments by PLC and EBCLC that some debtors may not have copies of the *Writ of Execution* and *Notice of Levy*, and thus form EJ-157 should only require that a copy of these documents be attached "if possible" or "if available," and a litigant's best efforts to obtain these documents should be sufficient. While the committee is sympathetic to this possibility, copies of these documents may very likely be necessary for a court to fully and fairly evaluate the ex parte application, and presumably most litigants have or will be able to obtain copies. Therefore, the committee declined to revise the proposed new form to eliminate the request that the Writ of Execution and Notice of Levy be attached, as suggested, but instead modified the form to allow for a litigant to provide an explanation as to why the writ or notice of levy is not attached.

Additionally, OCBA commented that the fact that the automatic deposit account exemption is per debtor and not per account should be stated more clearly on the face of form EJ-157 itself. The committee declined to further revise the form as suggested because item 1 of the instructions for this form, form EJ-157-INFO, explicitly states that the exemption "is per judgment debtor, and not per account."

Instructions for Ex Parte Application for Order on Deposit Account Exemption (form EJ-157-INFO)

The only comments specific to proposed new form EJ-157-INFO relate to items 1 and 2. The suggestions for item 2 are clarifying word changes with which the committee agrees.

The committee also considered several more substantive comments relating to item 1 of form EJ-157-INFO. As circulated for comment, item 1 stated:

> 1. **Applicable Law.** Code of Civil Procedure section 704.220 provides that financial institutions must apply an automatic exemption when served a *Notice of Levy* on a judgment debtor's deposit account, if the underlying judgment is not based on wages owed or child or spousal support. The exemption (the amount of which can be found on form EJ-156) is per judgment debtor, not per account. If the judgment debtor has multiple deposit accounts, either the judgment debtor or judgment creditor may make an ex parte application to a court for an order designating how and to which deposit account the automatic exemption is to be applied. (See Code Civ. Proc., § 704.220(e).)

The Public Law Center suggested that item 1 be revised to reflect that a financial institution must automatically withhold the exempted amount, but without a specific order from the court the financial institution will choose which account to protect. EBCLC similarly suggested that item 1 be split into separate sentences, with a new item that reads: "If you have only one bank account,

your bank will automatically exempt the amount protected under the law. If you have more than one bank account, use this form to ask the court to tell your bank how to apply the exemption. If you do not, you will still receive the exemption but your bank will decide to which account(s) it applies." And JRS proposed that a sentence be added to the end of item 1 to read: "The judgment creditor must make this application if there are multiple deposit accounts at different institutions."

Additionally, both before this proposal was circulated and in connection with the public comments, the committee considered whether it is appropriate for the new ex parte application and order to allow for the automatic exemption for deposit accounts created by section 704.220 to be allocated among multiple accounts at either a single or multiple financial institutions. The statute is somewhat confusing as to exactly what kind of order a judgment debtor with multiple accounts may obtain. While it is clear that either party may obtain an order determining *to which* account the exemption should apply,[22] it is less clear whether a judgment debtor may obtain an order that the exemption be spread *among* multiple accounts at either a single or multiple financial institutions. The legislative history on this issue is contradictory,[23] but section 704.220(e) specifically states that "the exemption applies per debtor, not per account" and courts are to determine "*how and* to which account the exemption should be applied" (italics added).

In light of this lack of clarity, the Invitation to Comment on this proposal specifically asked for input on this issue, and commenters expressed differing opinions based on varying understandings of the new statute. For example, the Superior Court of San Diego County and PLC commented that allocation across multiple accounts should be allowed, with PLC noting that there could be reasons why a debtor would want to maintain a certain minimum balance in a particular account (for example, to avoid bank fees) and the debtor should be able to apply to have the exemption allocated across accounts to protect minimum balances. In contrast, the Orange County Bar Association opined that allocation might be permissible for multiple accounts at a single financial institution, but not for multiple accounts across multiple institutions. Orange County's Civil and Appellate Division Management and Analyst Team commented that allocation across accounts could create confusion, and JRS indicated that it is not necessary or a good idea to allow for allocation among multiple accounts at multiple banks, and it would make more sense to have the bank make the election since the exemption is automatic and the bank knows the relevant account balances.

Having carefully considered the unclear statutory language, contradictory legislative history, and public comments supporting varying understanding of the new law, the committee concluded that the statute should be understood as allowing for the automatic deposit account exemption to

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[22] § 704.220(e)(2)–(3).

[23] An Assembly Floor Analysis dated September 6, 2019, summarizes the bill as, among other things, providing a procedure for seeking a court order allocating the exemption among multiple accounts. On the other hand, a Senate Floor Analysis dated September 10, 2019, states on page 3 that the new law "limits the automatic exemption to one bank account per debtor." Both reports are available at *http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB616*.

be allocated among multiple accounts at either a single or multiple financial institutions. The committee ultimately determined that the best way to implement the new law is to allow courts to decide whether to allocate the automatic exemption among multiple accounts as part of the ex parte process, and the forms proposed by the committee therefore allow for designation of the exemption to be spread among accounts or applied to a single account.

To clarify applicable law and implement the spirit of the public comments seeking further specificity, the committee has revised item 1 of form EJ-157-INFO to read:

> 1. **Applicable Law.** Code of Civil Procedure section 704.220 provides that financial institutions **must** apply an automatic exemption when served a *Notice of Levy* on a judgment debtor's deposit account, if the underlying judgment is not based on wages owed or child or spousal support. The exemption (amount found of which can be found on form EJ-156) is per judgment debtor, not per account. The exemption is automatically applied; the judgment debtor does not need to take any action for the exempted amount to be protected.
>
> 2. **Multiple Accounts**.
>
> - If the judgment debtor has multiple deposit accounts at a single bank, either the judgment debtor or judgment creditor may make an ex parte application for an order designating how and to which account the exemption applies. The bank must automatically withhold the exempted amount, but without a specific court order it will choose to which account the exemption applies. (Code Civ. Proc. § 704.220(e)(2).)
>
> - If the judgment debtor has multiple deposit accounts at multiple financial institutions, the judgment creditor must and the judgment debtor may make this application. (Code Civ. Proc. § 704.220(e)(3).)

Declaration Regarding Notice and Service for Ex Parte Application for Order on Deposit Account Exemption (form EJ-158)

The only comments relating specifically to proposed new form EJ-158 were directed to minor formatting and word change suggestions intended to improve the consistency and clarity of the form, and the committee implemented these suggested revisions. In particular, the committee agreed with suggestions to (1) conform the format and wording of the caption to other similar forms; (2) change the reference in the caption from "Plaintiff:" and "Defendant:" to "Plaintiff/Petitioner:" and "Defendant/Respondent:"; and (3) include reference to the "original" judgment creditor, "assignee of record," and "assignee of record's attorney."

Order on Application for Designation of Deposit Account Exemption (form EJ-159)

The only comments relating specifically to form EJ-159 were directed to minor formatting and word change suggestions intended to improve the consistency and clarity of the form, and the committee agreed with these suggestions. In particular, the committee agreed with suggestions to

(1) conform the format and wording of the caption to other similar forms; (2) change the reference in the caption from "Plaintiff:" and "Defendant:" to "Plaintiff/Petitioner:" and "Defendant/Respondent:"; (3) include reference to the "original" judgment creditor, "assignee of record," and "assignee of record's attorney"; and (4) fix a typographical error in item 3c.

Alternatives considered

Because, as of September 1, 2020, current forms EJ-130, EJ-150, EJ-155, and EJ-156 would be out of compliance with law if not revised, the committee did not consider the alternative of not revising those forms. In addition, because the new statute expressly mandates the council to revise or adopt forms to implement the provisions in new section 704.220, the committee did not consider not developing the new proposed forms. The committee did, however, consider alternatives while developing the new forms.

In addition to those issues discussed above in connection with the public comments, the committee considered whether it would be helpful or appropriate to add an optional request for stay of enforcement of judgment while the application for designation of which deposit account to apply the exemption to is pending. The invitation to comment specifically requested input on this issue, and comments were received both in favor of and against an optional request for a stay of enforcement of judgment. For example, OCBA, the Superior Court of Orange County Family Law and Juvenile Court, and the Superior Court of Orange County Civil and Appellate Division Management and Analyst Team each commented that a process that would allow for a stay of enforcement would be helpful while the ex parte application is proceeding.

In contrast, the Superior Court of San Diego County commented that adding an optional stay of enforcement of judgment to the new ex parte application and/or order forms would not be helpful or appropriate. JRS commented that a stay of enforcement of the judgment is not authorized by statute, and CAJP pointed out that such a revision is not necessary because new form EJ-159 already has a spot for "other rulings" and this would seem to encompass a stay or a temporary injunction or restraining order when a court deems it appropriate. As another alternative, PLC suggested that form EJ-160 could be revised to add a section similar to that in the claim of exemption form: this would notify the levying officer, financial institution, and creditor that the debtor is seeking a court determination as to which account the exemption should apply.[24]

After considering the comments received on the issue, the committee decided for multiple reasons not to further revise the forms to include items addressing a potential stay of enforcement of judgment while the application is pending. First, as indicated in the comments, nothing in the new statute authorizes a stay of enforcement: no provision requires the bank to delay providing funds to the levying officer to allow for the filing of the ex parte application, nor the financial institution (or levying officer) to be given notice of an application or to take any

[24] The committee did not adopt this suggestion because it is beyond the scope of the proposal and nothing in the statute requires a party seeking an order to notify nonparties, and there is no requirement that a bank with notice that a debtor is seeking a court determination must delay handing over funds.

action (or delay taking any action) if such notice is provided. Second, the exemption is to be applied automatically, meaning that a judgment debtor should still have the exempted funds in a deposit account without a stay, even if the funds are not in the specific account that the judgment debtor prefers. If the judgment debtor has deposit accounts at multiple financial institutions, the exempted amount will remain in *each* account unless the judgment creditor obtains an order under section 704.220(e)(3) that the exemption be applied to a particular account. Third, if a case warrants a stay of enforcement of judgment or similar type of relief, new order form EJ-159 has a place for a court to make "other rulings" that could serve this purpose by allowing for a stay or something similar in appropriate cases.

Fiscal and Operational Impacts

Because SB 616 establishes new enforcement of judgment exemptions and creates a new ex parte application process for the deposit account exemption, the change in law will likely require additional training for clerks, judicial officers, and court legal services and self-help offices on the new and revised forms. In its comments, the Superior Court of San Diego County noted that internal procedures and case management systems would need to be updated and staff would need to be trained, but that three months from approval to effective date would be sufficient if final versions of the forms are provided 30 days in advance to give courts time to update procedures, configure local packets, and order printed stock.

The Superior Court of Orange County Civil and Appellate Division Management and Analyst Team similarly noted that new procedures would need to be developed or revised, staff trained, systems updated and tested, and estimated that this would require approximately 40 FTE hours by two employees over the course of approximately three months. JRS likewise commented that some training would be required, and workload would be increased for judicial and nonjudicial staff (and that sheriffs acting as levying officers might also be impacted). It appears from these comments that the potential implementation requirements, while not insignificant, do not present a barrier to adoption of the proposal.

Attachments and Links

1. Forms EJ-130, EJ-150, EJ-155, EJ-156, EJ-157, EJ-157-INFO, EJ-158, and EJ-159, at pages 16 to 32.
2. Chart of comments, at pages 33 to 79.
3. Link A: Sen. Bill 616, *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB616*
4. Link B: Bill Analysis of Sen. Bill 616, *http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB616*

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*): ☐ ATTORNEY FOR ☐ ORIGINAL JUDGMENT CREDITOR ☐ ASSIGNEE OF RECORD	*FOR COURT USE ONLY* **DRAFT** **03-16-2020** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CASE NUMBER:
WRIT OF ☐ **EXECUTION (Money Judgment)** ☐ **POSSESSION OF** ☐ **Personal Property** ☐ **Real Property** ☐ **SALE**	☐ **Limited Civil Case** (including Small Claims) ☐ **Unlimited Civil Case** (including Family and Probate)

1. **To the Sheriff or Marshal of the County of:**
   You are directed to enforce the judgment described below with daily interest and your costs as provided by law.
2. **To any registered process server:** You are authorized to serve this writ only in accordance with CCP 699.080 or CCP 715.040.
3. (Name):
   is the ☐ original judgment creditor ☐ assignee of record whose address is shown on this form above the court's name.
4. **Judgment debtor** *(name, type of legal entity if not a natural person, and last known address):*

   ☐ Additional judgment debtors on next page
5. **Judgment entered** on *(date):*
   (See type of judgment in item 22.)
6. ☐ Judgment renewed on *(dates):*
7. **Notice of sale** under this writ:
   a. ☐ has not been requested.
   b. ☐ has been requested *(see next page).*
8. ☐ Joint debtor information on next page.
9. ☐ Writ of Possession/Writ of Sale information on next page.
10. ☐ This writ is issued on a sister-state judgment.

For items 11–17, see form MC-012 and form MC-013-INFO.

11. Total judgment *(as entered or renewed)*	$
12. Costs after judgment *(CCP 685.090)*	$
13. Subtotal *(add 11 and 12)*	$
14. Credits to principal *(after credit to interest)*	$
15. Principal remaining due *(subtract 14 from 13)*	$
16. Accrued interest remaining due per CCP 685.050(b) *(not on GC 6103.5 fees)*	$
17. Fee for issuance of writ *(per GC 70626(a)(l))*	$
18. **Total amount due** *(add 15, 16, and 17)*	$

19. **Levying officer:**
    a. Add daily interest from date of writ *(at the legal rate on 15) (not on GC 6103.5 fees)* . . . . . $
    b. Pay directly to court costs included in 11 and 17 *(GC 6103.5, 68637; CCP 699.520(j))* . . . . . $
20. ☐ The amounts called for in items 11–19 are different for each debtor. These amounts are stated for each debtor on Attachment 20.

[SEAL]

Issued on *(date):* _____ Clerk, by _____, Deputy

NOTICE TO PERSON SERVED: SEE PAGE 3 FOR IMPORTANT INFORMATION.

Form Approved for Optional Use
Judicial Council of California
EJ-130 [Rev. September 1, 2020]

WRIT OF EXECUTION

Code of Civil Procedure, §§ 699.520, 712.010, 715.010
Government Code, § 6103.5
www.courts.ca.gov

Plaintiff/Petitioner: Defendant/Respondent:	CASE NUMBER:

21. ☐ Additional judgment debtor(s) *(name, type of legal entity if not a natural person, and last known address):*

22. The judgment is for *(check one):*

a. ☐ wages owed.
b. ☐ child support or spousal support.
c. ☐ other.

23. ☐ Notice of sale has been requested by *(name and address):*

24. ☐ Joint debtor was declared bound by the judgment (CCP 989-994)

a. *on (date):*
b. name, type of legal entity if not a natural person, and last known address of joint debtor:

a. *on (date):*
b. name, type of legal entity if not a natural person, and last known address of joint debtor:

c. ☐ Additional costs against certain joint debtors are itemized ☐ Below ☐ on Attachment 24c.

25. ☐ Additional judgment debtor(s) *(name, type of legal entity if not a natural person, and last known address):*

a. ☐ Possession of real property: The complaint was filed on *(date):*
(Check (1) or (2). Check (3) if applicable. Complete (4) if (2) or (3) have been checked.)

(1) ☐ The *Prejudgment Claim of Right to Possession* was served in compliance with CCP 415.46. The judgment includes all tenants, subtenants, named claimants, and other occupants of the premises.

(2) ☐ The *Prejudgment Claim of Right to Possession* was NOT served in compliance with CCP 415.46.

(3) ☐ The unlawful detainer resulted from a foreclosure sale of a rental housing unit. (An occupant not named in the judgment may file a *Claim of Right to Possession* at any time up to and including the time the levying officer returns to effect eviction, regardless of whether a *Prejudgment Claim of Right to Possession* was served.) *(See CCP 415.46 and 1174.3(a)(2).)*

(4) If the unlawful detainer resulted from a foreclosure (item 25a(3)), or if the *Prejudgment Claim of Right to Possession* was not served in compliance with CCP 415.46 (item 25a(2)), answer the following:

(a) The daily rental value on the date the complaint was filed was $

(b) The court will hear objections to enforcement of the judgment under CCP 1174.3 on the following dates *(specify):*

Item 25 continued on next page

Plaintiff/Petitioner: Defendant/Respondent:	CASE NUMBER:

25. b. ☐ Possession of personal property.
☐ If delivery cannot be had, then for the value *(itemize in 25e)* specified in the judgment or supplemental order.
c. ☐ Sale of personal property.
d. ☐ Sale of real property.
e. The property is described ☐ below ☐ On Attachment 25c.

NOTICE TO PERSON SERVED

WRIT OF EXECUTION OR SALE. Your rights and duties are indicated on the accompanying *Notice of Levy* (form EJ-150).

WRIT OF POSSESSION OF PERSONAL PROPERTY. If the levying officer is not able to take custody of the property, the levying officer will demand that you turn over the property. If custody is not obtained following demand, the judgment may be enforced as a money judgment for the value of the property specified in the judgment or in a supplemental order.

WRIT OF POSSESSION OF REAL PROPERTY. If the premises are not vacated within five days after the date of service on the occupant or, if service is by posting, within five days after service on you, the levying officer will remove the occupants from the real property and place the judgment creditor in possession of the property. Except for a mobile home, personal property remaining on the premises will be sold or otherwise disposed of in accordance with CCP 1174 unless you or the owner of the property pays the judgment creditor the reasonable cost of storage and takes possession of the personal property not later than 15 days after the time the judgment creditor takes possession of the premises.

EXCEPTION IF RENTAL HOUSING UNIT WAS FORECLOSED. If the residential property that you are renting was sold in a foreclosure, you have additional time before you must vacate the premises. If you have a lease for a fixed term, such as for a year, you may remain in the property until the term is up. If you have a periodic lease or tenancy, such as from month-to-month, you may remain in the property for 90 days after receiving a notice to quit. A blank form *Claim of Right to Possession and Notice of Hearing* (form CP10) accompanies this writ. You may claim your right to remain on the property by filling it out and giving it to the sheriff or levying officer.

EXCEPTION IF YOU WERE NOT SERVED WITH A FORM CALLED PREJUDGMENT CLAIM OF RIGHT TO POSSESSION. If you were not named in the judgment for possession and you occupied the premises on the date on which the unlawful detainer case was filed, you may object to the enforcement of the judgment against you. You must complete the form *Claim of Right to Possession and Notice of Hearing* (form CP10) and give it to the sheriff or levying officer. A blank form accompanies this writ. You have this right whether or not the property you are renting was sold in a foreclosure.

ATTORNEY OR PARTY WITHOUT ATTORNEY *(name and address):*
After recording, return to:

TEL NO.: FAX NO. *(optional)*:
EMAIL ADDRESS *(optional)*:
☐ ATTORNEY FOR ☐ ORIGINAL JUDGMENT CREDITOR ☐ ASSIGNEE OF RECORD

DRAFT

03-25-2020

Not approved by the Judicial Council

FOR RECORDER'S USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

STREET ADDRESS:

MAILING ADDRESS:

CITY AND ZIP CODE:

BRANCH NAME:

PLAINTIFF/PETITIONER:

DEFENDANT/RESPONDENT:

LEVYING OFFICER *(name and address):*

LEVYING OFFICER FILE NO.:

COURT CASE NO.:

NOTICE OF LEVY

under Writ of ☐ **Execution (Money Judgment)**

☐ **Sale**

TO THE PERSON NOTIFIED *(name):*

1. The judgment creditor seeks to levy upon property in which the judgment debtor has an interest and apply it to the satisfaction of a judgment as follows:
   a. Judgment debtor (name):
   b. The property to be levied upon is described:
      ☐ in the accompanying writ of possession or writ of sale.
      ☐ as follows:

2. The judgment is for *(check one):*
   ☐ wages owed. ☐ child/spousal support. ☐ other.
3. The amount necessary to satisfy the judgment creditor's judgment writ is
   a. Total amount due (less partial satisfactions) from line 18 of writ (form EJ-130) . . . . . $
   b. Levy fee . . . . . $
   c. Sheriff's disbursement fee . . . . . $
   d. Recoverable costs . . . . . $
   e. Total *(a through d)* . . . . . $
   f. Daily interest from line 19a of writ (form EJ-130) . . . . . $
4. You are notified as:
   a. ☐ a judgment debtor.
   b. ☐ a person other than the judgment debtor *(state capacity in which person is notified):*

(Read Information for Judgment Debtor or Information for Person Other Than Judgment Debtor on page two.)

Notice of Levy was
☐ mailed on *(date)*:
☐ delivered on *(date)*:
☐ posted on *(date)*:
☐ filed on *(date)*:
☐ recorded on *(date)*:

Date:

(TYPE OR PRINT NAME)

(SIGNATURE)

☐ Levying officer ☐ Registered process server

Form Approved for Optional Use
Judicial Council of California
EJ-150 [Rev. September 1, 2020]

NOTICE OF LEVY
(Enforcement of Judgment)

Code of Civil Procedure, § 699.540
www.courts.ca.gov

SHORT TITLE:	LEVYING OFFICER FILE NO.:	COURT CASE NO.:

–INFORMATION FOR JUDGMENT DEBTOR–

1. The levying officer is required to take custody of the property described in item 1 in your possession or under your control.
2. There are automatic exemptions that financial institutions should apply to a deposit account before providing funds to the levying officer. See below for more information.
3. You may claim any available exemption for your property. A list of exemptions can be found on form EJ-155. **If you wish to claim an exemption for personal property, you must do so within 15 days after this notice was delivered to you or 20 days after this notice was mailed to you** by filing a claim of exemption and one copy with the levying officer as provided in section 703.520 of the Code of Civil Procedure. The date of filing is calculated as the date the claim is received by the levying officer, or the date of the postmark if the claim is mailed and assigned a tracking number by the U.S. Postal Service or another common carrier. **If you do not claim an exemption, you may lose it and the property is subject to enforcement of a money judgment. If you wish to seek the advice of an attorney, you should do so immediately so that a claim of exemption can be filed on time.**
4. You are not entitled to claim an exemption for property that is levied upon under a judgment for sale of property. This property is described in the accompanying writ of sale. You may, however, claim available exemptions for property levied upon to satisfy damages or costs awarded in such a judgment.
5. You may obtain the release of your property by paying the amount of a money judgment with interest and costs remaining unpaid.
6. If your property is levied upon under a writ of execution or to satisfy damages and costs under a writ of possession or sale, the property may be sold at an execution sale, perhaps at a price substantially below its value. Notice of sale will be given to you. Notice of sale of real property (other than a leasehold estate with an unexpired term of less than two years) may not be given until at least 120 days after this notice is served on you. This grace period is intended to give you an opportunity to settle with the judgment creditor, to obtain a satisfactory buyer for the property, or to encourage other potential buyers to attend the execution sale.
7. All sales at an execution sale are final; there is no right of redemption.

– INFORMATION FOR PERSON OTHER THAN JUDGMENT DEBTOR –

1. If the property levied upon is in your possession or under your control and you do not claim the right to possession or a security interest, you must deliver the property to the levying officer. If you do not deny an obligation levied upon or do not claim a priority over the judgment creditor's lien, you must pay to the levying officer the amount that is due and payable and that becomes due and payable during the period of the execution lien, which lasts two years from the date of issuance of the writ of execution. You must execute and deliver any documents needed to transfer the property.
2. If you are a financial institution, you are required to apply applicable exemptions to deposit accounts. See below.
3. You must complete the accompanying Memorandum of Garnishee within 10 days.
4. If you claim ownership or the right to possession of real or personal property levied upon or if you claim a security interest in or lien on personal property levied upon, you may make a third-party claim and obtain the release of the property under sections 720.010–720.800 of the Code of Civil Procedure.
5. **Make checks payable to the levying officer shown on page 1.**

– INFORMATION ABOUT DEPOSIT ACCOUNTS –

1. If the levy is ***not*** to satisfy a judgment for wages owed, child or spousal support, or liability to the state government, financial institutions must automatically exempt money in a deposit account up to a certain dollar amount, under section 704.220 of the Code of Civil Procedure, with no claim of exemption required. See form EJ-156 for the exemption amount.
2. Other automatic exemptions may apply to deposit accounts, such as exemptions for directly deposited social security or public benefits under section 704.080. (See form EJ-156 for the exemption amounts.) Generally, the financial institution should apply the larger set of exemptions that apply to an account. See section 704.220(b).
3. If a judgment debtor has multiple accounts in one or more financial institutions, either the judgment creditor or judgment debtor may file an application in the superior court identified on the front of this form for an order as to which account the exemption should apply. (See section 704.220(e).) To get such an order, file an *Ex Parte Application for Order on Deposit Account Exemption* (form EJ-157) as soon as possible. (See EJ-157-INFO for instructions.) If the judgment debtor has more than one account in a financial institution, that institution may decide how and to which account to apply the exemption, unless it is served with a court order directing how to apply the exemption.

EXEMPTIONS FROM THE ENFORCEMENT OF JUDGMENTS

The following is a list of assets that may be exempt from levy in enforcing a judgment.

Exemptions are found in the United States Code **(USC)** and in the California codes, primarily the Code of Civil Procedure (**CCP**).

Because of periodic changes in the law, the list may not include all exemptions that apply in your case. The exemptions may not apply in full or under all circumstances. Some are not available after a certain period of time. You or your attorney should read the statutes.

If you believe the assets that are being levied on are exempt, file the claim of exemption form that you received with the *Notice of Levy* packet.

AMOUNT OF EXEMPTIONS: For the exemption amount, please refer to the code section listed below for each type of property. The current amounts of certain exemptions are listed in *Current Dollar Amounts of Exemptions From Enforcement of Judgments* (form EJ-156). The amounts of some of the exemptions are amended every three years and become effective immediately on April 1 under the provisions of Code of Civil Procedure section 703.150.

Type of Property	Code and Section
ABLE Accounts	Welf & I C § 4880(c)
Accounts *(See Deposit Accounts)*	
Appliances	CCP § 704.020
Art and Heirlooms	CCP § 704.040
Automobiles	CCP § 704.010
BART District Benefits	CCP § 704.110 Pub Util C § 28896
Benefit Payments:	
BART District Benefits	CCP § 704.110 Pub Util C § 28896
Charity	CCP § 704.170
Civil Service Retirement Benefits (Federal)	5 USC § 8346
County Employees Retirement Benefits	CCP § 704.110 Govt C § 31452
Disability Insurance Benefits	CCP § 704.130
Fire Service Retirement Benefits	CCP § 704.110 Govt C § 32210
Fraternal Organization Funds Benefits	CCP § 704.130 CCP § 704.170
Health Insurance Benefits	CCP § 704.130
Irrigation System Retirement Benefits	CCP § 704.110
Judges Survivors Benefits (Federal)	28 USC § 376(n)
Legislators Retirement Benefits	CCP § 704.110 Govt C § 9359.3
Life Insurance Benefits:	
Group	CCP § 704. 100
Individual	CCP § 704. 100
Lighthouse Keepers Surviving Spouses Benefits	33 USC § 775
Longshore & Harbor Workers Compensation or Benefits	33 USC § 916
Military Benefits:	
Retirement	10 USC § 1440
Survivors	10 USC § 1450
Municipal Utility District Retirement Benefits	CCP § 704.110 Pub Util C § 12337
Peace Officers Retirement Benefits	CCP § 704.110 Govt C § 31913
Pension Plans (and Death Benefits):	
Private	CCP § 704.115
Public	CCP § 704.110
Public Assistance	CCP § 704.170 Welf & I C § 17409

Type of Property	Code and Section
Benefit Payments *(cont.)*	
Relocation Benefits	CCP § 704.180
Retirement Benefits and Contributions:	
Private	CCP § 704.115
Public	CCP § 704.110
Segregated Benefit Funds	Ins C § 10498.5
Social Security Benefits	42 USC § 407
Strike Benefits	CCP § 704.120
Supplemental Security Income	42 USC § 1383 42 USC § 407(d)
Transit District Retirement Benefits (Alameda and Contra Costa Counties)	CCP § 704.110 Pub Util C § 25337
Unemployment Benefits and Contributions	CCP § 704.120
Veterans Benefits	38 USC § 5301
Veterans Medal of Honor Benefits	38 USC § 1562
Welfare Payments	CCP § 704.170 Welf & I C § 17409
Workers Compensation	CCP § 704.160
Boats	CCP § 704.060 CCP § 704.710
Books	CCP § 704.060
Building Materials (Residential)	CCP § 704.030
Business:	
Licenses	CCP § 695.060 CCP § 699.720(a)(1)
Tools of Trade.	CCP § 704.060
Cars and Trucks (including proceeds)	CCP § 704.010
Cash	CCP § 704.070
Cemeteries:	
Land Proceeds	Health & SC § 7925
Plots	CCP § 704.200
Charity	CCP § 704.170
Claims, Actions and Awards:	
Personal Injury	CCP § 704.140
Worker's Compensation	CCP § 704.160
Wrongful Death	CCP § 704.150
Clothing	CCP § 704.020
Condemnation Proceeds	CCP § 704.720(b)
County Employees Retirement Benefits	CCP § 704.110 Govt C § 31452
Damages (*See Personal Injury and Wrongful Death)*	
Deposit Accounts:	
Deposit Accounts (generally)	CCP § 704.220

EXEMPTIONS FROM THE ENFORCEMENT OF JUDGMENTS

(Continued)

Type of Property	Code and Section
Deposit Accounts *(cont.)*	
Deposit Accounts (hardship)	CCP § 704.225
Escrow or Trust Funds	Fin C § 17410
Social Security Direct Deposits	CCP § 704.080
Direct Deposit Account:	
Social Security	CCP § 704.080
Supplemental Security Income	CCP § 704.080
Public Benefits	CCP § 704.080
Disability Insurance Benefits	CCP § 704.130
Dwelling House	CCP § 704.740
Earnings	CCP § 704.070 CCP § 706.050
Educational Grant	15 USC § 1673(a) Ed C § 21116
Employment Bonds	Lab C § 404
Federal Emergency Management Agency (FEMA) funds	CCP § 704.230
Financial Assistance:	
Charity	CCP § 704.170
Public Assistance	CCP § 704.170 Welf & I C § 17409
Student Aid	CCP § 704.190
Welfare *(See Public Assistance)*	
Fire Service Retirement	CCP § 704.110 Govt C § 32210
Fraternal Organizations	
Funds and Benefits	CCP § 704.130 CCP § 704.170
Fuel for Residence	CCP § 704.020
Furniture	CCP § 704.020
General Assignment for Benefit of Creditors	CCP § 1801
Health Aids	CCP § 704.050
Health Insurance Benefits	CCP § 704.130
Home:	
Building Materials	CCP § 704.030
Dwelling House	CCP § 704.740
Homestead	CCP § 704.720 CCP § 704.730
Housetrailer	CCP § 704.710
Mobilehome	CCP § 704.710
Homestead	CCP § 704.720 CCP § 704.730
Household Furnishings	CCP § 704.020
Insurance:	
Disability Insurance	CCP § 704.130
Fraternal Benefit Society	CCP § 704.110
Group Life	CCP § 704.100
Health Insurance Benefits	CCP § 704.130
Individual	CCP § 704.100
Insurance Proceeds—Motor Vehicle	CCP § 704.010
Irrigation System Retirement Benefits	CCP § 704.110
Jewelry	CCP § 704.040
Judges Survivors Benefits (Federal)	28 USC § 376(n)
Legislators Retirement Benefits	CCP § 704.110 Govt C § 9359.3
Licenses	CCP § 695.060 CCP § 720(a)(1)
Lighthouse Keepers Surviving Spouses Benefit	33 USC § 775
Longshore and Harbor Workers Compensation or Benefits	33 USC § 916
Military Benefits:	
Retirement	10 USC § 1440
Survivors	10 USC § 1450

Type of Property	Code and Section
Military Personnel—Property	50 USC § 3934
Motor Vehicle (Including Proceeds)	CCP § 704.010 CCP § 704.060
Municipal Utility District Retirement Benefits	CCP § 704.110 Pub Util C § 12337
Peace Officers Retirement Benefits	CCP § 704.110 Govt C § 31913
Pension Plans:	
Private	CCP § 704.115
Public	CCP § 704.110
Personal Effects	CCP § 704.020
Personal Injury Actions or Damages	CCP § 704.140
Prisoner's Funds	CCP § 704.090
Property Not Subject to Enforcement of Money Judgments	CCP § 704.210
Prosthetic and Orthopedic Devices	CCP § 704.050
Provisions (for Residence)	CCP § 704.020
Public Assistance	CCP § 704.170 Welf & I C § 17409
Public Employees:	
Death Benefits	CCP § 704.110
Pension	CCP § 704.110
Retirement Benefits	CCP § 704.110
Vacation Credits	CCP § 704.113
Railroad Retirement Benefits	45 USC § 231m
Railroad Unemployment Insurance	45 USC § 352(e)
Relocation Benefits	CCP § 704.180
Retirement Benefits and Contributions:	
Private	CCP § 704.115
Public	CCP § 704.110 Ins C § 10498.5
Segregated Benefit Funds	Ins C § 10498.6
Servicemembers Property	50 USC § 523(b)
Social Security	42 USC § 407
Social Security Direct Deposit Account	CCP § 704.080
Strike Benefits	CCP § 704.120
Supplemental Security Income	42 USC § 1383(d) 42 USC § 407
Student Aid	CCP § 704.190
Tools of Trade	CCP § 704.060
Transit District Retirement Benefits (Alameda and Contra Costa Counties)	CCP § 704.110 Pub Util C § 25337
Travelers Check Sales Proceeds	Fin C § 1875
Unemployment Benefits and Contributions	CCP § 704.120
Uniforms	CCP § 704.060
Vacation Credits (Public Employees)	CCP § 704.113
Veterans Benefits	38 USC § 5301
Veterans Medal of Honor Benefits	38 USC § 1562
Wages	CCP § 704.070 CCP § 706.050
Welfare Payments	CCP § 706.051 CCP § 704.170 Welf & I C § 17409
Workers Compensation Claims or Awards	CCP § 704.160
Wrongful Death Actions or Damages	CCP § 704.150

CURRENT DOLLAR AMOUNTS OF EXEMPTIONS FROM ENFORCEMENT OF JUDGMENTS
Code of Civil Procedure sections 703.140(b) and 704.010 et seq.

EXEMPTIONS UNDER SECTION 703.140(b)

The following lists the current dollar amounts of exemptions from enforcement of judgment under Code of Civil Procedure section 703.140(b) used in a case under title 11 of the United States Code (bankruptcy).

These amounts are effective April 1, 2019. Unless otherwise provided by statute after that date, they will be adjusted at each three-year interval, ending on March 31. The amount of the adjustment to the prior amounts is based on the change in the annual California Consumer Price Index for All Urban Consumers for the most recent three-year period ending on the preceding December 31, with each adjusted amount rounded to the nearest $25. (See Code Civ. Proc., § 703.150(d).)

Code Civ. Proc., § 703.140(b)	Type of Property	Amount of Exemption
(1)	The debtor's aggregate interest in real property or personal property that the debtor or a dependent of the debtor uses as a residence, or in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence,	$ 29,275
(2)	The debtor's interest in one or more motor vehicles	$ 5,850
(3)	The debtor's interest in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor (value is of any particular item)	$ 725
(4)	The debtor's aggregate interest in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor	$ 1,750
(5)	The debtor's aggregate interest, plus any unused amount of the exemption provided under paragraph (1), in any property	$ 1,550
(6)	The debtor's aggregate interest in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor	$ 8,725
(8)	The debtor's aggregate interest in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent	$ 15,650
(11)(D)	The debtor's right to receive, or property traceable to, a payment on account of personal bodily injury of the debtor or an individual of whom the debtor is a dependent	$ 29,275

CURRENT DOLLAR AMOUNTS OF EXEMPTIONS FROM ENFORCEMENT OF JUDGMENTS
Code of Civil Procedure sections 703.140(b) and 704.010 et seq.

EXEMPTIONS UNDER SECTION 704.010 et seq.

The following lists the current dollar amounts of exemptions from enforcement of judgment under title 9, division 2, chapter 4, article 3 (commencing with section 704.010) of the Code of Civil Procedure.

The amount of the automatic exemption for a deposit account under section 704.220(a) is effective September 1, 2020, and unless otherwise provided by statute after that date, will be adjusted annually effective July 1 by the Department of Social Services under Welf. & Inst. Code, § 11453 to reflect the minimum basic standard of care for a family of four as established by § 11452.*

The other amounts are all effective April 1, 2019. Unless otherwise provided by statute after that date, they will be adjusted at each three-year interval, ending on March 31. The amount of the adjustment to the prior amounts is based on the change in the annual California Consumer Price Index for All Urban Consumers for the most recent three-year period ending on the preceding December 31, with each adjusted amount rounded to the nearest $25. (See Code Civ. Proc., § 703.150(d).)

Code Civ. Proc. Section	Type of Property	Amount of Exemption
704.010	Motor vehicle (any combination of aggregate equity, proceeds of execution sale, and proceeds of insurance or other indemnification for loss, damage, or destruction)	$ 3,325
704.030	Material to be applied to repair or maintenance of residence	$ 3,500
704.040	Jewelry, heirlooms, art	$ 8,725
704.060	Personal property used in debtor's or debtor's spouse's trade, business, or profession (amount of exemption for commercial motor vehicle not to exceed $4,850)	$ 8,725
704.060	Personal property used in debtor's and spouse's common trade, business, or profession (amount of exemption for commercial motor vehicle not to exceed $9,700)	$ 17,450
704.220	Deposit account, generally (exemption without claim; amount per judgment debtor, section 704.220(a),(e))[1]	$ 1,724*
704.080	Deposit account with direct payment of social security or public benefits (exemption without claim, section 704.080(b))[2]	
	• Public benefits, one depositor is designated payee	$ 1,750
	• Social security benefits, one depositor is designated payee	$ 3,500
	• Public benefits, two or more depositors are designated payees[3]	$ 2,600
	• Social security benefits, two or more depositors are designated payees[3]	$ 5,250
704.090	Inmate trust account	$ 1,750
	Inmate trust account (restitution fine or order)	$ 325[4]
704.100	Aggregate loan value of unmatured life insurance policies	$ 13,975

1 This exemption does not preclude or reduce other exemptions for deposit accounts. However, if the exemption amount for the deposit account applicable under other automatic exemptions—such as those applicable for direct deposit of social security benefits or public benefits—is greater under the other exemptions, then those apply instead of this one. (Code Civ. Proc., § 704.220(b).)

2 The amount of a deposit account with direct deposited funds that exceeds exemption amounts shown is also exempt to the extent it consists of payments of public benefits or social security benefits. (Code Civ. Proc., § 704.080(c).)

3 If only one joint payee is a beneficiary of the payment, the exemption is in the amount available to a single designated payee. (Code Civ. Proc., § 704.080(b)(3) and (4).)

4 This amount is not subject to adjustments under Code Civ. Proc., § 703.150.

ATTORNEY OR PARTY WITHOUT ATTORNEY *(name and address):* After recording, return to: TEL NO.: FAX NO. (*optional*): EMAIL ADDRESS *(optional):* ☐ ATTORNEY FOR ☐ ORIGINAL JUDGMENT CREDITOR ☐ ASSIGNEE OF RECORD ☐ JUDGMENT DEBTOR	**DRAFT** **03-19-2020** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR RECORDER'S USE ONLY*
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	LEVYING OFFICER *(name and address):*
EX PARTE APPLICATION FOR ORDER ON DEPOSIT ACCOUNT EXEMPTION ☐ Without hearing ☐ Hearing on shortened time	LEVYING OFFICER FILE NO.: COURT CASE NO.:

Read *Instructions for Ex Parte Application for Order on Deposit Account Exemption* (form EJ-157-INFO) before filing this application. That form describes the requirements for giving notice of this application.

1. Applicant *(check one):*
   ☐ Judgment Debtor *(name)*:
   ☐ Judgment Creditor (original or assignee of record) *(name)*:
   applies for a court order as to how and to which of the judgment debtor's multiple deposit accounts the exemption from enforcement of a civil money judgment under Code of Civil Procedure section 704.220 should be applied.

2. This application is being made because:
   a. ☐ judgment debtor has multiple deposit accounts in one financial institution.
   b. ☐ judgment debtor has deposit accounts in multiple financial institutions.

3. A *Writ of Execution (Money Judgment)* was issued in this case on (date issued) and states that the underlying judgment is not for unpaid wages, child support, or spousal support. *Date writ issued:* . *(Attach a copy or provide an explanation why not attached.)*

4. A *Notice of Levy* (form EJ-150) has been issued based on the writ in item 3 to the following financial institutions *(identify and attach copy of each notice or provide an explanation why not attached)*:

Financial Institution	**Date of Issuance**

☐ Check here if there is not enough space to list all current notices of levy, and continue the list on an attached sheet titled Attachment 4.

Form Approved for Optional Use
Judicial Council of California
EJ-157 [New September 1, 2020]

EX PARTE APPLICATION FOR ORDER ON DEPOSIT ACCOUNT EXEMPTION

(Enforcement of Judgment)

Code of Civil Procedure, § 704.220
www.courts.ca.gov

SHORT TITLE:	LEVYING OFFICER FILE NO.:	COURT CASE NO.:

5. Applicant requests that the judgment debtor's deposit account exemption under Code of Civil Procedure section 704.220(a) be applied *(check one):*

   a. ☐ to deposit account number *(last four digits only):* at *(financial institution):* .

   b. ☐ spread across multiple deposit accounts as follows:

Name of financial institution	**Deposit account number** *(last four digits only)*	**Amount of exemption to be applied to account** *(Total cannot exceed total amount of exemption (See form EJ-156).)*

6. a. ☐ This matter may be set for hearing.

   b. ☐ Applicant is seeking this order without further hearing to help prevent immediate loss to a deposit account subject to exemption or enforcement. The facts supporting this need for immediate issuance of an order are (*explain circumstances*):

☐ Check here if there is not enough space, and continue the item on an attached sheet titled Attachment 6.

Date: _____

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE)

Declaration by Applicant

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

Date: _____

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE)

☐ Original judgment creditor ☐ Judgment debtor

☐ Assignee of record

INSTRUCTIONS FOR EX PARTE APPLICATION FOR ORDER ON DEPOSIT ACCOUNT EXEMPTION

1. **Applicable Law.** Code of Civil Procedure section 704.220 provides that financial institutions **must** apply an automatic exemption when served a *Notice of Levy* on a judgment debtor's deposit account, if the underlying judgment is not based on wages owed or child or spousal support. The exemption (the amount of which can be found on form EJ-156) is per judgment debtor, not per account. The exemption is automatically applied; the judgment debtor does not need to take any action for the exempted amount to be protected.
2. **Multiple Accounts.**
   - If the judgment debtor has multiple deposit accounts at a single bank, either the judgment debtor or judgment creditor may make an ex parte application for an order designating how and to which account the exemption applies. The bank must automatically withhold the exempted amount, but without a specific court order it will choose to which account the exemption applies. (Code Civ. Proc., § 704.220(e)(2).)
   - If the judgment debtor has multiple deposit accounts at multiple financial institutions, the judgment creditor must and the judgment debtor may make this application. (Code Civ. Proc., § 704.220(e)(3).)
3. **A judgment debtor or judgment creditor applying for an order to designate a specific account or how to allocate the exemption among multiple accounts should do so as soon as receiving a notice of a levy or memorandum of garnishment as applicable, because the financial institution is required to act promptly in sending funds to the levying officer.**
4. **Rules for Making the Application**. The ex parte application must be filed in the court in which the judgment was issued. The applicant must check with that court for local rules and timing as to when and where the applicant is to appear at court to have the court consider the ex parte application. The applicant must follow the rules relating to ex parte applications that are set out in California Rules of Court, rules 3.1203–3.1207, which describe the following requirements:

   Notice of the application. Notice of the ex parte application must generally be given to the other party in the case. Notice may be in person or by phone, fax, overnight mail, or email (if permitted in the case already). The party must be informed by 10:00 a.m. the day before the ex parte application is to be considered by the court, unless there is a good reason such notice could not or should not be given. How the notice was given, or why it was not, must be described in the declaration regarding notice and service (form EJ-158).

   Service of papers. Copies of the application and all related papers must be given to the other party as soon as reasonable and before the court appearance, if possible. (How this was done or why it was not must also be described in form EJ-158.)

   Appearance at court. The applicant must be available at the time the court is considering the application, either in person at the courthouse or by telephone. (If by phone, the applicant must inform the court and the other parties in advance, and must comply with California Rules of Court, rule 3.670(d), which requires that the application papers must be filed by 10:00 a.m. *two court days* before the application is to be considered.)
5. **Forms to Complete.** Before the time the court is scheduled to consider the application, the applicant must complete and file the following forms with the court:
   - Ex Parte Application for Order on Deposit Account Exemption (form EJ-157);
   - Declaration Regarding Notice and Service for Ex Parte Application for Order on Deposit Account Exemption (form EJ-158);
   - Order on Application for Designation of Deposit Account Exemption (form EJ-159) (complete caption and item 1 only).

   Take note of the following when completing form EJ-157:
   - The contents of the application must be provided under penalty of perjury.
   - If the applicant has good cause for why the court should act immediately, with no further hearing or briefing, the box under the title of form EJ-157 stating "Without hearing" should be checked and item 6b completed to explain why. Otherwise the box under the title for "Hearing on shortened time" and item 6a should be checked.
   - Copies of the Writ of Execution (form EJ-130) and any Notice of Levy (EJ-150) that have been issued to a financial institution must be attached to the application form.
   - Item 5 must include the specific account or accounts to which the court is being asked to order that the exemption apply. If the judgment debtor is asking that the exemption be allocated among multiple accounts, the total amount allocated may not be more than the total amount of the deposit account exemption. (See form EJ-156 for the amount.)
6. **Filing With the Court.** The completed forms should be filed with the court clerk. There will be a filing fee unless the party is eligible for a fee waiver. (If a party cannot afford the fee and has not already received a fee waiver, the party may file a *Request to Waive Court Fees* (form FW-001) with the other forms.) Take extra copies of all the forms to the court so the clerk can give back a stamped copy.

INSTRUCTIONS FOR EX PARTE APPLICATION FOR ORDER ON DEPOSIT ACCOUNT EXEMPTION

7. **What to Do With Order.** The court may rule on the application immediately if a delay could result in loss to a deposit account subject to exemption or enforcement, or may order that a hearing be held to consider the application and any opposition.
   - Once an order is issued by the court on form EJ-159, the applicant should serve the order on all other parties in the case as soon as possible. If the order sets a hearing date, it must be served by the date in item 4b on the order.
   - If the order sets a hearing date, the applicant should appear at the hearing either in person or by phone (if by phone, notice must be given in advance to the court and other side).
   - If the order designates the deposit account or accounts to which the exemption applies, without any further hearing, the applicant should serve the financial institution and levying officer as well as the other parties. Once an order has been issued by the court, the applicant should serve the order on all other parties in the case as soon as possible.

PARTY WITHOUT ATTORNEY OR ATTORNEY: STATE BAR NUMBER: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **03-19-2020** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
DECLARATION REGARDING NOTICE AND SERVICE FOR EX PARTE APPLICATION FOR ORDER ON DEPOSIT ACCOUNT EXEMPTION	CASE NUMBER:

This form must be filed any time an Ex Parte Application for Order on Deposit Account Exemption Application *(form EJ-157) is filed.*

1. I am *(specify)*: ☐ attorney for ☐ original judgment creditor ☐ assignee of record ☐ judgment debtor

2. I ☐ did ☐ did not give notice that papers will be submitted to the court asking a judicial officer how and to which of judgment debtor's deposit accounts the exemption under Code of Civil Procedure section 704.220 should apply, and that the court will consider the request on the date, time, and location indicated below:

   a. Date: Time: ☐ Dept.:
   b. Address of court: ☐ same as noted above ☐ other *(specify):*

3. **NOTICE** *(If you gave notice, complete item 3a. If you did not give notice, complete item 3b or 3c.)*
   a. ☐ I gave notice as described in items (1) through (5):
      (1) I gave notice to *(select all that apply)*:
      ☐ judgment debtor. ☐ judgment debtor's attorney.
      ☐ judgment creditor (or assignee of record). ☐ judgment creditor's attorney (or assignee of record's attorney).
      ☐ Other *(specify):*

      (2) I gave notice on *(date):* at: ☐ a.m. ☐ p.m.
      ☐ personally at *(location):* , California.
      ☐ by telephone using telephone no.:
      ☐ by fax using fax no.:
      ☐ by voicemail using voicemail no.:
      ☐ by electronic means *(if permitted)(specify electronic service address of person):*
      ☐ by overnight mail or other overnight carrier *(specify address of delivery):*

      (3) I gave notice *(select one)*:
      ☐ by 10 a.m. the court day before this ex parte appearance.
      ☐ after 10 a.m. the court day before this ex parte appearance because of the following exceptional circumstances *(specify):*

Form Approved for Optional Use
Judicial Council of California
EJ-158 [New September 1, 2020]

DECLARATION REGARDING NOTICE AND SERVICE FOR EX PARTE APPLICATION FOR ORDER ON DEPOSIT ACCOUNT EXEMPTION

Code of Civil Procedure, § 704.220,
Cal. Rules of Court, rules 3.1203-12075
www.courts.ca.gov

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CASE NUMBER:

3. a. (4) I notified the person in 3a(1) that an order is being requested designating that the exemption under section 704.220 should be applied to the following accounts *(specify)*:

(5) The person in 3a(1) responded as follows:

(6) I ☐ do ☐ do not believe that the person in 3a(1) will oppose the ex parte application.

b. ☐ **Request for waiver of notice.** I did not give notice about the ex parte application. I ask that the court waive notice to the other party for the following reasons *(identify the exceptional circumstances):*

☐ Attachment 3b.

c. ☐ **Unable to provide notice.** I did not give notice about the ex parte application. I used my best efforts to tell the opposing party when and where this hearing would take place but was unable to do so. The efforts I made to inform the other person were *(specify below):*

☐ Attachment 3c.

4. ☐ **SERVICE OF FORMS**

a. An unfiled copy of *Ex Parte Application for Order on Deposit Account Exemption* (form EJ-157) and related documents were served on:

☐ judgment debtor. ☐ judgment debtor's attorney.
☐ judgment creditor (or assignee of record). ☐ judgment creditor's attorney (or assignee of record's attorney).
☐ Other *(specify):*

b. Documents were served on *(date):* at: ☐ a.m. ☐ p.m.
☐ personally at *(location):* , California.
☐ by fax using fax no.:
☐ by electronic means *(if permitted)(specify electronic service address of person):*
☐ by overnight mail or other overnight carrier *(specify address of delivery):*

c. ☐ **Documents were not served on the opposing party** because of the exceptional circumstances specified in:
☐ 3b, above ☐ 3c, above ☐ Attachment 4c.

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

Date:

(TYPE OR PRINT NAME)

(SIGNATURE)

DECLARATION REGARDING NOTICE AND SERVICE FOR EX PARTE APPLICATION FOR ORDER ON DEPOSIT ACCOUNT EXEMPTION

ATTORNEY OR PARTY WITHOUT ATTORNEY *(name and address):* After recording, return to: TEL NO.: FAX NO. (*optional*): EMAIL ADDRESS *(optional):* ☐ ATTORNEY FOR ☐ ORIGINAL JUDGMENT CREDITOR ☐ JUDGMENT DEBTOR ☐ ASSIGNEE OF RECORD	**DRAFT** **03-20-2020** **Not approved by the Judicial Council** *FOR RECORDER'S USE ONLY*
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	LEVYING OFFICER *(name and address):*
ORDER ON APPLICATION FOR DESIGNATION OF DEPOSIT ACCOUNT EXEMPTION	LEVYING OFFICER FILE NO.: COURT CASE NO.:

1. Applicant *(check one):*
   ☐ Judgment Debtor *(name)*:
   ☐ Judgment Creditor (original or assignee of record) *(name)*:
   applied ex parte for an order as to how and to which of the judgment debtor's multiple deposit accounts the exemption from enforcement of a civil money judgment under Code of Civil Procedure section 704.220 should be applied.
2. The court, having reviewed the application, makes the following ruling.
3. ☐ **Application Denied.** The court denies the application.
   a. ☐ The application is incomplete.
   b. ☐ The application did not meet the requirements for providing notice or service of the application.
   c. ☐ There is no showing that judgment debtor has multiple deposit accounts subject to the deposit account exemption in section 704.220.
   d. ☐ Other (specify):
4. ☐ **Order Shortening Time**. A hearing will be held on the application, as follows.
   a. The hearing will be on the date, time, and location indicated below:

      Date: Time: ☐ Dept.: ☐ Room:
      Address of court: ☐ same as noted above ☐ other *(specify):*

   b. Applicant must serve this order and the *Ex Parte Application* (form EJ-157) on all other parties by *(date):* .
   c. Any papers in opposition must be served on all other parties and filed by *(date):* .
5. ☐ **Ex Parte Order.** The court finds that delay in ruling would result in loss or damage to deposit accounts subject to enforcement of judgment in this matter, and therefore rules ex parte to designate the account subject to exemption, as stated below.
6. ☐ **Order After Hearing.** This ruling is made after the application was heard on shortened time at
   a. Date: Time: ☐ Dept.: ☐ Room:
   b. The following were present at the hearing:
      ☐ Judgment debtor ☐ Judgment debtor's attorney
      ☐ Judgment creditor (or assignee of record) ☐ Judgment creditor's attorney (or assignee of record's attorney)
      ☐ Other (specify):

Form Approved for Optional Use
Judicial Council of California
EJ-159 [New September 1, 2020]

ORDER ON APPLICATION FOR DESIGNATION OF DEPOSIT ACCOUNT EXEMPTION
(Enforcement of Judgment)

Code of Civil Procedure, § 704.220
www.courts.ca.gov

SHORT TITLE:	LEVYING OFFICER FILE NO.:	COURT CASE NO.:

7. ☐ **Findings.** The court makes the following findings:

   a. ☐ The underlying judgment in this case is not based on unpaid wages or child or spousal support.

   b. ☐ A *Notice of Levy* has been issued in this case to the following financial institutions *(identify)*:

Financial Institution	**Date of Issuance**

   c. Applicant has requested that the court designate to which among multiple deposit accounts the exemption under Code of Civil Procedure section 704.220(a) be applied, and has specified that account or accounts in the application.

   d. ☐ An alternative designation was requested by ☐ judgment debtor ☐ judgment creditor (or assignee of record)

   e. ☐ Other findings:

8. **Designation of Deposit Account.** The exemption under Code of Civil Procedure section 704.220(a) from enforcement of civil money judgment is to be applied *(check one):*

   a. ☐ to deposit account number *(last four digits only):* at *(financial institution):* .

   b. ☐ spread across multiple deposit accounts, because the exemption amount is greater than the amount in a single deposit account, as follows:

Name of financial institution	**Deposit accounts** *(last four digits only)*	**Amount of exemption to be applied**

9. **Other Rulings.**

Date: _____

_____
Judicial Officer

W20-05

Civil Practice and Procedure: Enforcement of Judgment Forms—Exemptions (Revise forms EJ-130, EJ-150, EJ-155, and EJ-156; adopt forms EJ-157, EJ-157-INFO, EJ-158, and EJ-159)

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

	Commenter	Position	Comment	Committee Response
1.	Donna Comstock Victim of the Injustice of the Courts Paramount, California	AM	*This comment did not pertain to the proposal that circulated for comment and therefore is not included.	The committee notes the commenter's support for the proposal if modified, though no modification is suggested in the comment; no response is required.
2.	Joint Rules Subcommittee (JRS) Trial Court Presiding Judges Advisory Committee (TCPJAC), and the Court Executive Advisory Committee (CEAC)	AM	The JRS notes that the proposal is required to conform to a change of law. The JRS also notes the following impact to court operations: • Results in additional training, which requires the commitment of staff time and court resources. • Increases court staff workload. • Impact on local or statewide justice partners. 1. The judgment debtor is referred to as "defendant" on the following forms: • Form EJ-150, page 2, paragraph 3 (Information About Deposit Accounts) • Form EJ-157, paragraph 1 • Form EJ-157-INFO, paragraph 2 • Form EJ-159, paragraph 1 2. judgment creditor is referred to as "plaintiff" in the following forms: • Form EJ-157, paragraph 1	The committee notes the commenter's support for the proposal if modified and has considered the stated implementation requirements; no further response is required.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-05

Civil Practice and Procedure: Enforcement of Judgment Forms—Exemptions (Revise forms EJ-130, EJ-150, EJ-155, and EJ-156; adopt forms EJ-157, EJ-157-INFO, EJ-158, and EJ-159)

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

	Commenter	Position	Comment	Committee Response
			• Form EJ-159, paragraph 1 The designations are not accurate, because although the judgment debtor is usually the defendant, and the judgment creditor is usually the plaintiff, this is not always the case. A defendant may be awarded costs and/or attorney fees as part of a defense verdict, and thus, the defendant may be the judgment creditor.	The committee appreciates this suggestion and has modified the forms to remove parenthetical references to the judgment debtor as "defendant" and judgment creditor as "plaintiff" on the forms as referenced in this comment.
			2. Form EJ-159, paragraph 3c has a typo - "section 104.220" should be "section 704.220".	The committee appreciates this correction and has modified the proposal accordingly.
			3. Add "single" in front of "financial institution" Form EJ-150, page 2, paragraph 3, last sentence (Information About Deposit Accounts).	The committee declines to incorporate this suggestion because it understands section 704.220 to allow for allocation of the exemption across accounts at multiple financial institutions.
			4. Remove the "*" after $1,724 on page 2 of Form EJ-156.	The committee declines to incorporate this suggestion because the "*" relates back to note at the top of the page that ends with a "*".
			5. The explanation regarding calculation of the filing date of the claim of exemption (Form EJ-150, page 2, paragraph 2) is not as clear as the statute.	The committee has considered this comment and modified the proposal accordingly.
			6. In answer to the request for specific comments: a. The forms appropriately address the stated purpose.	The committee appreciates the responses to the specific questions presented in the invitation to comment.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

	Commenter	Position	Comment	Committee Response
			b. It is not a good idea to allow an optional request to stay enforcement of the judgment. Such would provide the judgment debtor with more relief than the statute entitles. A stay of enforcement of the "judgment," would prevent the judgment creditor from being able to attach non-deposit account assets or conduct post judgment discovery, including a judgment debtor exam. c. It is not necessary or a good idea for the application and order to allow the exemption to be allocated among multiple accounts at a single financial institution. EJ-150, paragraph 3, indicates "If the judgment debtor has more than one account in a [single] financial institution, that institution may decide how and to which account to apply the exemption ..." It makes more sense to have the financial institution make the election since the exemption is automatic, and the financial institution possesses sufficient info regarding the judgment debtor's account balances to determine if funds exist in any accounts in excess of the automatic exemption. The statute provides for an automatic exemption of a set amount; it does not allow the judgment debtor to limit the judgment creditor's ability to	The committee appreciates this comment on whether the forms should provide for an optional request for stay of enforcement of judgment. Having considered all of the comments on this issue, the committee concluded that the forms should not be further revised to include an optional request for a stay because this is beyond what the statute provides for and the form order allows for "other rulings" which may encompass similar relief where appropriate. The committee appreciates this comment disfavoring allocation across multiple accounts at a single financial institution. The committee has considered all of the comments on this issue, unclear statutory language, contradictory legislative history, and potential policy implications of various interpretations. Though there are reasonable arguments to the contrary, the committee understands the new law to allow for allocation of the deposit account exemption across multiple accounts at a single or multiple financial institutions.

	Commenter	Position	Comment	Committee Response
			collect non-exempt funds or make it more difficult or time consuming to the judgment creditor to collect non-exempt funds. Other Comments Training will be necessary and workload for judicial and non-judicial staff will increase. County Sheriffs that act as levying officers may be impacted by the change.	The committee has considered the stated implementation requirements; no further response is required.
3.	Orange County Bar Association by Scott B. Garner, President Newport Beach, California	AM	The Orange County Bar Association believes the proposed forms appropriately address the stated purpose of implementing S.B.616 provided that the forms are further modified to conform to all provisions of S.B.616 after further comparisons to S.B.616. For instance, the provisions creating CCP §704.220(e)(1) specifically state that the "automatic exemption" (now at $1,724) applies "per debtor" and not "per account"; however only the proposed Form EJ-157-INFO sets forth this limitation and it is no where stated on Form EJ-157 itself which will cause confusion among judicial officers, clerks, debtors, and creditors. In addition, the new CCP §704.220(e)(3) states that if a judgment debtor holds deposit accounts in multiple accounts at two or more financial institutions then the "judgment creditor shall" file an ex parte application in the superior court for a "hearing" to establish "how and to which account the exemption should be applied"; however the proposed new forms (especially EJ-157, EJ-157-INFO, and EJ-159) do not ever	The committee has considered this comment and concluded that direction on form EJ-157 to read the instructions before filing, coupled with the explicit statement on EJ-157-INFO item 1 that the exemption is per debtor and not per account, should provide sufficient explanation of this portion of the law. The committee has considered this comment and modified the proposal to make clearer that the

	Commenter	Position	Comment	Committee Response
			indicate that (1) the judgment creditor is required by statute to make the ex parte request if there are multiple deposit accounts at different institutions, (2) the ex parte request is to request a hearing not to obtain an ex parte determination (apparently), and (3) the hearing is for the purpose of determining "how and to which account the exemption should be applied" (not which "accounts" as provided as an option under EJ-159; applying the exemption to multiple accounts contradicts CCP §704.220(a),(e)(3), although the legislative history is confusing and unclear as noted by the Judicial Council). For the reasons stated above, it is not appropriate for the Ex Parte Application & Order to allow for the exemption to be allocated among multiple accounts among multiple institutions, but it may be so authorized for multiple accounts at a single institution. Compare CCP §704.220(e)(1) with (e)(2) and with (e)(3) – what did the legislature intend by these contradictory provisions? Regarding the request for comments concerning adding a request for stay of enforcement as part of the new ex parte application form, we believe the optional request would be appropriate and helpful to all parties, including the levying officers, the financial institutions, the court, and the litigants. This is a troublesome series of new statutes since they create "automatic	judgment creditor must make the application if there are multiple accounts. Though the statute is somewhat unclear, the committee understands it to allow for either an order shortening time for a hearing on the application or an ex parte order without a hearing where appropriate. The committee has considered this comment disfavoring allocation across multiple accounts at multiple financial institutions. The committee has considered all of the comments on this issue, unclear statutory language, contradictory legislative history, and potential policy implications of various interpretations. Though there are reasonable arguments to the contrary, the committee understands the new law to allow for allocation of the deposit account exemption across multiple accounts at a single or multiple financial institutions. The committee appreciates this comment on whether the forms should provide for an optional request for stay of enforcement of judgment, and has considered the suggestion that the forms should provide for this type of request. However, having considered all of the comments on this issue, the committee concluded that the forms should not be further revised to include an

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Civil Practice and Procedure: Enforcement of Judgment Forms—Exemptions (Revise forms EJ-130, EJ-150, EJ-155, and EJ-156; adopt forms EJ-157, EJ-157-INFO, EJ-158, and EJ-159)

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

	Commenter	Position	Comment	Committee Response
			exemptions" without the debtor making any application for exemption and without most creditors even knowing whether or not the judgment debtor has "multiple deposit accounts" or even has a "deposit account."	optional request for a stay because this is beyond what the statute provides for and the form order allows for "other rulings" which may encompass similar relief where appropriate.
4.	Public Law Center By Leigh E. Ferrin Director of Litigation and Pro Bono Santa Ana, California	AM	Public Law Center (PLC) is a 501(c)(3) not-for-profit organization that provides free civil legal services to low-income individuals and families across Orange County. The civil legal services that we provide include consumer, family, immigration, housing, veterans, community organizations, and health law. PLC appreciates the opportunity to comment on Invitation W20-05 which is the modification of forms EJ-130, EJ-150, EJ-155 and EJ-156. PLC worked on SB 616 over the past few years and is grateful to the Judicial Council for its efforts in complying with the new law. PLC believes that the new protections will have a significant impact on its low-income clients who are often left with little to nothing when their bank account is cleaned out by a debt buyer or debt collector. It is important to note that SB 616 provides for an automatic exemption under Cal. Code Civ. Proc. Section 704.220(e)(3), and therefore it is important to clarify in the forms that debtors only need to file an ex parte application in certain limited circumstances. While EJ-157-INFO states clearly that financial institutions must apply an automatic exemption in Section 1, it might make sense to bold that and leave it	The committee notes the commenter's support for the proposal if modified and recognizes the work of this organization; no response is required. The committee has considered this comment and modified EJ-157-INFO to incorporate the spirit of

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

	Commenter	Position	Comment	Committee Response
			as Section 1, and then either separate the following text into a separate paragraph, or add a section that has the next two sentences in it about when an ex parte application would be needed. PLC would propose the following: 1. Automatic Exemption: Code of Civil Procedure section 704.220 provides that financial institutions must apply an automatic exemption when served a Notice of Levy on a judgment debtor's deposit account, if the underlying judgment is not based on wages owed or child or spousal support. 2. The exemption (the amount of which can be found on form EJ-156) is per judgment debtor, not per account. If the judgment debtor has multiple deposit accounts, either the judgment debtor or judgment creditor may make an ex parte application to a court for an order designating how and to which deposit account the automatic exemption is to be applied. (See Code of Civ. Proc. §704.220(e).) 3. A judgment debtor (defendant) applying for an order to designate a specific account or how to allocate the exemption among multiple accounts should do as soon as receiving a notice of a levy, because the financial institution is required to act promptly in sending funds to the levying officer.	this and similar suggestions to provide further specificity and clarity about the new law and the debtor and creditor's respective rights and obligations with respect to the automatic deposit account exemption.

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Civil Practice and Procedure: Enforcement of Judgment Forms—Exemptions (Revise forms EJ-130, EJ-150, EJ-155, and EJ-156; adopt forms EJ-157, EJ-157-INFO, EJ-158, and EJ-159)

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

	Commenter	Position	Comment	Committee Response
			PLC appreciates the judicial council expressing the urgency of acting to protect particular account(s) if the debtor so wishes. While PLC does not want to further complicate or confuse the issue, PLC also believes that certain language may be more confusing if not clarified. PLC proposes that the language be changed to reflect that the financial institution is required to automatically withhold the exempted amount, but that without a specific order from the court, the financial institution will choose which account to protect. The financial institution is not required to wait for a court order, so the debtor should submit the ex parte application and a claim of exemption to notify the bank that action is being taken. Rather than a stay of enforcement, PLC proposes adding a section to Form EJ-160 that is the same as a debtor submitting a claim of exemption to the levying officer, that notifies the levying officer, the financial institution and the creditor, that the debtor is seeking a determination from the court as to which account(s) the exemption should apply. That way the bank will not turn money over to the levying officer until further instruction is received. It would be a relatively minor fix, but the debtor would then have a mechanism by which he or she could notify the levying officer, the creditor and the financial institution that a court process was occurring, similar to what happens when a claim of exemption is	The committee appreciates this comment on whether the forms should provide for an optional request for stay of enforcement of judgment, and has considered the suggestion that Form EJ-160 instead be revised to provide notice to the levying officer, financial institution and creditor that the debtor is seeking a judicial determination. However, this suggestion is beyond the scope of the proposal and does not appear to be authorized by the new statute.

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W20-05

Civil Practice and Procedure: Enforcement of Judgment Forms—Exemptions (Revise forms EJ-130, EJ-150, EJ-155, and EJ-156; adopt forms EJ-157, EJ-157-INFO, EJ-158, and EJ-159)

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

	Commenter	Position	Comment	Committee Response
			submitted to the levying officer and the creditor submits its opposition. In all situations, PLC encourages the Judicial Council to refer to a judgment debtor "submitting" the claim of exemption form to the levying officer, rather than using the word "filing." Judgment debtors, especially those who are representing themselves and/or who primarily speak a language other than English, are often confused by the term "filing," which implies filing with the court. Using the word "submit" or "submitting" or something similar, better removes that presumption that the forms should be filed with the Court. Hardship Exemption One very important piece of SB 616 is the hardship exemption which now applies to bank accounts. A debtor, upon receiving notice of a bank levy, may submit a claim of exemption to the levying officer stating that it would cause the debtor a hardship if his or her bank account were to be levied. The debtor will need to provide a supporting financial statement, just like in the case of claims of exemption to wage garnishment based on hardship, but very clearly is allowed to make the argument. On EJ-150, on the Information Sheet, An additional paragraph should be added under the third section, "Information About Deposit Accounts," that states that a debtor may also claim that the funds in a deposit account are exempt from levy	The committee appreciates this suggestion and will take it into account in its future work. The committee appreciates this comment relating to the hardship exemption established by section 704.225, and has modified EJ-155 to include this additional exemption in the list under "Deposit Accounts." However, the committee declines to add a paragraph to EJ-150 page 2 "Information About Deposit Accounts" because the "Information for Judgment Debtors" section above informs debtors of the existence of non-automatic exemptions such as the new hardship exemption and an additional paragraph would be repetitive.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

	Commenter	Position	Comment	Committee Response
			because such a levy would cause the debtor a hardship under Section 704.225. On EJ-155, the list of applicable exemptions, the line reading "Deposit Accounts (generally) ….. CCP §704.220" should also include CCP §704.225. Additionally, on EJ-156, a section should be added under the current section for 704.220 that reads: 704.225 Deposit account, upon debtor's claim of exemption for hardship $5 and have the footnote 5 state: No specific exemption amount; based on debtor's claim of exemption for hardship. Because Form EJ-155 is often not attached to the notice that the debtor receives, PLC suggests specifically citing to the form in which the exemptions can be found, either EJ-155 and/or EJ-156. Ex Parte Application Writ of Execution and Notice of Levy In our experience, the majority of debtors receive notice of the levy from the bank directly, which usually provides some type of letter on the bank's own letterhead notifying the debtor that their bank account is or will be frozen as a result of a levy. Sometimes the bank attaches a copy of the instructions it received from the local levying officer and sometimes the	The committee appreciates this comment relating to the hardship exemption established by section 704.225, and has modified EJ-155 to include this additional exemption in the list under "Deposit Accounts." The committee has considered this suggestion, but because form EJ-156 is a list of the "current dollar amounts" of various exemptions that are revised on a triennial schedule, whereas the hardship exemption is not a set dollar amount, the committee believes its inclusion would be misplaced on this form. The committee appreciates this suggestion and has modified form EJ-150 page 2 to include a specific reference to form EJ-155 (a reference to form EJ-156 is already included). The committee appreciates this comment indicating that some debtors may not have copies of the Writ of Execution and Notice of Levy and a litigant's best efforts to obtain these documents should be sufficient for form EJ-157. While the committee is sympathetic to this possibility,

	Commenter	Position	Comment	Committee Response
			bank does not attach a copy. Either way, the debtor almost never receives a copy of the writ of execution and notice of levy itself. Requiring the debtor to attach those documents will lead to many ex parte applications being denied as a result. PLC suggests that the language instead state that the debtor make their best efforts to obtain copies of the writ of execution and notice of levy so that they may be attached to the ex parte, but making clear that an ex parte cannot be denied solely because a debtor failed to attach such copies. In many cases, those documents are in the plaintiff's/creditor's possession and in the court's possession, and the debtor is the party least able to access the documents.	copies of these documents may be necessary for a court to fully and fairly evaluate the ex parte application. Therefore, the committee declined to revise the proposed new form to eliminate the request that the Writ of Execution and Notice of Levy be attached, but instead modified the form to allow for a litigant to provide an explanation as to why the Writ or Notice of Levy is not attached.
			Procedural Questions PLC agrees with the judicial council's interpretation that either the debtor or the creditor may request a hearing on shortened notice (or, in certain circumstances request an order without a hearing) for the court to determine how and to which accounts the exemption applies. PLC proposes that the preference be for a hearing on shortened notice, since this process results in the loss of property and many of these will be filed by self-represented litigants who may need the opportunity to be heard.	The committee appreciates this comment relating to the ex parte hearing process. As noted, though the statute is somewhat unclear, the committee has determined that it allows for either an order shortening time for a hearing on the application or an ex parte order without a hearing where appropriate. The forms themselves do not indicate a "preference," and it will be up to the court in each individual case to determine whether it is appropriate to rule without a hearing.
			PLC also proposes that a court may determine that an exemption be applied across accounts, or	The committee has considered this comment favoring allocation of the automatic deposit

	Commenter	Position	Comment	Committee Response
			to a single account. It may be that there are reasons why it is important for accounts to maintain certain minimum balances, and a debtor may want to therefore apply the exemption across two accounts to protect minimum balances in both accounts (for instance, to avoid bank fees).	account exemption across multiple accounts. The committee has considered all of the comments on this issue, unclear statutory language, contradictory legislative history, and potential policy implications of various interpretations. Though there are reasonable arguments to the contrary, the committee understands the new law to allow for allocation of the deposit account exemption across multiple accounts at a single or multiple financial institutions.
5.	Superior Court of San Diego County By Mike Roddy Executive Officer	AM	**Does the proposal appropriately address the stated purpose?** Yes. Should EJ-159 have an addition box to include an option for an attachment to allow for the listing of more accounts? Also, should item 9 on EJ-159 include a "checkbox" for "Other Rulings" or "Additional Orders"? **Is it appropriate for the application and order to include items allowing the exemption to be allocated among multiple accounts? If not, why?** Yes. **Would adding an optional request for stay of enforcement of judgment to the new ex parte application form be appropriate or helpful?** No. **What would the implementation requirements be for courts—for example,**	The committee appreciates the commenter's support for the proposal if modified and has considered the comments specific to form EJ--159. The committee notes that form EJ-159 item 8 includes a large space for a list of financial institutions and accounts, and item 9 includes a space for "other rulings." The committee appreciates this comment favoring allocation of the automatic deposit account exemption across multiple accounts. Though there are reasonable arguments to the contrary, the committee understands the new law to allow for allocation of the deposit account exemption across multiple accounts at a single or multiple financial institutions. The committee appreciates this comment that an optional request for stay of enforcement of judgment would not be helpful or appropriate.

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Civil Practice and Procedure: Enforcement of Judgment Forms—Exemptions (Revise forms EJ-130, EJ-150, EJ-155, and EJ-156; adopt forms EJ-157, EJ-157-INFO, EJ-158, and EJ-159)

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

	Commenter	Position	Comment	Committee Response
			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? Updating internal procedures, training staff and adding filings to case management system.	The committee has considered the stated implementation requirements; no further response is required.
			Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes, provided the final version of the forms are provided to the courts at least 30 days prior to the effective date. This will give courts sufficient time to update their procedures, configure local packets, and order printed stock.	The committee has considered the stated implementation requirements; no further response is required.
			How well would this proposal work in courts of different sizes? It appears that the proposal would work for courts of all sizes.	The committee has considered the stated implementation requirements; no further response is required.
			General Comments:	
			EJ-157, Item 5: Replace "creditor's" with "debtor's", "Applicant requests that the judgment ~~creditor's~~ **debtor's** deposit account exemption…"	The committee appreciates this correction and has modified the proposal accordingly.
			EJ-159, item 3c: Section referenced should be **704.220**, not 104.220.	The committee appreciates this correction and has modified the proposal accordingly.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-05

Civil Practice and Procedure: Enforcement of Judgment Forms—Exemptions (Revise forms EJ-130, EJ-150, EJ-155, and EJ-156; adopt forms EJ-157, EJ-157-INFO, EJ-158, and EJ-159)

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	Commenter	Position	Comment	Committee Response
6.	East Bay Community Law Center by Sharon Djemal Director Consumer Justice Clinic Jenna Miara, Directing Attorney Bet Tzedek Rebecca Miller, Senior Litigator Western Center on Law & Poverty Claire Johnson Raba Clinical Teaching Fellow, Consumer Law Clinic University of California-Irvine School of Law	AM	The East Bay Community Law Center, Bet Tzedek, University of California-Irvine School of Law, and Western Center on Law and Poverty are pleased to have the opportunity to comment on the Judicial Council's proposed forms for the implementation of SB-616. As co-sponsors of SB-616 or members of a co-sponsoring organization, we are intimately familiar with the purposes of these important changes to the law; and we support your efforts to bring the forms into compliance with the new legislation. The legislation and forms are a critical step towards protecting low-income Californians. The proposed forms convey most of the new information, and we appreciate the painstaking efforts the Judicial Council has clearly already put into these forms. However, in some instances, the proposed forms misstate the law, exclude crucial exemptions, or are unnecessarily confusing. Our work with low-income residents convinces us that our clients and other vulnerable people across California will be best protected if the proposed forms are revised to better reflect the wording and intent of SB-616. Below, we specify the various issues we identified with theproposed forms and recommend alternative language where appropriate. **A.** <u>Proposed Form EJ-157-INFO Should Be</u>	The committee appreciates the commenters' support for the proposal if modified.

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			Revised to Clarify That Under Certain Circumstances, the Financial Institutions Will Automatically Apply the Exemption SB-616 was implemented in order to help remove the great burdens debtors face when their accounts are levied. Unfortunately, we believe that proposed form EJ-157-INFO may mislead debtors into believing that, in all circumstances, they must file an ex parte application in order to prevent their financial institution from levying their bank account. Specifically, EJ-157-INFO, paragraph 2, states that when a judgment debtor applies for an order to specify how to designate a specific account or how to allocate the exemption amount multiple accounts, the debtor should apply an ex parte application as soon as possible because the financial institution is required to act promptly in sending funds to the levying officer. This can be confusing for the debtor because it implies that the bank is not required to automatically apply the exemption absent a court order. The debtor only needs to file an ex parte application if the debtor wants to designate to which account the bank account(s) the bank should apply the exemption when the debtor has multiple accounts in the same institution. We recognize the great difficulty in creating forms that are both easily comprehensible,	The committee has considered this comment and modified EJ-157-INFO to incorporate the spirit of this and similar suggestions to provide further specificity and clarity about the new law and the debtor's and creditor's respective rights and obligations with respect to the automatic deposit account exemption.

	Commenter	Position	Comment	Committee Response
			while also distinguishing the complicated details that are not necessarily easy to convey on a form. However, we feel it is very important that this distinction clear to the debtor. In order to achieve an accurate recitation of the law, we propose that the following language replace paragraph 2 of EJ-157-INFO: 1. Automatic exemption: California Code of Civil Procedure section 7040.220 provides that financial institutions <u>must</u> apply automatic exemption when served a notice of levy on a judgment debtor's deposit account, if the underlying judgment is not based on wages owed or child or spousal support. 2. If you only have one bank account, your bank will automatically exempt the amount protected under the law. If you have more than one bank account, use this form to ask the court to tell your bank how to apply the exemption. If you do not, you will still receive the exemption but your financial institution will decide to which account(s) it applies. **B.** <u>Proposed Forms Fail to Acknowledge 704.225's Hardship Exemption and Effective Date</u> Although SB-616 only directs the Judicial	

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			Council to amend or adopt forms necessary to implement CCP § 704.220, it is important that the new forms properly convey debtors' full range of exemptions, especially those contained within SB-616. Unfortunately the proposed forms do not mention newly created exemption CCP § 704.225, the "hardship exemption." This exemption is already in effect, as it became law on January 1, 2020. It allows a judgment debtor to exempt money in their deposit account "to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor." This gives debtors the opportunity to exempt even more money in their deposit account than the current automatic exemption amount authorized by 704.220. Essentially, the hardship exemptions allows a debtor the opportunity to argue that, even though the money in their deposit account is not otherwise exempt from collection, due to the debtor's actual financial needs to support themselves and their dependents, the court should exempt that money needed for support from collection. This new section is not mentioned on any of the updated forms. It is imperative that all Judicial Council forms are properly updated to reflect the stand-alone hardship exemption for deposit accounts. In order to achieve this, we propose the following amendments: 1. EJ-155, "Exemptions from the	

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			Enforcement of Judgments", should be revised to include, on page 1, "CCP § 704.225" under "Deposit Accounts (generally)"; 2. EJ-156, "Current Dollar Amounts of Exemptions from Enforcement of Judgments," should be revised to include, on page 2, "704.225 Money in a Judgment Debtor's Deposit Account that is not otherwise exempt, but is needed for the support of the judgment debtor and the spouse and dependents of the judgment debtor." Since this amount varies dependent on the debtor, it might be prudent to include an asterisk for the dollar amount, which varies according to each debtor's particular situation. **C.** Proposed Forms EJ-150 and EJ-157 Fail to Properly Implement SB-616 and Contain Confusing and Misleading Statements As previously stated, SB-616 directs the Judicial Council to amend and adopt forms necessary to implement CCP § 704.220. Due to the tremendous impact that the automatic deposit account exemption is going to have on debtors; as well as the procedural changes that financial institutions will have to understand in order to carry out the mission of SB-616, it is	The committee appreciates this comment relating to the hardship exemption established by section 704.225, and has modified EJ-155 to include this additional exemption in the list under "Deposit Accounts." The committee has considered this suggestion, but because form EJ-156 is a list of the "current dollar amounts" of various exemptions that are revised on a triennial schedule, whereas the hardship exemption is not a set dollar amount, the committee believes its inclusion would be misplaced on form EJ-156.

	Commenter	Position	Comment	Committee Response
			imperative that the forms properly convey the law in a clear and easy to understand fashion. Unfortunately, beyond the suggestions made above, proposed EJ-150 and EJ-157 contain numerous misstatements of the law and often utilize unnecessarily confusing and ambiguous language. As a result, we propose the modifications outlined below. *i. Changes Needed to Comply with Statutory Language* In order to make proposed EJ-150 comply with the law, the following changes must be made: 1. On page 2, under "Information For Judgment Debtor": a. Paragraph 2 states "…assigned a tracking number by the US Postal Service." Unlike the language in the form, the relevant statute, CCP § 703.520, does not limit the carrier to the US Postal Service. Instead, the statute states: "assigned a tracking number by the United States Postal Service or another common carrier…" Moreover, individuals filling out the form may have easier access to a common carrier that is not the US Postal Service. Thus, the form should be changed to state "…assigned a tracking number by the US Postal Service or	The committee appreciates this suggestion and has modified the proposal accordingly.

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			other common carrier." In order to make proposed EJ-157 comply with the law, the following changes should be made: 1. On page 1, paragraphs 3 and 4, the form directs the movant to attach a copy of the Writ of Execution and Notice of Levy that is at issue. Unfortunately, many debtors do not end up receiving copies of the Writ of Execution and/or Notice of Levy. In some cases, debtors file exemption documents based on incomplete secondhand information they obtained from their bank because they never received a copy of the Writ and/or Notice. The statute does not require the movant to attach the Writ or Notice to the ex parte application. Thus, this requirement is an unnecessary requirement that may lead to debtors not exercising their exemption rights simply because they do not have copies of the documents. We recognize it would be very difficult for a court to issue an order on an ex parte application without being able to review copies of the Writ and Notice, and that it is definitely preferable that these documents are attached to the ex parte application. Thus, we suggest that paragraph 3 of the proposed form be revised to state: "(Attach a copy, if available.) And that paragraph 4 be revised to state: "(identify and attach a copy of each notice, if available):"	The committee appreciates this comment indicating that some debtors may not have copies of the Writ of Execution and Notice of Levy and the suggestion that copies should only be required "if available." While the committee is sympathetic to this possibility, copies of these documents may be necessary for a court to fully and fairly evaluate the ex parte application. Therefore, the committee declines to revise the proposed new form to eliminate the request to attach the Writ of Execution and Notice of Levy, but instead modified the form to allow for a litigant to provide an explanation as to why the Writ or Notice of Levy is not attached.

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			ii. Changes Suggested to Make Forms More User Friendly and Understandable In order to make EJ-150 less confusing, the following changes should be made: 1. On page 2, under "Information For Judgment Debtor": a. Paragraph 2 and 3 should be switched so it's clear that a debtor does not need to file a claim of exemption to receive the automatic protections of SB- 616.	The committee appreciates this suggestion and has modified the proposal accordingly.
			b. Paragraph 2 states "A list of exemptions is attached." Most debtors obtain Judicial Council forms electronically, where a list of exemptions is not attached. Instead of this language, the form should be revised to cite to the form that contains the list of exemptions. Specifically, the second sentence should read: "A list of exemptions ~~is attached~~ can be found on form EJ- 155."	The committee appreciates this suggestion and has modified the proposal accordingly.
			c. Paragraph 2 states "…by filing a claim of exemption and one copy with levying officer as provided…" This should be corrected to read: "…by filing a claim of exemption and one copy of the claim with the levying officer…"	The committee appreciates this suggestion and has modified the proposal accordingly.
			d. Paragraph 3 states, "There are automatic exemptions that financial institutions should apply to a deposit account before providing funds to the levying officer." Proposed language: "This notice does not mean that all of the money in your bank	The committee has considered this comment and suggested modified language, but determined that the existing language is equally clear and more succinct.

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			account will be levied and paid to the creditor. There are legal protections that exempt (protect) your money up to a certain dollar amount. See below for more information about money in deposit accounts." 2. On page 2, under "Information About Deposit Accounts": a. Paragraph 1 states that "there is an automatic exemption for money in a deposit account…" Since SB-616 is a new law, and financial institutions will be utilizing these forms while navigating their new legal responsibilities, it is important that financial institutions are aware that they are the entities that will be effectively applying the automatic exemption. Therefore, we suggest the sentence be reworded to state: "If the levy is not to satisfy a judgment for wages owed, child or spousal support, or liability to the state government, ~~there is an automatic exemption for~~ financial institutions must automatically exempt money in a deposit account up to a certain dollar amount, under section 704.220 of the Code of Civil Procedure, with no claim of exemption required." b. Paragraph 1 instructs financial institutions to reference form EJ-156 for the exemption amount, but does not explain where. EJ-156 is two pages of lists, which can be daunting. In order to make clearer where financial institutions should refer for information about required exemption	The committee appreciates this suggestion and has modified the proposal accordingly. The committee has considered this suggestion, but declines to further revise the form to include specific statutory references, as this level of

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			amounts, the instructions should be rewritten to read "See form EJ-156, Code Civ. Proc. Section 704.220, for the exemption amount." c. Paragraph 2 can similarly be rewritten to provide more specific instructions to readers: "(See form EJ-156, Code Civ. Proc. Section 704.080, for the exemption amounts.)" D. Procedural Question We agree with the Judicial Council's interpretation that either the debtor or the creditor may request a hearing on shortened notice (or, in certain circumstances request an order without a hearing) for the court to determine how and to which accounts the exemption applies. We propose that the preference be for a hearing on shortened notice, since this process results in the loss of property and many of these will be filed by self-represented litigants who may need the opportunity to be heard. Given the expansion of protections for low-income Californians and the difference these new protections will make in their lives, it is critical that those who stand to benefit are correctly and adequately informed of their rights. Revising forms to reflect the statutory meaning and creating new forms to make accessing those rights easier is critical to the law's success. In conclusion, we wish to reiterate our	statutory specificity would be atypical and the reference to the form itself should provide sufficient explanation. The committee has considered this suggestion, but declines to further revise the form to include specific statutory references, as this level of statutory specificity would be atypical and the reference to the form itself should provide sufficient explanation. The committee appreciates this comment relating to the ex parte hearing process. As noted, though the statute is somewhat unclear, the committee has determined that it allows for either an order shortening time for a hearing on the application or an ex parte order without a hearing where appropriate. The forms themselves do not indicate a "preference," and it will be up to the court in each individual case to determine whether it is appropriate to rule without a hearing. The committee appreciates the commenter's perspective on the impact SB 616 may have on various stakeholders; no further response required.

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			appreciation for the Judicial Council's efforts to implement SB-616. We are grateful for the Council's work as well as for its investment of time and effort in this issue of immediate importance to our low-income clients. EBCLC, Bet Tzedek, University of California-Irvine School of Law and Western Center on Law & Poverty are grateful, too, for its invitation to comment on the proposed forms. We are confident the Council's efforts will substantially improve the lives of thousands of Californians.	
7.	California Association of Judgment Professionals by Gretchen D. Lichtenberger Legislative Chairperson	NI	On behalf of the California Association of Judgment Professionals, we would like to submit our comments regarding the proposed revisions to the Judicial Council forms EJ-130, EJ-150, EJ-155, and EJ-156 and the adoption of forms EJ-157, EJ-157-INFO, EJ-158 and EJ-159. <u>Comments and Suggestions:</u> Yes, this new law is very confusing and will cause a great deal of havoc for creditors and for the courts. We have no idea yet of the full impact this poorly written law will have upon all those involved with judgment enforcement, including the courts, the clerks and the sheriffs. I could go on and on about what a mess this is going to cause because the law put the requirements for compliance on the financial institutions, which now have a huge added burden to processing levies.	The committee appreciates the commenter's perspective on the impact SB 616 may have on various stakeholders; no further response required.

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			Judgment Creditors will have no way of knowing if the financial institutions have properly complied or not. The new law makes no provisions for whether the financial institution is suppose to freeze the money for any length of time or whether the financial institution will simply not freeze the automatically exempt amount of $1,724.00 and allow the judgment debtor full access to said money after the levy. If the judgment debtor has multiple accounts at the same financial institution and the financial institution happens to apply the $1,724.00 exemption to EACH account, the judgment debtor may be able to liquidate all the funds before the judgment creditor has a chance to do anything. I can see a future where the judgment creditors will go into court ex parte, no notice and get the order BEFORE doing the levy and then serving the order about allotment of the funds WITH the Notice of Levy to assure the judgment debtor doesn't abscond with the funds once they know about the levy. What a mess!! Anyway, here are my suggestions and comments regarding the Invitation to Comment: Specifically, you asked for comments regarding a stay of enforcement. A "Stay of Enforcement" would benefit and be requested for only by the judgment debtor whereas a "Temporary Injunction or Restraining Order" would benefit and be requested by the judgment creditor to prevent the financial	The committee appreciates this comment on whether the forms should provide for an optional request for stay of enforcement of judgment, and the suggestion that the existing space for "other rulings" on the form order may be sufficient . Having considered all of the comments on this

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			institution from allowing the debtor to remove funds from the deposit account until the court makes an order about the exemption. If either party goes into court quickly, the court is able to make whatever ruling is necessary to protect either side. Your new EJ-159 Order already has a spot for "Other Rulings" in item 9 where the court can order stay of enforcement or temporarily restrain the financial institution or whatever else is required. I, personally, have gone into court ex-parte on many occasions over the years to obtain an order from the court for whatever I needed to accomplish my goal. It is impossible to know all the fallout of this new law until it starts being applied and used. The pitfalls are many and only time will tell how this law will twist and turn the multiple accounts scenario. <u>Suggestions for the Writ of Execution, EJ-130 form:</u> 1) In the caption on page 1 on top of the EJ-130, I suggest changing the wording of "Plaintiff :" to "Plaintiff/Petitioner :" and changing "Defendant :" to "Defendant/Respondent :", so it is clear for Family Law and Probate cases. Also, the same change to the top of pages 2 & 3. I will be making this suggestion/comment for all forms in the future, as well. Some forms on page 2 show the "Plaintiff"	issue, the committee concluded that the forms should not be further revised to include an optional request for a stay because this is beyond what the statute provides for and the form order allows for "other rulings" which may encompass similar relief where appropriate. The committee appreciates this suggestion and has modified the proposal accordingly.

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			and the "Defendant" lines separately and autofill those lines from the entries on page 1 whereas other forms have "Short Title" on the top of page two without any autofill so said area must be typed separately. It would be nice for all forms to be consistently the same, as suggested by our Members.	The committee appreciates this suggestion and, where possible and appropriate, has modified the second page of the forms so that they are consistent and can autofill from the first page.
			2) Another suggestion by our Members was that some forms have the upper box where the filing party's information is type as individual lines to type into whereas some forms have one box that allows typing everything like for a letter or envelope. This second options is best because we can copy the complete name and address at one time and just paste that information into another form one time without copying each line and pasting each line separately.	The committee appreciates this suggestion and, where possible and appropriate, has modified the second page of the forms so that they are internally consistent. Where this change has not been made, the suggestion will be considered for future revisions of these forms.
			3) I would like to suggest that you move the vertical line in the caption box a little to the left so the Case Number area is slightly large to accommodate the full case number where some courts have long numbers. Also, please make the "Case Number" boxes on pages 2 and 3 slightly larger. As an alternative, please format the Case Number boxes to automatically reduce the font size if a longer number is typed into said box.	The committee appreciates this suggestion and, where possible and appropriate, has modified the formatting of the form captions to provide some additional space for the case number. Where this change has not been made, the suggestion will be considered for future revisions of these forms.
			4) Under item 4 on page 1 of the EJ-130, I suggest adding another check box with the words "Includes additional names pursuant to	The committee has considered the suggestion to include reference to an "affidavit of identity" but declines to make this change at this time as it is

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			an affidavit of identity" above the check box "Additional judgment debtors on next page". In item 21 on page 2 of the EJ-130, I suggest the words of the check box be extended to one line across to the right side (to make space) plus I suggest adding a "(s)" to "debtor" so said sentence reads "Additional judgment debtor(s) (name, type of legal entity if not a natural person, and last known address): ". I then suggest adding a check box below the area for the debtor(s) name and address indicating below each "Includes additional names pursuant to an affidavit of identity". If you need more space on page 3, you can change item 24c by removing the area for the creditor to itemize costs and by removing the check box for "Below" and just have check box 24c read "Additional costs against certain joint debtors are itemized on Attachment 24c". This itemization area is rarely used. If you opt not to make this change, please change the second check box for item 24c to read "on Attachment 24c" rather than "Attachment 23c", since you changed that item's number. This change to include reference to the affidavit of identity is necessary because Code of Civil Procedure section 699.520(k) mandates this information be on the Writ of Execution. This has been a mandate for quite some time however not included on past EJ-130 forms. When using a Writ of Execution which includes additional names of the	beyond the scope of the proposal. The suggestion will be considered for future revision of the form. The committee appreciates this suggestion and has modified the proposal accordingly. The committee has considered the suggestion to include reference to an "affidavit of identity" but declines to make this change at this time as it is beyond the scope of the proposal. The suggestion will be considered for future revision of the form. The committee appreciates this correction and has modified the proposal accordingly.

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			judgment debtor pursuant to an affidavit of identity, the judgment creditor is required to serve a copy of the affidavit of identity upon the judgment debtor [CCP §700.010(a)(4)] along with a copy of the Writ [CCP §700.010(a)(1)].	
			5) Under item 22c where the check box reads "other", presumably, there will be a text box following the word "other" to fill in clarification of why the levy would not be subject to CCP §704.220 exemption. If this wasn't planned, I would like to make that suggestion.	The committee appreciates this suggestion and has modified the proposal accordingly.
			6) Under item 25, presuming you renumber this item, I suggest you change the references to "24" in item 25a(4) to read "item 25a(3)" and "item 25a(2)" at the bottom of page 2, and in item 25b to read "(itemize in 25e)" and in item 25e to read "On Attachment 25e"	The committee appreciates this suggestion and has modified the proposal accordingly.
			7) In item 17, I suggest adding "(GC 70626(a)(1)" after "Fee for issuance of writ". The fee just went up to $40.00 so this is a reminder where to find the correct amount that goes on this line.	The committee has considered this suggestion, but declines to further revise the form to include this specific statutory reference, as this level of statutory specificity would be atypical.
			8) In item 18, I suggest the wording be changed from "Total" to "Total amount due" so item 18 will read "Total amount due (add 15, 16, 17)". The reason for this change is to make the verbiage uniform on the integrated	The committee appreciates this suggestion and has modified the proposal accordingly.

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			forms for clarity. The number that is in item 18 on the Writ of Execution EJ-130 form is the same number that goes into item 2a (now item 3a) on the Notice of Levy EJ-150 form. 9) In item 19b, please change "CCP 699.520(i)" to "CCP 699.520(j)". The addition of items to 699.520 several years ago caused the renumbering of the subsection for the court reimbursement costs. 10) It would be great if somehow in item 5 it could read "Judgment entered/amended on (date):". There is always confusion when a judgment has been amended on a date that is not "nunc pro tunc" so creditors are confused what to put in this item when a judgment is "entered" on a particular date, then "amended" on a date later. My suggestion to make this happen would be to reword the item 9 check box to one line to read "Writ of Possession/Writ of Sale information on next page" and move the item 8 check box up above the item 9 check box. Then, item 8 and item 9 would have consistent wording. This would allow a little more space on the left side of the page. <u>Suggestions for the Notice of Levy, EJ-150 form:</u> 1) In the caption box in the upper left, I suggest you add the word "original" to	The committee appreciates this suggestion and has modified the proposal accordingly. The committee has considered this suggestion, but declines to further revise the form to include the word "amended" as this could also cause confusion. The committee appreciates the suggestion to modify the language of item 9 to make it more consistent with item 8, and has modified the proposal accordingly.

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			"judgment creditor", like on the Writ of Execution EJ-130 caption; so, the second check box should read "Original Judgment Creditor". You can move the "Assignee of Record" check box to the right, if needed. 2) Please make sure the upper right corner of page 1 of the EJ-150 fully complies with Government Code 27361.6 to leave ample room for the Recorder. 3) In the caption on page 1 on top of the EJ-150, I suggest changing the wording of "Plaintiff :" to "Plaintiff/Petitioner :" and changing "Defendant :" to "Defendant/Respondent :", so it is clear for Family Law and Probate cases. 4) In the caption area (where it shows the title of the document "Notice of Levy"), I suggest that you bring the check box for "Sale" under the check box for "Execution (Money Judgment), similar to how the Writ of Execution EJ-130 caption looks. This way you can move the vertical line after "Sale" to the left to create a larger box for the "Court Case No". I suggest the "Court Case No." box should be formatted to hold a case number like "56-2020-00889966-CU-PO-VTA", for example. Additionally, the "Court Case No." box on page 2 should be enlarged by making the "Short Title" box made smaller.	The committee appreciates this suggestion and has modified the proposal accordingly. The committee appreciates this suggestion and considered the requirements of the statute in formatting the form. The committee appreciates this suggestion and has modified the proposal accordingly. The committee appreciates this suggestion and, where possible and appropriate, has modified the formatting of the form captions to provide some additional space for the case number. Where this change has not been made, the suggestion will be considered for future revisions of these forms.

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			5) In item 1a, I suggest you add clarity so it will read "Judgment Debtor (name, as shown in item 4 or 21 of Writ)". This additional language should also satisfy the requirement in CCP §699.540(e) regarding informing the person notified of names added to the Writ by affidavit of identity. Said statutory requirement says the Notice of Levy form "shall inform the person notified" of all names listed in the writ of execution.	The committee appreciates this suggestion but declines to modify the proposal in this way at this time.
			6) In item 1b, I suggest you add before the check box "as follows" to read " in Attachment 1b or ". In other words, I suggest you add an option to describing the property to be levied upon in item 1b by adding a check box indicating the property to be levied upon is described in an Attachment….. or as follows.	The committee appreciates this suggestion but declines to modify the proposal to create a new attachment at this time.
			7) In item 2, where the check box reads "other", presumably, there will be a text box following the word "other" to fill in clarification of why the levy would not be subject to CCP §704.220 exemption. If this wasn't planned, I would like to make that suggestion.	The committee appreciates this suggestion and has modified the proposal accordingly.
			8) Item 3 has obviously been renumbered by the addition of item 2. In item 3a, I suggest you remove "(less partial satisfactions)" and replace it with "(line 18 from the Writ)". Per my suggestion for line 18 of the Writ above, I am suggesting the	The committee appreciates this suggestion and has modified the proposal to include reference to line 18 of the Writ.

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			verbiage is uniform among the forms. So, item 3a should read "Total amount due (line 18 from the Writ)". This will aid judgment creditors when filling out this form.	
			9) In item 3b, I suggest adding the statutory reference of GC 26720.9, so item 3b will read "Levy fee (GC 26720.9)". This is a reminder where to find the correct amount that goes on this line.	The committee has considered this suggestion, but declines to further revise the form to include specific statutory references, as this level of statutory specificity would be atypical.
			10) In item 3c, I suggest adding the statutory reference of GC 26746(a), so item 3c will read "Sheriff's disbursement fee (GC 26746(a))". This is a reminder where to find the correct amount that goes on this line.	The committee has considered this suggestion, but declines to further revise the form to include specific statutory references, as this level of statutory specificity would be atypical.
			11) In item 3d, I suggest adding the statutory reference of CCP 685.090(c) & (d), so item 3d will read "Recoverable costs (CCP 685.090(c) & (d))". This is a reminder where to find the correct amount that may be entered on this line.	The committee has considered this suggestion, but declines to further revise the form to include specific statutory references, as this level of statutory specificity would be atypical.
			12) In item 3f, I suggest you add "(line 19a from the Writ)" so item 3f will read "Daily Interest (line 19a from the Writ)". This will aid judgment creditors when filling out this form.	The committee appreciates this suggestion and has modified the proposal accordingly.
			13) In item 4, which has obviously been renumbered from item 3 by the addition of item 2, I suggest you add the statutory reference of "pursuant CCP 700.010 et seq"	The committee has considered this suggestion, but declines to further revise the form to include

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	Commenter	Position	Comment	Committee Response
			for clarity so item 4 will read "You are notified as (pursuant to CCP 700.010 et seq.)". This will aid judgment creditors when filling out this form to figure out in what capacity a person is required to be served by statute. 14) On page 2, item 2 under 'Information for Judgment Debtor', I suggest a slight revision to the language, as follows: "A list of exemptions is ~~attached~~ enclosed" "The date of filing is calculated as the date ~~it~~ the claim is received by the levying officer, or the date of the postmark if the claim is mailed and assigned a tracking number by the ~~US~~ U.S. Postal Service." 15) On page 2, item 3 under 'Information for Person Other Than Judgment Debtor', I suggest a slight revision to the language, as follows: "You must complete the accompanying Memorandum of Garnishee within 10 days (CCP 701.030(a))" 16)On page 2, item 5 under 'Information for Person Other Than Judgment Debtor', I suggest a slight revision to the language, as follows: " Make checks payable to the levying officer	specific statutory references, as this level of statutory specificity would be atypical. The committee appreciates these suggested modifications to page two of form EJ-150 "Information for Judgment Debtor" at item 2. The committee has considered these and other similar suggestions and modified item 2 (now renumbered as item 3) in various ways to increase clarity. The committee has considered this suggestion and included the 10 day requirement, but declines to further revise the form to include a specific statutory reference, as this level of statutory specificity would be atypical. The committee has considered this suggestion and included the suggested reference to page 1.

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	Commenter	Position	Comment	Committee Response
			shown on upper right of page 1" 17)On page 2, item 3 under 'Information About Deposit Accounts', I suggest a slight revision to the language, as follows: "If a judgment debtor has multiple accounts in one or more financial institution, either the judgment creditor or judgment debtor ~~(defendant)~~ may file an application in the superior court identified in the front of this form for an order as to which account the exemption should apply." The statute does not use the word "defendant" and said word is inaccurately used here. A "defendant" is an adverse party in a civil <u>action</u> [CCP §308]. After judgment is entered, the party against whom the judgment is rendered is the "judgment debtor" to the judgment [CCP §680.250], irrespective of whether said party was the Plaintiff or the Defendant in the action or proceeding. Referring to the judgment debtor as "defendant" could be confusing when a judgment is rendered against the Plaintiff, which happens routinely.	The committee appreciates this suggestion and has modified the proposal accordingly.

			Suggestions for the Exemptions From the Enforcement of Judgments EJ-155 form: 1) On page 1, in the fourth paragraph, I suggest a slight revision to the language, as follows: " If you believe the assets that are being levied on are exempt, file the claim of exemption form that your received ~~from the levying officer~~ with the Notice of Levy packet. Registered Process Server also serve levy packets under CCP §699.080 and are required to serve the judgment debtor with all the documents listed in CCP §700.010, therefore, the claim of exemption form may be received from an RPS. If this form says to use the claim of exemption form "from the levying officer", the judgment debtors may call the levying officers to obtain a form from them, which is unnecessary. 2) On page 1, at the lower left where you are adding "Deposit Accounts (generally)", I would like to suggest alternatively you use "Deposit Accounts (minimum only)" or	The committee appreciates this suggestion and has modified the proposal accordingly. The committee appreciates this suggestion but declines to modify the proposal as suggested

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	Commenter	Position	Comment	Committee Response
			"Deposit Accounts (limited)" or something similar. <u>Suggestions for the Current Dollar Amounts of Exemptions From the Enforcement of Judgments EJ-156 form:</u> 1) On page 1, for the third line, I suggest a slight revision to the language, as follows: "EXEMPTIONS UNDER SECTION 703.140(b) USED IN A CASE UNDER TITLE 11 OF THE UNITIED STATES CODE (ie. Bankruptcy)" Regularly, judgment debtors try to claim the amounts shown on page 1 of the EJ- 156 form on their Claim of Exemption form in a regular civil case where they are supposed to use the amounts on page 2 of said form. The addition of my suggested language to page 1 may help minimize the confusion. <u>Suggestions for the Ex Parte Application for Order on Deposit Account EJ-157 form:</u> 1) In the caption on page 1 on top of the EJ-157 form, I suggest changing the wording of "Plaintiff :" to "Plaintiff/Petitioner :" and changing "Defendant :" to "Defendant/Respondent :", so it is clear for Family Law and Probate Cases.	because the reference to "Deposit Accounts (generally)" accurately describes the exemption. The committee appreciates this suggestion and has modified the proposal accordingly. The committee appreciates this suggestion and has modified the proposal accordingly.

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W20-05

Civil Practice and Procedure: Enforcement of Judgment Forms—Exemptions (Revise forms EJ-130, EJ-150, EJ-155, and EJ-156; adopt forms EJ-157, EJ-157-INFO, EJ-158, and EJ-159)

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

	Commenter	Position	Comment	Committee Response
			2) In the caption box in the upper left, I suggest you add the word "original" to "judgment creditor", like on the Writ of Execution EJ-130 caption; so, the second check box should read "Original Judgment Creditor". You can move the "Assignee of Record" check box to the right, if needed. 3) On page 1, where the title of the document is shown, I suggest a slight revision to the format, as follows: EX PARTE APPLICATION FOR ORDER ON DEPOSIT ACCOUNT EXEMPTION Without hearing Hearing on Shortened Notice This format change would allow you to move the vertical line in the caption box a little to the left so the Case Number area is slightly large to accommodate the full case number where some courts have long numbers. Also, please make the "Court Case No,:" box on page 2 slightly larger by shortening the length of the "Short Title" box. 4) On page 1, item 1, I suggest you remove the words "defendant" and "plaintiff" for the same reasons stated in item 17 for the EJ-150 form above. I suggest you leave "or assignee of record" in the parenthesis after "Judgment Creditor" because an assignee of record is, by statute, the judgment creditor [CCP§680.240]. Or you may want to replace	The committee appreciates this suggestion and has modified the proposal accordingly. The committee appreciates this suggestion and, where possible and appropriate, has modified the formatting of the form captions to provide some additional space for the case number. Where this change has not been made, the suggestion will be considered for future revisions of these forms. The committee appreciates these suggestions and has modified the proposal accordingly.

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W20-05

Civil Practice and Procedure: Enforcement of Judgment Forms—Exemptions (Revise forms EJ-130, EJ-150, EJ-155, and EJ-156; adopt forms EJ-157, EJ-157-INFO, EJ-158, and EJ-159)

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

	Commenter	Position	Comment	Committee Response
			the word "plaintiff" with "original" so inside the parenthesis reads "original or assignee of record" after "Judgment Creditor". 5) On page 1, item 3, I suggest a slight revision to the wording, as follows: "Date Issued:" should read "Date Writ Issued:", for clarity. [I know some of my suggestions seem unnecessary however you have no idea how many questions I field from judgment creditors who don't understand what to fill into certain lines on various judgment enforcement forms. Creditors, as well as Clerks, Sheriffs and Judges, need as much clarity and simplification as possible].	The committee appreciates this suggestion and has modified the proposal accordingly.
			6) On page 1, at the very bottom the check box should reference "Attachment 4" not "Attachment 3".	The committee appreciates this correction and has modified the proposal accordingly.
			7) On page 2, item 5 should be corrected to read: "Applicant requests that the judgment creditor's debtor's deposit account exemption under Code of Civil Procedure section 704.220(a) be applied (check one)"	The committee appreciates this suggestion and has modified the proposal accordingly.
			8) On page 2, at the lower right, presumably the words "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct" (BTW, "law" is missing the "s" on	The committee appreciates this suggestion and has modified the proposal to add an "s" and remove the fillable blank space accordingly.

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			the form) will all run together as a sentence without the space as shown on the proposed EJ-157 form. I am not sure if the space was intended to be a fillable line for the declarant's name, however if that is the case, it is not necessary because the name of the Declarant/Applicant is typed or written below the date in the lower left of page 2 next to the signature line. <u>Suggestions for the Instructions for Ex Parte Application for Order on Deposit Account EJ-157-INFO form:</u> 1) In item 2, I suggest you remove the word "defendant" after "judgment debtor" for the same reasons stated in item 17 for the EJ-150 form above. Also, I suggest you add "or judgment creditor" to be in compliance with the wording of the statute. I suggest a slight revision to the wording, as follows: A judgment debtor ~~(defendant)~~ or a judgment creditor applying for an order to designate a specific account or how to allocate the exemption among multiple accounts should do so as soon as possible after receiving a notice of levy or after receiving the memorandum of garnishee, as applicable,…… <u>Suggestions for the Declaration Regarding Notice and Service of Ex Parte Application for Order on Deposit Account Exemption EJ-</u>	The committee appreciates this suggestion and has modified the proposal accordingly.

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W20-05

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

	Commenter	Position	Comment	Committee Response
			158 form 1) In the caption on page 1 on top of the EJ-158 form, I suggest changing the wording of "Plaintiff :" to "Plaintiff/Petitioner :" and changing "Defendant :" to "Defendant/Respondent :", so it is clear for Family Law and Probate cases.	The committee appreciates this suggestion and has modified the proposal accordingly.
			2) I suggest box for the Case Number area be large enough to accommodate the full case number where some courts have long numbers. If this current space does not do so, may I suggest you move the vertical line to the left so the Case Number box fits long case numbers, or in the alternative set the formatting so when the longer case numbers are typed, the font size automatically reduces to fit the box. Also, please make the "Case Number" box on page 2 permits the entire longer case number otherwise please shorten the Plaintiff/Defendant box (should this box say "Short Title" to be consistent with other forms??)	The committee appreciates this suggestion and, where possible and appropriate, has modified the formatting of the form captions to provide some additional space for the case number. Where this change has not been made, the suggestion will be considered for future revisions of these forms.
			3) On page 1, item 1, I suggest a change of the words "judgment creditor" to "original judgment creditor" and adding another check box for "assignee of record", or in the alternative the "judgment creditor" check box can read "original judgment creditor or assignee of record".	The committee appreciates this suggestion and has modified the proposal accordingly.
			4) On page 1, item 3a(1), and on page 2,	

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	Commenter	Position	Comment	Committee Response
			item 4a. I suggest you revise the "judgment creditor" wording to include an assignee of record as follows: "judgment creditor (or assignee or record)" "judgment creditor's attorney (or assignee of record's attorney)"	The committee appreciates this suggestion and has modified the proposal accordingly.
			<u>Suggestions for the Order Application for Designation of Deposit Account ExemptionEJ-159 form</u>	
			1) In the caption box in the upper left, I suggest you add the word "original" to "judgment creditor", like on the Writ of Execution EJ-130 caption; so, the second check box should read "Original Judgment Creditor". You can move the "Assignee of Record" check box to the right, if needed.	The committee appreciates this suggestion and has modified the proposal accordingly.
			2) In the caption on page 1 on top of the EJ-159 form, I suggest changing the wording of "Plaintiff :" to "Plaintiff/Petitioner :" and changing "Defendant :" to "Defendant/Respondent :", so it is clear for Family Law and Probate cases.	The committee appreciates this suggestion and has modified the proposal accordingly.
			3) In the caption area where it shows the title of the document, I suggest that move the vertical line to the left to create a larger box for the "Court Case No". I suggest the "Court Case No." box should be formatted to hold a case number like "56-2020-00889966-CU-	The committee appreciates this suggestion and, where possible and appropriate, has modified the formatting of the form captions to provide some additional space for the case number. Where this

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W20-05

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	Commenter	Position	Comment	Committee Response
			PO-VTA", for example. Additionally, the "Court Case No." box on page 2 should be enlarged by making the "Short Title" box made smaller.	change has not been made, the suggestion will be considered for future revisions of these forms.
			4) On page 1, item 1, I suggest you remove the words "defendant" and "plaintiff" for the same reasons stated in item 17 for the EJ-150 form above. I suggest you leave "or assignee" in the parenthesis after "Judgment Creditor" because an assignee of record is, by statute, the judgment creditor [CCP §680.240]. Or you may want to replace the word "plaintiff" with "original" so inside the parenthesis reads "original or assignee of record" after "Judgment Creditor".	The committee appreciates this suggestion and has modified the proposal accordingly.
			5) On page 1, item 3c, the statutory reference should be changed from "104.220" to "704.220"	The committee appreciates this correction and has modified the proposal accordingly.
			6) On page 1, item 6b, I suggest you revise the "judgment creditor" wording to include an assignee of record as follows: i. "judgment creditor (or assignee or record)" ii. "judgment creditor's attorney (or assignee of record's attorney)"	The committee appreciates this suggestion and has modified the proposal accordingly.
			7) On page 2, item 7d, I suggest you revise the "judgment creditor" wording to include an assignee of record as follows:	

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W20-05

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	Commenter	Position	Comment	Committee Response
			i. "judgment creditor (or assignee or record)" Thank you for your consideration. Should you need any further clarification or have any questions, please do not hesitate to contact me.	The committee appreciates this suggestion and has modified the proposal accordingly.
8.	Fen-Ru Chen Administrative Analyst Family Law and Juvenile Court Superior Court of California, County of Orange	NI	Request for Specific Comments • Does the proposal appropriately address the stated purpose: Yes • Is it appropriate for the application and order to include items allowing the exemption to be allocated among multiple accounts, if not, why: N/A • Would adding an optional request for stay of enforcement of judgment to the new ex parte application form be appropriate for help: Yes • What would the implementation requirements be for courts, for example, training staff (positions and hours), revising procedures and process (describe), changing docket codes in case management system, or modifying case management systems: Implementation would require staff training, procedure revision, and updates to the case	The committee appreciates the commenter's responses to the specific questions presented in the invitation to comment. The committee appreciates this comment indicating agreement that the forms should provide for an optional request for stay of enforcement of judgment. Having considered all of the comments on this issue, the committee concluded that the forms should not be further revised to include an optional request for a stay because this is beyond what the statute provides for and the form order allows for "other rulings" which may encompass similar relief where appropriate.

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W20-05

Civil Practice and Procedure: Enforcement of Judgment Forms—Exemptions (Revise forms EJ-130, EJ-150, EJ-155, and EJ-156; adopt forms EJ-157, EJ-157-INFO, EJ-158, and EJ-159)

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	Commenter	Position	Comment	Committee Response
			management sytem. • Would three (3) months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation: Yes	The committee has considered the stated implementation requirements; no further response is required. The committee has considered the stated implementation requirements; no further response is required.
9.	Orange County Superior Court Civil and Appellate Division Management and Analyst Team	NI	**Does the proposal appropriately address the stated purpose?** Yes **Is it appropriate for the application and order to include items allowing the exemption to be allocated among multiple accounts? If not, why not?** No. Adopting this practice creates confusion for the party filing the exemption. Nothing provided in section 704.220 gives the financial institution a waiting period for the filing of this exemption and since the financial institution is required to act promptly, it is likely the funds would be levied before the party can respond. **Would adding an optional request for stay of enforcement of judgment to the new ex parte application form be appropriate or helpful?** Yes. With the addition of the ex parte process for stay of enforcement would be helpful while the application and order is ruled on by the court.	The committee appreciates the commenter's responses to the specific questions presented in the invitation to comment. The committee appreciates this comment disfavoring allocation across multiple accounts. The committee has considered all of the comments on this issue, unclear statutory language, contradictory legislative history, and potential policy implications of various interpretations. Though there are reasonable arguments to the contrary, the committee understands the new law to allow for allocation of the deposit account exemption across multiple accounts at a single or multiple financial institutions. The committee appreciates this comment indicating agreement that the forms should provide for an optional request for stay of enforcement of judgment. Having considered all of the comments on this issue, the committee concluded that the forms should not be further revised to include an optional request for a stay because this is beyond what the statute provides for and the form order allows for "other rulings"

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	Commenter	Position	Comment	Committee Response
			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? New and revised procedures reflecting the new section would be required. The new forms would need to be posted and distributed. Information would need to be shared with court staff and judicial officers. New filings would need to be added and tested in the case management system. Case processing staff and courtroom clerks would need to be trained. The approximate level of effort is estimated at 40 hours FTE by at least two Program Coordinator Specialists over approximately three month to test filings in the CMS, revise procedures, approve through workflow, train staff and implement.	which may encompass similar relief where appropriate. The committee has considered the stated implementation requirements; no further response is required.
			Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes.	The committee has considered the stated implementation requirements; no further response is required.
			How well would this proposal work in courts of different sizes? Modification of the exemption process as stated should have a similar impact and benefit to courts of all sizes.	The committee has considered the stated implementation requirements; no further response is required.

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W20-05

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	Commenter	Position	Comment	Committee Response
			Staff suggestions on form changes:	
			EJ-150 – Notice of Levy On page 2 of 2, item 2, where it states "by filing a claim of exemption" suggest inserting the form number.	The committee appreciates this suggestion but declines to modify the proposal in this way at this time.
			EJ-157 Ex parte Application for Order on Deposit Account Exemption Should the header portion also indicate "Judgment Debtor" since Item 1 on the form indicates this can be filed by either Judgment Creditor or Judgment Debtor? If, not, please explain.	The committee appreciates this suggestion and has modified the proposal accordingly.
			Page 2 of 2, has two signature lines and does not indicate who is to sign the upper signature line. If it is for the submitting attorney, indicate "attorney signature".	The committee has considered this comment but declined to modify the form because it appears clear that the first signature line is for the person completing the form (either self-represented or an attorney), and the second signature line is for the applicant's declaration under penalty of perjury.
			EJ-158 Declaration Regard Notice and Service of Ex Parte Application for Order on Deposit The header portion is different from the other forms, there are no check boxes to indicate who is the submitting party.	The committee appreciates this suggestion and, where possible and appropriate, has modified the forms so that they are internally consistent.

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Deferred

Item number:16

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Practice and Procedure: Court Reporters for Civil Proceedings (Amend rule 2.956; approve form FW-020; and revise FW-001 INFO)

Committee or other entity submitting the proposal:
Civil and Small Claims Advisory Committee

Staff contact (name, phone and e-mail): Anne M. Ronan, 415-865-8933, anne.ronan@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Implementation of New Law re Court Reporters: . Jameson v. Desta: Develop or revise forms to assist indigent parties to request court reporter or electronic recording at civil proceedings under the holding of Jameson v. Desta, and consider input from commenters that further rules or legislation are needed to appropriately implement that decision, including investigating potential costs and feasibility of proposals to provide court reporters or electronic recording for all civil proceedings involving an indigent party.

2. Assembly Bill 2664 (2018): This bill amended Government Code section 68086, which mandates that the council adopt rules on court reporting services in civil cases. (See CA Rules of Court, rule 2.956). Assembly Bill 2664 added a new provision to be included in the rules, clarifying that, when court reporters are not available, courts are, upon the request of a party, to appoint a pro tem court reporter to be present in the court, unless there is good cause to refuse the appointment. .

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.)
Advisory committee still exploring facts and issues surrounding proposal for court reporters in all civil court proceedings for fee waiver recipient if not electronically recorded, but in the meantime are moving forward with a form parties to use to make request for court reporter and statewide rules for making the request.

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue . San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-07

Title
Civil Practice and Procedure: Court Reporters for Civil Proceedings

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 2.956; approve form FW-020; revise form FW-001-INFO

Proposed by
Civil and Small Claims Advisory Committee
Hon. Ann I. Jones, Chair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Anne M. Ronan
415-865-8933
anne.ronan@jud.ca.gov

Executive Summary and Origin

The California Supreme Court recently held that courts that do not provide official court reporters must upon request make court reporters or other means to create a verbatim record available to parties entitled to a waiver of fees. (*Jameson v. Desta* (2018) 5 Cal.5th 594.) The Civil and Small Claims Advisory Committee proposes a new court reporter request form, a revised fee waiver information form, and amendments to California Rules of Court, rule 2.956, to help fee waiver recipients avail themselves of rights recognized in *Jameson*. The proposal would also revise that rule to reflect recent changes to Government Code section 68086.

Background

Jameson v. Desta (2018) 5 Cal.5th 594 (*Jameson*) involved a plaintiff who had been granted a fee waiver under Government Code section 68631. Such a litigant is entitled to a waiver of court fees for the attendance of an official court reporter at a court proceeding (Gov. Code, § 68086(b).) In *Jameson,* however, the plaintiff was not provided a court reporter at his civil trial because the Superior Court of San Diego County, as a result of a reduction in its budget, had adopted a policy under which no official court reporters were provided at most civil trials, even for persons who qualified for a fee waiver. Under the policy, a party could hire and pay for a private court reporter. (*Jameson*, at p. 598.) It was undisputed that if an official court reporter had been made available for the trial in this case, the plaintiff would have been entitled to the court reporter's attendance at the trial without the payment of a fee. (*Id.* at p. 600.) The Supreme Court concluded that the superior court policy was inconsistent with prior in forma pauperis

judicial decisions and with the public policy of facilitating equal access to the courts. (*Id.* at p. 599.) It stated:

> [I]n order to satisfy the principles underlying California's in forma pauperis doctrine and embodied in the legislative public policy set forth in [Government Code] section 68630, subdivision (a), when a superior court adopts a general policy under which official court reporters are not made available in civil cases but parties who can afford to pay for a private court reporter are permitted to do so, the superior court must include in its policy an exception for fee waiver recipients that assures such litigants the availability of a verbatim record of the trial court proceedings, which under current statutes would require the presence of an official court reporter.

(*Jameson,* at p. 623.)

The Supreme Court concluded that a superior court must generally make available to fee waiver recipients an official court reporter or other valid means to create an official verbatim record, for purposes of appeal, upon request. (*Jameson, supra,* 5 Cal.5th 594 at p. 599.)

Last year, the Judicial Council, at the recommendation of the Civil and Small Claims Advisory Committee, approved revisions to several fee waiver forms and to rule 2.956[1] so that they would reflect the *Jameson* holding. At the time the recommendation was made, the advisory committee noted that it would this year recommend a statewide form that could be used by a fee waiver recipient to ask for a court reporter.

Also at that time, the council received comments from several legal service organizations asserting that the recommendation did not go far enough and asking that the council make further rules. The commenters proposed, among other things, that courts should be required to provide court reporters automatically at any hearing in which a fee waiver recipient is a party, with no request required. The council directed the committee to consider the suggestions made by the commenters, and the committee is currently doing so.

While the committee believes that the suggestions to require a court reporter in all courtrooms where a fee waiver recipient appears, without any request, expand the holding of *Jameson*, it is an expansion that could be approved as a matter of policy by the council. Therefore, the committee is attempting to gather information about what resources might be required and the possibility and practicability of providing court reporters for all hearings and proceedings not otherwise being electronically recorded, if a fee waiver recipient is appearing. The information is particularly important in light of the shortage of court reporters across the state. The committee will report back to the council when it has completed more work in this area.

In the meantime, the advisory committee proposes moving forward with the planned statewide court reporter request form and with further revisions to an information sheet provided to fee

[1] All references to rules in this document are to the California Rules of Court, unless otherwise indicated.

waiver applicants. In addition, the committee is circulating proposed statewide rules for the process of requesting a court reporter.

The Proposal

Rule 2.956

Rule 2.956 was originally adopted to implement the mandate in Government Code section 68086 that the council adopt rules to ensure that:

- The parties are given adequate and timely notice of the availability of an official court reporter (rule 2.956(b));
- If no official court reporter is available, a party is authorized to arrange for a certified shorthand reporter to serve as a court reporter pro tem at that party's expense (rule 2.956(c)); and
- None of the other fees in the statute are to be charged if the party arranges for and pays for the court reporter pro tem (rule 2.956(d)).

Last year, at this committee's recommendation, the council revised subdivision (c) of the rule to reflect the *Jameson* holding, by dividing it into two parts. The rule now provides that in the instance where there is no official court reporter at a hearing or trial in a civil case, a party could either (1) arrange for one at the party's expense; or (2) if a fee waiver recipient, ask the court to provide one. The rule also notes that the request should be made in compliance with local rules.

Amendments Relating to Fee Waiver Recipients

Statewide process. Commenters urged the council that, if a request is to be required to ensure the presence of a court reporter, then there should be a statewide process for doing so, in order to provide consistency across the state. They asserted that this would simplify the process for fee waiver recipients, who are frequently self-represented, and for the legal service agencies and self-help centers who provide information to those parties. The proposed amendments to rule 2.956 prescribe such a process, identifying a form that should be used to request a court reporter and setting out a timeline: 10 days before the proceeding for which court reporter is wanted, or, if the proceeding is set on a shorter time frame, as soon as practicable. (See proposed rule 2.956(c)(2)(A) and (B).) The proposed rule also provides that once a request for a court reporter for a trial is made, it does not have to be repeated if the trial is continued to a later date. (See proposed rule 2.956(c)(2)(C).) In addition, because the commenters asserted that, as drafted, the rule may be unclear as to whether the court would not only provide a court reporter for a fee waiver recipient who asked for one, but do so at no charge to that party, a statement to that effect has been added. (See proposed rule 2.956(c)(2)(D).)

Court mandate. Commenters also asserted that if the rule is to require that a fee recipient has to request a court reporter, then it should also mandate that, under Jameson, the request must be granted. They asserted that, as it currently stands, rule 2.956(c) leaves the decision up to the court. As written, the rule is focused on the party's action. As to the court's action, the rule (and this committee) assumes that the court will follow the law under Jameson. However, in light of

the concerns raised, such a mandate has been included in the proposed amendments. (See proposed rule 2.956(c)(2).)[2]

Amendments Relating to Other Parties

Assembly Bill 2664 recently amended Government Code section 68086(d)—the provision requiring the council to adopt certain rules regarding court reporters—effective January 1, 2019. The amendments to the rule proposed here would incorporate the change in the Government Code.

The primary amendment of the statute was to provide that, if an official court reporter is not available and a party arranges for the presence of a certified shorthand reporter in the courtroom, the court *shall* appoint that reporter as the pro tem court reporter unless there is good cause shown for the court to refuse to appoint the appointment. The rule has been amended to reflect this mandate. (See proposed rule 2.956(c)(1).)

New and Revised Forms

The proposed *Request for Court Reporter by Party With a Fee Waiver* (form FW-020) is based on several current local court forms. It contains instructions at the top, including a statement of the timeline for filing included in the proposed rule of court, and a request for a court reporter at the bottom. It also asks the party to confirm that the party has received a fee waiver in the case.

In light of the concerns raised by the commenters last year that fee waiver recipients would not know to ask for a court reporter and that they might not understand that the court reporter would be free if requested, the committee is also proposing the addition of a new paragraph to the end of the *Information Sheet on Waiver of Superior Court Fees and Costs* (form FW-001-INFO) to provide more information to all fee waiver recipients about requesting court reporters. In addition, a cross-reference to the new request form has been added to item 1 on the first page of the form, to the item for court reporter fees in the list of waived fees.[3]

[2] In light of the changes to the rule to add provisions arising from the *Jameson* decision, the beginning of the rule has also been amended to reflect that it no longer is based solely on Government Code section 68086.

[3] The committee would like specific comments on this revision, specifically as to whether the cross-reference to this form may make the information sheet confusing. The committee notes that similar cross-references are not provided for other items for which a fee waiver recipient may have to make a request, such as telephonic appearance fees or sheriff's fees to give notice.

Alternatives Considered

The committee considered not recommending statewide rules and forms for the process of requesting a court reporter, instead leaving it to each court to develop its own process, to allow the courts more flexibility, particularly in light of the severe shortage of court reporters in many areas. However, advisory members from legal service organizations pointed out that without such statewide procedures, it could be difficult for fee waiver recipients to determine how to request a court reporter. The committee concluded it should develop the rules and forms to aid self-represented parties in particular, and to circulate those rules for further comments.

The committee considered but did not include in the request form a statement contained on several of the local court forms currently in use, that a party to the action who is not a fee waiver recipient will be responsible for a proportionate share of the cost of the court reporter's attendance at the hearing. While this statement is correct for long cause matters (see Gov. Code, § 68068(a)(2)), the committee concluded that it is not information that needs to be included on a form being filed by the fee waiver recipient.

Fiscal and Operational Impacts

The holding in *Jameson v. Desta*, mandating that courts provide a court reporter for civil hearings for a fee waiver recipient who requests one if no electronic recording is available, has had a significant fiscal and operational impact on courts. This proposal, to provide a statewide form and a timeline for making such requests, is an attempt to aid parties, self-help centers, and legal advisors by providing a consistent process across the state for requesting court reporters. The new form and rules will require training of court personnel, although the proposed 10-day notice period for the request appears to be consistent which what is being used by many courts already.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose of providing a consistent process for fee waiver recipients?
- On form FW-001-INFO, is it helpful to add a cross-reference to the new court reporter request form (proposed form FW-020) among the list of waived fees, or does the addition make the list more confusing? (See footnote 3.)

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 2.956, at page 7
2. Forms FW-001-INFO and FW-020, at pages 8–10
3. Link A: Assembly Bill 2664, *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB2664*

Rule 2.956 of the California Rules of Court would be amended, effective January 1, 2021, to read:

Rule 2.956. Court reporting services in civil cases

(a) Statutory reference; application

This rule implements and must be applied so as to give effect to ~~is adopted to effectuate the statutory mandate of~~ Government Code sections 68086(a) ~~(b)~~(c) ~~and must be applied so as to give effect to these sections. It applies to trial courts~~.

(b) * * *

(c) Party may procure reporter or request reporter if granted fee waiver

If the services of an official court reporter are not available for a hearing or trial in a civil case, a party may:

(1) Arrange for the presence of a certified shorthand reporter to serve as an official pro tempore reporter, whom the court must appoint unless there is good cause shown to refuse to do so. It is that party's responsibility to pay the reporter's fee for attendance at the proceedings, but the expense may be recoverable as part of the costs, as provided by law; or

(2) If the party has been granted a fee waiver, ~~In compliance with any local court rules,~~ request that the court provide an official reporter for attendance at the proceedings, whom the court must provide if the party has been granted a fee waiver and if the court is not electronically recording the hearing or trial.

(A) The request should be made by filing a *Request for Court Reporter by Party with a Fee Waiver* (form FW-020).

(B) The party should file the request 10 calendar days before the proceeding for which a court reporter is desired, or as soon as practicable if the proceeding is set with less than 10-days' notice.

(C) If the party has requested a court reporter for a trial, that request remains in effect if the trial is continued to a later date.

(D) The court reporter's attendance is to be provided at no fee or cost to the fee waiver recipient.

(d)–(e) * * *

INFORMATION SHEET ON WAIVER OF SUPERIOR COURT FEES AND COSTS

If you have been sued or if you wish to sue someone, if you are filing or have received a family law petition, or if you are asking the court to appoint a guardian for a minor or a conservator for an adult or are an appointed guardian or conservator, and if you (or your ward or conservatee) cannot afford to pay court fees and costs, you may not have to pay them in order to go to court. If you (or your ward or conservatee) are getting public benefits, are a low-income person, or do not have enough income to pay for your (or his or her) household's basic needs *and* your court fees, you may ask the court to waive all or part of those fees.

1. To make a request to the court to waive your fees in superior court, complete the *Request to Waive Court Fees* (form FW-001) or, if you are petitioning for the appointment of a guardian or conservator or are an appointed guardian or conservator, complete the *Request to Waive Court Fees (Ward or Conservatee)* (form FW-001-GC). If you qualify, the court will waive all or part of its fees for the following:

   - Filing papers in superior court (other than for an appeal in a case with a value of over $25,000)
   - Making and certifying copies
   - Giving notice and certificates
   - Sheriff's fee to give notice
   - Sending papers to another court department
   - Court fee for telephone hearing
   - Reporter's fee for attendance at hearing or trial, if the court is not electronically recording the proceeding and you request that the court provide an official reporter (see form FW-020)
   - Assessment for court investigations under Probate Code section 1513, 1826, or 1851
   - Preparing, certifying, copying, and sending the clerk's transcript on appeal
   - Holding in trust the deposit for a reporter's transcript on appeal under rule 8.833 or 8.834
   - Making a transcript or copy of an official electronic recording under rule 8.835

2. You may ask the court to waive other court fees during your case in superior court as well. To do that, complete a *Request to Waive Additional Court Fees (Superior Court)* (form FW-002) or *Request to Waive Additional Court Fees (Superior Court) (Ward or Conservatee)* (form FW-002-GC). The court will consider waiving fees for items such as the following, or other court services you need for your case:

   - Jury fees and expenses
   - Fees for court-appointed experts
   - Other necessary court fees
   - Fees for a peace officer to testify in court
   - Court-appointed interpreter fees for a witness

3. If you want the Appellate Division of the Superior Court or the Court of Appeal to review an order or judgment against you and you want the court fees waived, ask for and follow the instructions on *Information Sheet on Waiver of Appellate Court Fees (Supreme Court, Court of Appeal, Appellate Division)* (form APP-015/FW-015-INFO).

IMPORTANT INFORMATION!

- **You are signing your request under penalty of perjury. Answer truthfully, accurately, and completely.**
- **The court may ask you for information and evidence.** You may be ordered to go to court to answer questions about your ability, or the ability of your ward or conservatee, to pay court fees and costs and to provide proof of eligibility. Any initial fee waiver you or your ward or conservatee are granted may be ended if you do not go to court when asked. You or your ward's or conservatee's estate may be ordered to repay amounts that were waived if the court finds you were not eligible for the fee waiver.
- **Public benefits programs listed on the application form.** In item 5 on the *Request to Waive Court Fees* (item 8 of the *Request to Waive Court Fees (Ward or Conservatee))*, there is a list of programs from which you (or your ward or conservatee) may be receiving benefits, listed by the abbreviations they are commonly known by. The full names of those programs can be found in Government Code section 68632(a), and are also listed here:
  - Medi-Cal
  - Food Stamps—California Food Assistance Program, CalFresh Program, or SNAP
  - SSP—State Supplemental Payment
  - Supp. Sec. Inc.—Supplemental Security Income (not Social Security)
  - County Relief/Gen. Assist.—County Relief, General Relief (GR), or General Assistance (GA)

- IHSS—In-Home Supportive Services
- CalWORKs—California Work Opportunity and Responsibility to Kids Act
- Tribal TANF—Tribal Temporary Assistance for Needy Families
- CAPI—Cash Assistance Program for Aged, Blind, or Disabled Legal Immigrants

• **If you receive a fee waiver, you must tell the court if there is a change in your finances, or the finances of your ward or conservatee.** You must tell the **court** within five days if those finances improve or if you, or your ward or conservatee, become able to pay court fees or costs during this case. (File *Notice to Court of Improved Financial Situation or Settlement* (form FW-010) or *Notice to Court of Improved Financial Situation or Settlement (Ward or Conservatee)* (form FW-010-GC) with the court.) You may be ordered to repay any amounts that were waived after your eligibility, or the eligibility of your ward or conservatee, came to an end.

• **If you receive a judgment or support order in a family law matter:** You may be ordered to pay all or part of your waived fees and costs if the court finds your circumstances have changed so that you can afford to pay. You will have the opportunity to ask the court for a hearing if the court makes such a decision.

• **If you win your case in the trial court:** In most circumstances the other side will be ordered to pay your waived fees and costs to the court. The court will not enter a satisfaction of judgment until the court is paid. (This does not apply in unlawful detainer cases. Special rules apply in family law cases and in guardianships and conservatorships. (Gov. Code, § 68637(d), (e); Cal. Rules of Court, rule 7.5.).

• **If you settle your civil case for $10,000 or more:** Any trial court-waived fees and costs must first be paid to the court out of the settlement. **The court will have a lien on the settlement in the amount of the waived fees and costs.** The court may refuse to dismiss the case until the lien is satisfied. A request to dismiss the case (use form CIV-110) must have a declaration under penalty of perjury that the waived fees and costs have been paid. Special rules apply to family law cases.

• **The court can collect fees and costs due the court.** If waived fees and costs are ordered paid to the trial court, or if you fail to make the payments over time, the court can start collection proceedings and add a $25 fee plus any additional costs of collection to the other fees and costs owed to the court.

• **The fee waiver ends.** The fee waiver expires 60 days after the judgment, dismissal, or other final disposition of the case or earlier if a court finds that you or your ward or conservatee are not eligible for a fee waiver. If the case is a guardianship or conservatorship proceeding, see California Rules of Court, rule 7.5(k) for information on the final disposition of that matter.

• **If you are in jail or state prison:** Prisoners may be required to pay the full cost of the filing fee in the trial court but may be allowed to do so over time. See Government Code section 68635.

• **If you want a record made of your court hearing or trial:** If you receive a fee waiver and if the court is not electronically recording the proceeding, you may ask the court to have an official court reporter attend your hearing or trial at no cost to you so there can be a record of the proceeding. You should use form FW-020 to make the request, which you should file at least 10 calendar days before a scheduled court date, or as soon as you can if the court date is set with less than 10-days' notice.

The fee for the court reporter being at your hearing will be waived (there will be no cost to you), but note that having a court reporter does not guarantee the right to get a free transcript.

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **03/27/20** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
Plaintiff/Petitioner: Defendant/Respondent:	
REQUEST FOR COURT REPORTER BY PARTY WITH A FEE WAIVER	CASE NUMBER:

INSTRUCTIONS

If you have been granted a waiver of court fees and costs, you may use this form to request the services of an official court reporter for a hearing or trial for which a court reporter is not normally available and for which electronic recording is not provided.

- You must make a request 10 calendar days before any court date for which you want a reporter. If the court date is scheduled with less than 10-days notice, you should file the request as soon as you can.
- If you do not file the request on time, the court may be unable to provide a court reporter on the date requested and may have to reschedule the hearing or trial.
- There will be no fee to you for the court reporter being at the hearing.
- **Note***:* Having a court reporter may not guarantee the right to get a transcript.

  If you are eligible, the court will try to schedule a court reporter for the court proceeding but cannot guarantee that one will be available at that time.

REQUEST FOR COURT REPORTER

I, _____, received a waiver of court fees and costs granted by the court on *(date)* _____ and I request an official court reporter for ☐ trial ☐ hearing on (*date*) _____.

Date: _____

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE)

Form Approved for Optional Use
Judicial Council of California
FW-020 [New January 1, 2021]

Cal. Rules of Court, rules 3.55 and 2.956(c)
www.courts.ca.gov

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 8, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Practice and Procedure: Sealing Previously Filed Papers Under Code of Civil Procedure Section 367.3

Committee or other entity submitting the proposal:
Civil and Small Claims Advisory Committee

Staff contact (name, phone and e-mail): Ingrid Leverett, 916-643-7073, Ingrid.Leverett@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: No. 4
Project description from annual agenda: Assembly Bill 800 allows active participants in the Safe at Home address confidentiality program to participate in civil proceedings, as plaintiffs or defendants, under a pseudonym and provides other protections when that person is a party to the proceedings. Current forms will be revised or new forms or rules developed as appropriate to implement this bill.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
The current proposal is for two sets of forms, and one instructional sheet, that will facilitate an active participant in the Safe at Home address confidentiality program in requesting that a court seal any previously-filed documents that disclose the participant's true name or other identifying characteristics. The two sets of forms and the instructional sheet are:

1. Forms to move the court to retroactively seal previously-filed documents:
-Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home) (form SH-020)
-Declaration in Support of Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home) (form SH-022)
-Order on Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home) (form SH-025)

2. Forms to apply to the court for shortened time for a hearing on the retroactive sealing motion:
-Ex Parte Application for Order Shortening Time for Hearing on Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home) (form SH-030).
-Declaration Regarding Notice and Service of Ex Parte Application for Order Shortening Time for Hearing on Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home) (form SH-032)
-Order on Ex Parte Application for Order Shortening Time for Hearing on Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home) (form SH-035).

3. Instructions on the retroactive sealing motion and the ex parte application to shorten time (Instructions for Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home) (form SH-020-INFO))

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-08

Title
Civil Practice and Procedure: Sealing Previously Filed Papers Under Code of Civil Procedure Section 367.3

Proposed Rules, Forms, Standards, or Statutes
Adopt forms SH-020, SH-022, SH-030, and SH-032; approve forms SH-020-INFO, SH-025, and SH-035

Proposed by
Civil and Small Claims Advisory Committee
Hon. Ann I. Jones, Chair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Ingrid Leverett, 916-643-7073
Ingrid.Leverett@jud.ca.gov

Executive Summary and Origin

Assembly Bill 800 provides that a party who is participating in the Safe at Home program (an address confidentiality program run by the Secretary of State) may appear pseudonymously in a civil action, and that the true name of the party and any other identifying characteristics are to be kept confidential by the court and other parties in the case. The Civil and Small Claims Advisory Committee proposes new forms to be used by pseudonymous parties to (1) move the court to seal previously filed documents that disclose that party's name or other identifying characteristics; (2) apply to the court ex parte to hear such a motion on shortened time; and (3) provide comprehensive instructions to self-represented litigants as to how to complete, file, and serve these forms.

Background

The Safe at Home address confidentiality program administered by the Secretary of State is intended to protect the privacy and safety of individuals who have been subjected to domestic violence, sexual assault, stalking, human trafficking, or elder or dependent abuse. (Gov. Code, § 6205.) It permits victims to maintain a confidential mailing address in order to shield their location from abusers. AB 800[1] added section 367.3 to the Code of Civil Procedure, effective January 1, 2020, providing that a party who is an active participant in the Safe at Home address

[1] A copy of AB 800 (Stats. 2019, ch. 439) is available online at *https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB800*.

confidentiality program (defined in the bill as a "protected person") may appear in a civil action under a pseudonym (Jane Doe, John Doe, or Doe) and may exclude or redact from all documents filed in court any identifying characteristics, including name, addresses (physical or online), age, or marital status. (Code Civ. Proc., § 367.3(a).)

Under the new law, a protected person who decides to appear pseudonymously must file with the court and serve on all other parties a "confidential information form" specifying the protected person's true name and identifying characteristics that have been excluded or redacted from a document filed in court and using the protected person's pseudonym. The court and the other parties must thereafter keep this information confidential by redacting or omitting it from documents filed in the case and using the protected person's pseudonym. (Code Civ. Proc., § 367.3(b)(1)–(2).) The Judicial Council is required to adopt rules and forms, as appropriate, to implement the new statute. (Code Civ. Proc., § 367.3(e).) The committee therefore circulated for public comment from December 13, 2019, through February 11, 2020, proposed *Confidential Information Form Under Code of Civil Procedure Section 367.3* (form SH-001). The committee anticipates that the council will adopt a version of that form, effective September 1, 2020.

The *Confidential Information Form* does not provide confidentiality for documents that have already been filed in court. Specifically, a protected person who wishes to appear pseudonymously in a civil matter that has already begun faces a potential problem that a similarly situated plaintiff[2] does not. Before the defendant or other party in a civil action has appeared or has had any opportunity to advise the court of the party's desire to proceed pseudonymously under the new law, the plaintiff will likely have publicly disclosed the defendant's (or other party's) identifying information in a complaint, petition, or other paper filed in court. With the current proposal, the committee seeks to address the potential need to seal previously filed documents that disclose a protected person's identifying characteristics.

Code of Civil Procedure section 367.3, does not address the potential need for a protected person to request confidentiality for documents previously filed by another party. The new law, however, expressly provides that any protected person may file a motion to seal all or part of a record in accordance with rules 2.550 and 2.551 of the California Rules of Court. (Code Civ. Proc., § 367.3(b)(4).) The committee has concluded that the provision authorizing the court to seal records may be used to retroactively seal the name and identifying characteristics of a protected party that have been included in court files accessible to the public.

The Proposal

The Civil and Small Claims Advisory Committee is proposing seven new forms that would enable a defendant or any other party who is an active participant in the Safe at Home program to (1) move the court to seal previously filed court records that disclose the true name and/or other

[2] Throughout this document, references to "plaintiff" include petitioners, and references to "defendants" include respondents and objectors.

identifying characteristics of a protected person and (2) seek shortened time for a hearing on such a motion.

The committee anticipates that many of those likely to take advantage of the pseudonymous filing provisions of the Safe at Home program under Code of Civil Procedure section 367.3 will be self-represented litigants. In the committee's view, without forms and instructions, these parties would likely find it confusing and difficult to avail themselves of the protections of the Safe at Home program. In response to a question in the invitation to comment circulated for proposed *Confidential Information Form*, the committee received comments suggesting that the Judicial Council should approve forms for both (1) a motion to retroactively seal previously filed documents that disclose identifying characteristics and (2) an ex parte application to shorten time to hear the retroactive sealing motion. The committee believes that such forms will facilitate a protected person's effort to obtain the protections of Code of Civil Procedure section 367.3 by asking the court, on shortened time, to remove that person's name and other identifying characteristics from the public record.

The committee proposes two sets of new forms and a related instructional form, as follows:

- Forms to move the court to retroactively seal previously filed documents:
    - *Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-020)
    - *Declaration in Support of Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-022)
    - *Order on Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-025)

- Forms to apply to the court for shortened time for a hearing on the retroactive sealing motion:
    - *Ex Parte Application for Order Shortening Time for Hearing on Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-030)
    - *Declaration Regarding Notice and Service of Ex Parte Application for Order Shortening Time for Hearing on Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-022)
    - *Order on Ex Parte Application for Order Shortening Time for Hearing on Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-035).

- Instructions on the retroactive sealing motion and the ex parte application to shorten time (*Instructions for Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-020-INFO))

Because the protection of the new law may be invoked in all civil cases, the committee intends that a protected party in any type of civil case be able to use the proposed forms. For this reason, the forms list the types of parties as "plaintiff/petitioner" and "defendant/respondent/objector" in the captions and in items asking for a party's identity.[3]

The forms are discussed below.

Motion forms to retroactively seal previously filed documents (SH-020, SH-022, SH-025)

A protected party's filing of the proposed *Confidential Information Form* alone will not shield a protected person from disclosure of identifying information in *previously filed* documents. Code of Civil Procedure section 367.3 expressly authorizes a protected person to file a motion to seal all or part of a record already in the public file (see Code Civ. Proc., § 367.3(b)(4).). The proposed motion forms are intended to facilitate a protected person's motion to retroactively seal documents.

A protected person in a civil matter—typically (but not always) a defendant—would serve and file the proposed new motion form and related papers[4] to ask the court to seal, and to maintain as confidential, previously filed documents that disclose the protected person's true name and identifying characteristics. Such documents might include a complaint or petition, a summons, a civil cover sheet, a proof of service, etc. The documents to be retroactively sealed would be listed on the motion form (which includes a checklist of the most likely types).

The protected person would also prepare, serve, and lodge with the court redacted versions of the previously filed documents that the party is requesting be sealed. If the motion to retroactively seal is granted, the court clerk could then substitute the redacted versions for the originals of those documents in the public file and place those original documents under seal.

Proposed forms are primarily for defendants but also for plaintiffs

Although the new forms—the motion form (form SH-020) and the supporting declaration form (form SH-022)—would likely be used primarily by defendants seeking to seal documents previously filed by plaintiffs/petitioners, plaintiffs/petitioners may also have occasion to move a court to seal previously filed documents. Such would be the case if, for example, plaintiffs/petitioners join the Safe at Home program and become protected persons only *after* filing a complaint or petition. The new forms accommodate the possibility that the party filing them may be a plaintiff, petitioner, or other party as well as a defendant or respondent.

[3] The committee is seeking specific comments on whether the proposed forms should be revised so that a protected party in any type of civil case is aware that the party may use the forms.

[4] The committee is proposing the motion and supporting declaration forms as mandatory forms to ensure that protected persons, many of whom may be self-represented, meet all the procedural requirements of a motion to seal under California Rules of Court, rules 2.550 and 2.551. The committee is seeking specific comments on whether these forms should be mandatory or optional.

Status as an active participant constitutes "specific facts" sufficient to support the motion
Rule 2.550 of the California Rules of Court requires that the court "specifically state the facts" that support its findings to place a document under seal. (Cal. Rules of Court, rule 2.550(e).) The committee concluded that the applicant's status as an active participant in the Safe at Home program under Code of Civil Procedure section 367.3, itself, constitutes the "specific facts" supporting the motion necessary to retroactively seal documents.

The new forms allow for a request to change the public register of actions to replace true name with pseudonym
The new motion form (form SH-020) and corresponding order form (form SH-025) both prompt the moving party and the court, respectively, to request or order that the public register of actions be changed to replace the pseudonymous party's true name with a pseudonym. The order form further prompts the court to indicate that previously filed documents have retroactively been placed under seal.

***Ex parte* application forms to shorten time to hear motion to retroactively place documents under seal (SH-030, SH-032, SH-035)**
Unless the moving party applies for an ex parte order shortening time to hear the motion to retroactively place documents under seal, the hearing on the sealing request could take place months after the motion to seal is filed. During that period, the protected person's identifying characteristics would be a matter of public record.

The committee proposes forms that would facilitate a protected person's request to shorten time on the hearing for the sealing motion. These ex parte application forms track California Rules of Court, rules 3.1203–3.1207 (rules governing ex parte applications). The court's ex parte order (assuming it is granted and an expedited hearing is set) could serve as notice of the hearing on the retroactive sealing motion (form SH-020). The applicant would need only to arrange to have the ex parte order served on the other parties.[5]

***Instructions for Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-020-INFO)**
The instructions provide detailed guidance on how a protected person should complete, serve, and file both an ex parte application shortening time and the underlying motion to seal previously filed documents. The instructions are stated in plain terms so that a self-represented litigant can understand them. A separate sheet of instructions is particularly warranted given that a protected person will need to file two separate sets of forms with the court (the ex parte application forms and the retroactive sealing motion forms).

[5] As with the motion forms, the committee is proposing that the ex parte application forms be adopted as mandatory forms, to ensure that the parties comply with the detailed requirements for ex parte applications stated in California Rules of Court, rules 3.1203–3.1207. The committee is seeking specific comments on whether the forms should be mandatory or optional.

Alternatives Considered

The committee considered but rejected not offering ex parte forms to shorten time. Without such forms, the applicant would have to be instructed on the complexities of how to file an ex parte application to shorten time under the detailed provisions of rules 3.1203–3.1207 of the California Rules of Court. Forms dedicated to this purpose would simplify matters for self-represented applicants in particular, and, presumably, also for courts.

Fiscal and Operational Impacts

Because of the Legislature's enactment of the new statute, clerks, judicial officers, and court legal services and self-help offices will require training on the new pseudonymous filing process permitted for participants in the Safe at Home program, and on the level of confidentiality to be accorded to certain information relating to such parties. New training materials and internal procedures will need to be developed. As a result of the new law, courts may have to change computerized case management systems to allow for changing the name of the case in the public register of actions if a party invokes these new provisions after a case has been initiated. This proposal for new forms is intended to assist parties and courts in complying with the new procedures required by statute. Training will also be needed on the use of the forms, particularly if they are adopted as mandatory.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Would the proposed forms—and particularly the forms' captions—work satisfactorily in probate and family law cases in which a protected person files under Code of Civil Procedure section 367.3? If not, how should they be revised?
- The forms (other than the order forms) are proposed as mandatory forms. Should they be optional instead and, if so, why?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Forms SH-020, SH-020-INFO, SH-022, SH-025, SH-030, SH-032, and SH-035, at pages 8–23
2. Link A: Assem. Bill 800, *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB800*

(Party without an attorney should provide this information on Confidential Information Form *(form SH-001))*	*FOR COURT USE ONLY*
ATTORNEY NAME: STATE BAR NUMBER: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	**DRAFT** **03-16-2020** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
(Use Doe name where appropriate) PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT/ESTATE OF:	
MOTION TO PLACE DOCUMENTS UNDER SEAL UNDER ADDRESS CONFIDENTIALITY PROGRAM (SAFE AT HOME)	CASE NUMBER:

Before completing this form, read instructions for how to apply to the court to place documents under seal (make them confidential) if you are under the Safe at Home address confidentiality program; the instructions are found on the information sheet entitled Instructions for Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home) *(form SH-020-INFO). A* Confidential Information Form *(form SH-001) must be filed with this form.*

1. The person filing this motion *(Doe name):* _____ (pseudonymous party) is an active participant in the Secretary of State's address confidentiality program (Safe at Home) and is a *(check one):*
   a. ☐ Plaintiff/Petitioner
   b. ☐ Defendant/Respondent/Objector
   c. ☐ Other *(specify):*

   in this action.

2. Pseudonymous party requests that the court place under seal (make confidential) the following documents that were previously filed in this action *(check all that apply):*
   a. ☐ Complaint
   b. ☐ Petition
   c. ☐ Summons
   d. ☐ Proof of Service
   e. ☐ Civil Cover Sheet
   f. ☐ Notice
   g. ☐ Order
   h. ☐ Other *(specify):*

3. The purpose of this motion is to ask the court to maintain the confidentiality of the pseudonymous party's name and identifying characteristics on documents that have already been filed in the court, as provided by Code of Civil Procedure section 367.3.

4. The facts that support this motion to place the documents checked above under seal are stated in the *Declaration in Support of Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-022), filed with this document.

(Use Doe name where appropriate) PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT/ESTATE OF:	CASE NUMBER:

5. Pseudonymous party has prepared a redacted version (a version with true names and identifying characteristics blacked out) of each of the documents checked above and is lodging it with the court. The information redacted from these documents is limited to the pseudonymous party's true name and identifying characteristics as defined in Code of Civil Procedure section 367.3(a).
6. The pseudonymous party requests that the court change the public register of actions to replace pseudonymous party's true name with pseudonym *(check all that apply):*
   a. ☐ John Doe
   b. ☐ Jane Doe
   c. ☐ Doe
   d. ☐ If more than one party is using a Doe name, designation of the Doe in question (for example, Doe A or Doe B, etc.):

   _____
7. Pseudonymous party requests that the redacted versions of the documents identified above be placed in the public court file in place of the original documents that pseudonymous party is asking the court to place under seal.

Date:

_____ ▶ _____

(TYPE OR PRINT NAME)
(*Party without attorney should use Doe name*)

(SIGNATURE OF ATTORNEY OR PARTY WITHOUT ATTORNEY)
(*Pseudonymous party should sign with Doe name*)

INSTRUCTIONS FOR MOTION TO PLACE DOCUMENTS UNDER SEAL UNDER ADDRESS CONFIDENTIALITY PROGRAM (SAFE AT HOME)

(**Note:** This form may be used only in cases in which one or more parties are enrolled in the Safe at Home program and using a pseudonym under Code of Civil Procedure section 367.3.)

1. **Applicable Law.** The Safe At Home program is an address confidentiality program run by the Secretary of State. Active participants in that program who are parties in a civil court proceeding (a civil court case) may use a pseudonym (Jane Doe, John Doe, or Doe) in place of the party's true name in the civil court proceeding. Pseudonymous parties (parties using a Doe name in a civil court proceeding) may exclude or redact (black out) their true names and identifying characteristics (defined below) from documents they file in court, as provided in Code of Civil Procedure section 367.3 by using the *Confidential Information Form* (SH-001) to provide the information to the court confidentially.

2. **Purpose of Motion to Seal.** The purpose of the *Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-020) is to enable a person who is an active participant in the Safe at Home address confidentiality program and who wishes to appear under a pseudonym (a Doe name) in a civil court case, but whose name is already in the case files, to have the person's name and identifying characteristics removed from the public record by sealing documents that have already been filed in that case. If the court grants the motion, documents that were previously filed with the court and that disclose the Safe at Home participant's name and identifying characteristics will be replaced by versions of those documents with that information redacted (blacked out).

   Important: Form SH-020 and related papers are not to be used when a party is filing the party's own documents, because the party can redact the party's name and other information from the documents to be included in the public file and use a *Confidential Information Form* (form SH-001) to provide the information in confidence to the court and keep it out of the public files. If at the time the pseudonymous party is filing documents, the party wants to have such documents sealed as well (as permitted under the statute), the party must follow the procedures stated in California Rules of Court, rules 2.550 and 2.551. Form SH-020 and related papers are to be used only when a pseudonymous party wants the court to seal documents that were *previously* filed.

3. **What Documents Should Be Sealed.** Documents that may have already been filed in court and that are likely to disclose the pseudonymous party's name and identifying characteristics may include any or all of the following:
   - Complaint or petition
   - Summons
   - Civil cover sheet
   - Order or notice from the court
   - Proof of service

   "Identifying characteristics" that the party using the pseudonym may keep confidential include, but are not limited to, name or any part thereof, address or any part thereof, city or unincorporated area of residence, age, marital status, relationship to another party, race or ethnic background, telephone number, email address, social media profiles, online identifiers, contact information, or any other information, including images of the party using a pseudonym, from which that party's identity can be discerned. (Code Civ. Proc., § 367.3(a)(1).) (See Code Civ. Proc., § 367.3(a)(2) for a list of "online identifiers.")

4. **How to Ask the Court to Seal the Documents.** To ask the court to seal the documents, the pseudonymous party needs to complete the following forms:

   - *Confidential Information Form* (form SH-001). The pseudonymous party will write on this form the party's true name and any identifying characteristics that the party is redacting (blacking out) on any of the other forms or documents to be filed because the party wishes to keep that information confidential.
   - *Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-020). The pseudonymous party should use the pseudonym (Doe name) and should not include any identifying characteristics on this form, including when identifying the plaintiff/petitioner or the defendant/respondent at the top of the form. The party should sign the form using the pseudonym.
   - *Declaration in Support of Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe At Home)* (form SH-022). The pseudonymous party should use the pseudonym (Doe name) and should not include any identifying characteristics on this form, including when identifying the plaintiff/petitioner or the defendant/respondent at the top of the form. The party should sign the form using the pseudonym.
   - *Redacted versions of the documents.* The pseudonymous party must create copies of the documents the party wants the court to seal because they disclose identifying characteristics, including the party's true name. On these copies, the party must redact (black out) identifying characteristics, including the party's true name. If the court grants the motion to seal, the redacted versions of the documents submitted by the party will be substituted in the court's file for the original versions of those documents. The original versions of the documents that disclose the party's identifying characteristics will be placed in a confidential location not open to the public.

Form Approved for Optional Use
Judicial Council of California
SH-020-INFO [New January 1, 2021]

Code of Civil Procedure, § 367.3;
Cal. Rules of Court, rules 2.550, 2.551
www.courts.ca.gov

5. **How to Ask the Court to Seal the Documents as Soon as Possible.** To remove the name and identifying characteristics from the public record as quickly as possible, the pseudonymous party should ask the court to schedule a hearing sooner than is normally done. To do so, the party should file an *Ex Parte Application for Order Shortening Time for Hearing on Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-030) asking the court to set an early date for a hearing on the motion to place the documents under seal. Steps for filing the ex parte application to shorten time are as follows:

- The ex parte application to shorten time must be filed in the court where the case has been filed. The applicant can determine which court this is from the documents that have already been filed in the case.
- The applicant must check with that court for local rules as to when and where the applicant must appear for the court to consider the ex parte application for an order shortening time.
- The applicant must follow the rules relating to ex parte applications that are set out in California Rules of Court, rules 3.1203--3.1207. These rules describe the following requirements:
  - o **Notice of the ex parte application to shorten time.** The applicant must let the other party or parties in the civil court proceeding know that the applicant is filing an ex parte application to shorten time for a hearing on the *Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-020). Notice to the other party or parties may be given in person or by phone, fax, overnight mail, or email (if emailed notice is permitted in the case already). The other party or parties must be informed by 10 a.m. the day before the court is to consider the ex parte application to shorten time, unless there is a good reason such notice could not or should not be given.
  - o **Service of papers.** Copies of the ex parte application to shorten time and all related papers must be given to the other party or parties in the civil court proceeding as soon as reasonable, and before the ex parte court appearance, if possible.
  - o **Appearance at court.** The applicant must appear in court at the time and place that the applicant learned from the court's local rules is when and where the court hears ex parte applications.

6. **Forms to Complete for Ex Parte Application.** Before the time the court is scheduled to hear the ex parte application to shorten time, the pseudonymous party must complete and file the following forms with the court:

- *Ex Parte Application for Order Shortening Time for Hearing on Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-030).
- *Declaration Regarding Notice and Service of Ex Parte Application for Order Shortening Time for Hearing on Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-032).

Wherever the forms ask for the pseudonymous party's name, the party should use the pseudonym (Doe name) and should not include any identifying characteristics---including the party's true name. If the pseudonymous party is not represented by an attorney, the party should sign the forms using the pseudonym.

7. **Filing With the Court.** The completed ex parte application forms should be filed with the court clerk. When filing the ex parte application forms, the applicant may (but is not required to) attach the completed forms requesting sealing of documents (listed in instruction 4) to the ex parte documents described in instruction 6. (The court will not file the forms requesting sealing until after the court has scheduled a hearing on the motion to seal (form SH-020).)

There will be a filing fee unless the party is eligible for a fee waiver. (If the party cannot afford the fee and has not already received a fee waiver, the party may file a *Request to Waive Court Fees* (form FW-001) with the other forms.)

The applicant should take the original of each of the forms to be filed to the court clerk, along with two extra copies of each form. The clerk will file the original forms and will stamp and give back the copies.

8. **What to Do After Court Makes an Order.** When the court decides on the applicant's ex parte application to shorten time for a hearing on the motion to place previously filed documents under seal (form SH-030 and related papers), the court will usually make a written order.

- *If the court's order sets a hearing date*. If the parties to the case are present at the ex parte application hearing, the order and copies of all the documents for the motion to place documents under seal (forms SH-020, SH-022, and SH-025) may be given to them at that time. If some or all parties are not present at the ex parte hearing, the applicant must arrange for another person to serve (deliver to) the absent parties a copy of the court's written order and the papers listed in instruction 4. The person serving the documents must be over 18 years old and cannot be a party to the court proceeding. The person serving the documents must fill out and sign a proof of service, which may be done using the form *Proof of Service---Civil* (form POS-040). The proof of service must be filed in court, typically by the applicant.

- *If the court's order does not set a hearing date.* The court's order may not set a hearing date on the motion to seal documents (form SH-020 and related papers). If this is the case, the pseudonymous party will have to ask the court clerk's office for a date, time and location on the court's regular law and motion hearing calendar for a hearing on the motion to place documents under seal (form SH-020). The pseudonymous party will also need to prepare a notice of hearing in accordance with California Rules of Court, rule 3.1110, and arrange to have someone serve the notice of hearing on the other parties in the case, along with the other documents listed in instruction 4. Finally, the pseudonymous party will need to arrange for someone else to serve these documents on (deliver them to) the other parties. The person serving the documents must be over 18 years old and cannot be a party to the court proceeding. The person serving the documents must fill out and sign a proof of service, which may be done using the form *Proof of Service---Civil* (form POS-040). The proof of service must be filed in court, typically by the pseudonymous party.

- On the date the court sets for the hearing on the motion to place documents under seal (form SH-020), the pseudonymous party should appear at the hearing either in person or by phone (if by phone, notice must be given in advance to the court and the other side).

- Once the court makes an order on the motion to place documents under seal (form SH-025 or an order prepared by the court), the pseudonymous party should arrange for someone to serve the other parties with this order as soon as possible.

- If the court determines that the pseudonymous party is not an active participant in the Safe at Home program and denies the motion to place documents under seal, then those documents and the name of the party who made the motion to place documents under seal will be available in the public record.

(Party without an attorney should provide this information on Confidential Information Form *(form SH-001))*	*FOR COURT USE ONLY*
ATTORNEY NAME: STATE BAR NUMBER: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	**DRAFT** **03-16-2020** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
(Use Doe name where appropriate) PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT/ESTATE OF:	
DECLARATION IN SUPPORT OF MOTION TO PLACE DOCUMENTS UNDER SEAL UNDER ADDRESS CONFIDENTIALITY PROGRAM (SAFE AT HOME)	CASE NUMBER:

This form must be filed any time a Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home) *(form SH-020) is filed.*

I declare as follows:

1. I have personal knowledge of the facts stated in this declaration and could and would testify competently to those facts.
2. I am an active participant in the Secretary of State's confidential address program, Safe at Home.
3. I am seeking to have the court place under seal (make confidential) the documents identified on the *Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (SH-020).
4. Facts showing that there is an overriding interest that overcomes the right of public access to the records in this proceeding and that this overriding interest supports placing the documents under seal in this proceeding are as follows *(specify):*

   a. I am participating in the Safe at Home program in order to avoid:
      - ☐ Domestic violence.
      - ☐ Stalking.
      - ☐ Sexual assault.
      - ☐ Human trafficking.

   b. Because of my participation, Code of Civil Procedure section 367.3 authorizes my name and identifying characteristics to be kept confidential in any civil action.

   c. ☐ O*ther (specify):*

☐ Continued on Attachment 4 *(If you need more space, attach form MC-025.)*

Form Adopted for Mandatory Use
Judicial Council of California
SH-022 [New January 1, 2021]

Code of Civil Procedure, § 367.3,
Cal. Rules of Court, rules 2.550, 2.551
www.courts.ca.gov

(Use Doe name where appropriate) PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT/ESTATE OF:	CASE NUMBER:

5. Facts showing that there is a substantial probability that the overriding interest described in item 4 will be prejudiced (harmed or impaired) if the records in this proceeding are not sealed (made confidential) are *(specify):*

☐ Continued on Attachment 5. *(If you need more space, attach form MC-025.)*

6. The fact showing that an order sealing the records in this action is narrowly tailored to protect that overriding interest is that the versions of the documents that pseudonymous party has lodged (submitted) with the court redact (black out) only the pseudonymous party's identifying characteristics as provided under Code of Civil Procedure section 367.3.

7. The fact showing that there is no less restrictive means to protect that overriding interest than placing the record under seal is that the versions of the documents that the pseudonymous party has lodged (submitted) with the court do not redact (black out) any information other than the pseudonymous party's identifying characteristics as provided under Code of Civil Procedure section 367.3.

☐ The number of pages attached is:

(The Pseudonymous Party must sign here)

I declare under penalty of perjury under the laws of the State of California that the foregoing, including statements on all attachments, is true and correct. I agree that when I sign this declaration using my Doe name, I sign as the party identified on the *Confidential Information Form* (form SH-001).

Date:

(TYPE OR PRINT DOE NAME)

▶ (SIGN DOE NAME)

(Use Doe name where appropriate) ATTORNEY NAME: STATE BAR NUMBER: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	***FOR COURT USE ONLY*** **DRAFT** **03-24-2020** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
(Use Doe name where appropriate) PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT/ESTATE OF:	
ORDER ON MOTION TO PLACE DOCUMENTS UNDER SEAL UNDER ADDRESS CONFIDENTIALITY PROGRAM (SAFE AT HOME)	CASE NUMBER:

1. The motion was duly considered
   a. ☐ at the hearing on *(date)*: in Department: of the above-entitled court.
   b. ☐ without hearing.

THE COURT FINDS

2. a. As to whether the following factors apply to the documents for which placement under seal has been requested,
   (1) an overriding interest that overcomes the right of public access to the record ☐ does ☐ does not exist.
   (2) the overriding interest ☐ does ☐ does not support sealing the record.
   (3) a substantial probability ☐ does ☐ does not exist that the overriding interest will be prejudiced if the record is not sealed.
   (4) The proposed order to seal this record ☐ is ☐ is not narrowly tailored.
   (5) A less restrictive means to achieve the overriding interest ☐ does ☐ does not exist.
   b. ☐ Other findings *(if any):*

THE COURT ORDERS

3. ☐ The motion to place documents under seal is **denied.**
4. ☐ The motion to place documents under seal is **granted.** The following documents must be placed under seal and kept confidential:
   a. ☐ Complaint
   b. ☐ Petition
   c. ☐ Summons
   d. ☐ Proof of Service
   e. ☐ Civil Cover Sheet
   f. ☐ Notice
   g. ☐ Order
   h. ☐ Other *(specify):*

Form Approved for Optional Use
Judicial Council of California
SH-025 [New January 1, 2021]

Code of Civil Procedure, § 367.3;
Cal. Rules of Court, rules 2.550, 2.551
www.courts.ca.gov

(Use Doe name where appropriate) PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT/ESTATE OF:	CASE NUMBER:

5. The register of actions ☐ must ☐ must not be revised as necessary to replace the pseudonymous party's true name with the pseudonym (the Doe name) *(check all that apply)*
   a. ☐ John Doe
   b. ☐ Jane Doe
   c. ☐ Doe
   d. ☐ If more than one party is using a Doe name, designation of the Doe in question (for example, Doe A or Doe B, etc.) and to indicate that specified materials have been placed under seal.

6. ☐ Other findings *(if any):*

Date: _____

_____
JUDGE OF THE SUPERIOR COURT

(Party without an attorney should provide this information on Confidential Information Form *(form SH-001))*	*FOR COURT USE ONLY*
ATTORNEY NAME: STATE BAR NUMBER: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	**DRAFT** **03-16-2020** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
(Use Doe name where appropriate) PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT/ESTATE OF:	
EX PARTE APPLICATION FOR ORDER SHORTENING TIME FOR HEARING ON MOTION TO PLACE DOCUMENTS UNDER SEAL UNDER ADDRESS CONFIDENTIALITY PROGRAM (SAFE AT HOME)	CASE NUMBER:

Read Instructions for Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home) *(SH-020-INFO) before filing this application. That instruction sheet describes the requirements for giving notice of this application.*

1. The person filing this motion (*Doe name*): _____ (pseudonymous party) is an active participant in the Secretary of State's address confidentiality program (Safe at Home) and is a *(check one):*
   a. ☐ Plaintiff/Petitioner
   b. ☐ Defendant/Respondent/Objector
   c. ☐ Other *(specify):*

   in this action.

2. Applicant requests a court order shortening time for a hearing on *Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-020) and related papers.

3. Applicant is an active participant in the Safe at Home address confidentiality program and is appearing in this case under a pseudonym (Doe name) under Code of Civil Procedure section 367.3.

4. Certain documents currently in the court's public file disclose the applicant's true name and/or other identifying characteristics of a protected person who has the right to keep this information confidential under Code of Civil Procedure section 367.3.

5. The applicant intends to file a *Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-020) in order to have the protected person's true name and/or other identifying characteristics removed from the public court file.

Date: _____

_____
(TYPE OR PRINT NAME)
(*Party without attorney should use Doe name*)

_____
(SIGNATURE OF ATTORNEY OR PARTY WITHOUT ATTORNEY)
(*Pseudonymous party should sign with Doe name*)

Form Adopted for Mandatory Use
Judicial Council of California
SH-030 [New Jan. 1, 2021]

Code of Civil Procedure, § 367.3
www.courts.ca.gov

(Use Doe name where appropriate) PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT/ESTATE OF:	CASE NUMBER:

Declaration by Pseudonymous Party

I declare under penalty of perjury under the laws of the State of California that the foregoing, including statements on all attachments, is true and correct. I agree that when I sign this declaration using my Doe name, I sign as the party identified on the *Confidential Information Form* (form SH-001).

Date: _____

_____ ▶ _____

(TYPE OR PRINT DOE NAME) SIGN DOE NAME

(*Party without an attorney should provide this information on* Confidential Information Form *(form SH-001)*)	*FOR COURT USE ONLY*
ATTORNEY NAME: STATE BAR NUMBER: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	**DRAFT** **03-16-2020** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
(Use Doe name where appropriate) PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT/ESTATE OF:	
DECLARATION REGARDING NOTICE AND SERVICE OF EX PARTE APPLICATION FOR ORDER SHORTENING TIME FOR HEARING ON MOTION TO PLACE DOCUMENTS UNDER SEAL UNDER ADDRESS CONFIDENTIALITY PROGRAM (SAFE AT HOME)	CASE NUMBER:

This form must be filed any time an Ex Parte Application (form SH-030) is filed.

1. I am *(select all that apply):* ☐ attorney for ☐ Plaintiff/Petitioner ☐ Defendant/Respondent/Objector ☐ Other *(specify):*

2. I ☐ did ☐ did not give notice that papers will be submitted to the court on the date, time, and location below asking a judicial officer to shorten time for (expedite) a hearing on a *Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-020) (which is supported by applicant's *Declaration in Support of Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-022)).

   a. Date: Time: ☐ Dept.:
   b. Address of court: ☐ same as noted above ☐ other *(specify):*

3. **NOTICE** *(If you gave notice, complete item 3a. If you did not give notice, complete item 3b or 3c.)*
   a. ☐ I gave notice as described in items (1) through (5):
      (1) I gave notice to *(select all that apply):*
      ☐ Plaintiff/Petitioner.
      ☐ Defendant/Respondent/Objector.
      ☐ Attorney for Plaintiff/Petitioner.
      ☐ Attorney for Defendant/Respondent/Objector.
      ☐ Other *(specify):*

Form Adopted for Mandatory Use
Judicial Council of California
SH-032 [New January 1, 2021]

Code of Civ. Proc., § 367.3,
Cal. Rules of Court, rules 3.1203-1207
www.courts.ca.gov

(Use Doe name where appropriate) PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT/ESTATE OF:	CASE NUMBER:

3. a. (2) I gave notice on *(date):* at: ☐ a.m. ☐ p.m.
   - ☐ personally at *(location):* , California.
   - ☐ by telephone using telephone no.:
   - ☐ by fax using fax no.:
   - ☐ by voicemail using voicemail no.:
   - ☐ by electronic means *(if permitted)(specify electronic service address of person):*
   - ☐ by overnight mail or other overnight carrier *(specify address of delivery):*

   (3) I gave notice *(select one)*
   - ☐ by 10 a.m. the court day before this ex parte appearance.
   - ☐ after 10 a.m. the court day before this ex parte appearance because of the following exceptional circumstances *(specify):*

   (4) I notified the person in 3a(1) that an order shortening time is being requested for a hearing on the applicant's *Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-020).

   (5) The person in 3a(1) responded as follows:

   (6) I ☐ do ☐ do not believe that the person in 3a(1) will oppose the ex parte application.

b. ☐ **Request for waiver of notice.** I did not give notice about the ex parte application for order shortening time. I ask that the court waive notice to the other party for the following reasons *(identify the exceptional circumstances):*

☐ Attachment 3b.

c. ☐ **Unable to provide notice.** I did not give notice about the ex parte application for order shortening time. I used my best efforts to tell the opposing party when and where this hearing would take place but was unable to do so. The efforts I made to inform the other person were *(specify below):*

☐ Attachment 3c.

(Use Doe name where appropriate)	CASE NUMBER:
PLAINTIFF/PETITIONER:	
DEFENDANT/RESPONDENT/ESTATE OF:	

4. ☐ **SERVICE OF FORMS**

a. An unfiled copy of *Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-020) and related documents were served on

- ☐ Plaintiff/Petitioner
- ☐ Defendant/Respondent/Objector
- ☐ Attorney for Plaintiff/Petitioner
- ☐ Attorney for Defendant/Respondent/Objector
- ☐ Other *(specify):*

b. Documents were served on *(date):* at: ☐ a.m. ☐ p.m.

- ☐ personally at *(location):* , California.
- ☐ by fax using fax no.:
- ☐ by electronic means *(if permitted)(specify electronic service address of person):*
- ☐ by overnight mail or other overnight carrier *(specify address of delivery):*

c. ☐ **Documents were not served on the opposing party** because of the circumstances specified in ☐ 3b ☐ 3c ☐ below:

(If the Pseudonymous Party is signing this form, sign here.)

I declare under penalty of perjury under the laws of the State of California that the foregoing, including statements on all attachments, is true and correct. I agree that when I sign this declaration using my Doe name, I sign as the party identified on the *Confidential Information Form* (form SH-001).

Date:

(TYPE OR PRINT DOE NAME)

▶ (SIGN DOE NAME)

(If someone other than the Pseudonymous Party's attorney is signing this form, sign here.)

I declare under penalty of perjury under the laws of the State of California that the foregoing, including statements on all attachments, is true and correct.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF DECLARANT)

(Use Doe name where appropriate) ATTORNEY OR PARTY WITHOUT ATTORNEY STATE BAR NUMBER: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **03-16-2020** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
(Use Doe name where appropriate) PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT/ESTATE OF:	
ORDER ON EX PARTE APPLICATION FOR ORDER SHORTENING TIME FOR HEARING ON MOTION TO PLACE DOCUMENTS UNDER SEAL UNDER ADDRESS CONFIDENTIALITY PROGRAM (SAFE AT HOME)	CASE NUMBER:

1. Applicant applied ex parte for an order shortening time for a hearing on *Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (form SH-020).

2. The court, having reviewed the application, makes the following ruling.

3. ☐ **Application Denied.** The court denies the application.
   a. ☐ The application is incomplete.
   b. ☐ The application did not meet the requirements for providing notice or service of the application.
   c. ☐ Other:

4. ☐ **Shortening Time**. The court finds that delay in ruling would result in prejudice to the applicant's rights under Code of Civil Procedure section 367.3. A hearing will be held on the application, as follows:
   a. The hearing will be on the date, time, and location indicated below:

Date:	Time:	☐ Dept.:	☐ Room:
Address of court: ☐ same as noted above	☐ other *(specify):*		

   b. Applicant must serve this order and the *Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (SH-020), and related papers, including the *Declaration in Support of Motion to Place Documents Under Seal Under Address Confidentiality Program (Safe at Home)* (SH-022), on all other parties by *(date):* .
   c. Any papers in opposition must be served on all other parties and filed by *(date):* .

Form Approved for Optional Use
Judicial Council of California
SH-035 [New January 1, 2021]

ORDER ON EX PARTE APPLICATION FOR ORDER SHORTENING TIME FOR HEARING ON MOTION TO PLACE DOCUMENTS UNDER SEAL UNDER ADDRESS CONFIDENTIALITY PROGRAM (SAFE AT HOME)

Code of Civil Procedure, § 367.3
www.courts.ca.gov

(Use Doe name where appropriate) PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT/ESTATE OF:	CASE NUMBER:

5. **Other Rulings.**

Date: _____

_____
JUDICIAL OFFICER

Item number:18

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Practice and Procedure: Streamlined Discovery Pilot Project (adopt Cal. Rules of Court, rules 3.1030-3.1039; adopt forms CIV-200 and CIV-200-INFO)

Committee or other entity submitting the proposal:
Civil and Small Claims Advisory Committee

Staff contact (name, phone and e-mail): Anne M. Ronan, 415-865-8933, anne.ronan@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: New Civil Tiers and Streamlined Litigation : . . . •The committee began working on alternative ways to further the recommendations, and has now focused on the concept of a pilot project, based on voluntary participation of the parties, which is one of the projects the committee intends to work on in the 2019-2020 committee year

If requesting July 1 or out of cycle, explain:

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

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-09

Title
Civil Practice and Procedure: Streamlined Discovery Pilot Project

Proposed Rules, Forms, Standards, or Statutes
Adopt Cal. Rules of Court, rules 3.1030–3.1039; approve forms CIV-200 and CIV-200-INFO

Proposed by
Civil and Small Claims Advisory Committee
Hon. Ann I. Jones, Chair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Anne M. Ronan, 415-865-8933
anne.ronan@jud.ca.gov

Executive Summary and Origin

This proposal from the Civil and Small Claims Advisory Committee would provide for a pilot project to apply new discovery provisions for unlimited civil cases. The pilot project would be optional for courts and voluntary for parties appearing in participating courts. The proposal is based on the recommendations of the Commission on the Future of California's Court System to streamline the discovery process in order to lessen the cost of litigation and therefore provide greater access to justice for civil litigants.

Background

The *Commission on the Future of California's Court System: Report to the Chief Justice* (Futures Commission report), issued in May 2017, included recommendations relating to civil cases. The Civil and Small Claims Advisory Committee has been directed to develop, with input from stakeholders, recommendations to the Judicial Council to implement the recommendations in the report that existing civil procedures be amended to reduce litigation costs by streamlining the discovery process and facilitating the early exchange of information.[1] The advisory committee previously circulated a more extensive legislative proposal that it believed would further the recommendations of the Futures Commission by changing the discovery process for most civil parties across the

[1] Commission on the Future of California's Court System, *Report to the Chief Justice* (Oct. 2017), pp. 19–22. The report may be viewed at *www.courts.ca.gov/documents/futures-commission-final-report.pdf*.

state but, in light of comments received, decided an optional pilot project is a better first step.

The Proposal

The streamlined discovery pilot project would be available in any county in which the court agrees to take part. Currently, the leadership of the Superior Courts of Santa Clara and San Bernardino Counties have indicated their willingness to take part in the pilot project, and other courts are welcome to, also. The court would establish the pilot project by local rule or standing order, with approval of the council, subject to the statewide rules for the project.[2]

Under the proposed rules, a court in the pilot project would provide information about the project to plaintiffs in all unlimited general civil filings[3] by providing them with the proposed *Streamlined Discovery Pilot Project Information Sheet* (form CIV-200-INFO) and *[Proposed] Consent Order for Streamlined Discovery Pilot Project* (form CIV-200-INFO), and the plaintiffs would be required to serve copies of those forms on defendants.[4] If parties in a case agree to participate in the program, discovery in that case will be stayed until an initial round of disclosures is completed.[5] Unless the parties stipulate to a different schedule, plaintiffs are to make their initial disclosures (including production of documents) within 30 days after either the filing of the proposed consent order or the filing of a responsive pleading by the defendant, whichever is later. Defendants are to make their disclosures (also including production of documents) within 45 days after the plaintiff's disclosure.[6] Failure to provide information in the disclosures could serve as a basis for evidentiary or issue preclusion sanctions.

In addition, following the initial disclosures, participants in the pilot will be limited, to the 35 specially prepared interrogatories and requests for admission currently permitted by statute, with any further interrogatories or requests permitted only if agreed to or by court order on a showing of good cause.[7] In other words, a "good cause" declaration

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[2] See proposed rule 3.1030.

[3] "General civil case" means all civil cases *except* probate, guardianship, conservatorship, juvenile, and family law proceedings; small claims proceedings; unlawful detainer proceedings; petitions to prevent civil harassment, elder abuse, and workplace violence; petitions for name change; election contest petitions; and petitions for relief from late claims. (Cal. Rules of Court, rule 1.6.)

[4] See proposed rule. 3.1031. A court interested in the pilot project has suggested that all parties be required to meet and confer at the beginning of the litigation to consider whether to take part in the pilot project. Specific comments are being requested on this suggestion.

[5] See proposed rule 3.1034(a).

[6] See proposed rule 3.1033.

[7] See proposed rule 3.1034(b). A court interested in the pilot has suggested that the rules also limit the number of document requests. The statutes currently place no limit on this type of request, so a specific limit would need to be developed. Specific comments are requested on this proposal.

would be insufficient by itself to allow for additional discovery. Parties will also be able to request supplementation of the disclosures during the litigation.[8]

Because the program is voluntary, parties may ask that a case be removed from the pilot project at any time, either by stipulation of all the parties or by noticed motion to the court.[9]

Under this proposal, participating courts will provide incentives to parties to join the pilot project by providing the parties with informal discovery conferences when requested, giving them preference in hearing dates on noticed discovery motions if needed,[10] and setting earlier trial dates if requested by all parties.[11] Specific comments are being requested here as to other potential incentives that could be provided.

Courts will be responsible for keeping track of the cases in the pilot project, to ensure that the council can evaluate the effect of the project.[12]

Alternatives Considered

As noted above, the advisory committee considered the alternative of proposing legislation that would have mandated changes to the civil discovery process similar to the ones proposed here in many general civil cases across the state. In light of concerns raised by commenters, the committee decided instead to recommend a voluntary pilot project so that the results could be evaluated before proposing statewide changes.

Fiscal and Operational Impacts

Because the proposal focuses on discovery between the parties, the primary impact will be on litigants and their counsel. Participating courts will be holding more informal discovery conferences, which may be a change for the court, but the committee expects that, in the long run, the proposal will lessen the amount of court appearances required for discovery motions. Participating courts will also need to track information about cases involved in the pilot project and report it to the Judicial Council.

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[8] See proposed rule 3.1034(c).

[9] See proposed rule 3.1038.

[10] See proposed rule 3.1036.

[11] See proposed rule 3.1037.

[12] See proposed rule 3.1039.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Should all parties in general civil matters in courts participating in the pilot project be required to meet and confer over whether to take part in the project? If so, when should the deadline for that meeting and conference be: within 30 days of service of the complaint, within 30 days of service of the first responsive pleading, or some other date?
- Should the pilot project include a limitation on the number of demands for inspection, copying, etc. under Code of Civil Procedure section 2031, et seq. that a party can make without showing good cause for more? If so, what should that number be?
- What incentives, in addition to those in the proposal, could be provided by courts to encourage participation in the pilot project?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rules 3.1030–3.1039, at pages 5–8
2. Forms CIV-200 and CIV-200-INFO, at pages 9–12
3. Link A: Futures Commission report (2017), *www.courts.ca.gov/documents/futures-commission-final-report.pdf*

California Rules of Court, rules 3.1030–3.1039 would be adopted, effective January 1, 2021, as follows:

Chapter 3. Streamlined Discovery Pilot Project

Rule 3.1030. Authorization for pilot project

(a) Authorization

With the approval of the Judicial Council, a superior court may, through June 30, 2025, establish by local rule or standing order a pilot project to permit streamlined discovery in unlimited general civil cases to be conducted under the rules in this chapter.

(b) Participation by court

To obtain approval of the Judicial Council to conduct a streamlined discovery pilot project under these rules, a court must inform the council of its intent to do so and agree to comply with the rules in this chapter.

Rule 3.1031. Information to parties about streamlined discovery pilot project

(a) Court-provided information package for plaintiffs

Any court taking part in the streamlined discovery pilot project must, at the time the complaint is filed in any unlimited general civil case, make available to a plaintiff the *Streamlined Discovery Pilot Project Information Sheet* (form CIV-200-INFO) and a blank *[Proposed] Consent Order for Streamlined Discovery Pilot Project* (form CIV-200), which the parties may use to agree to join the pilot project.

(b) Availability of information on court website

A court may make the streamlined discovery pilot project forms available on its website, as long as paper copies are also made available at the clerk's office.

(c) Information package served to defendants by plaintiff

In all unlimited general civil cases filed in a court participating in the pilot project, the plaintiff must serve a copy of the *Streamlined Discovery Pilot Project Information Sheet* (form CIV-200-INFO) and a blank *[Proposed] Consent Order for Streamlined Discovery Pilot Project* (form CIV-200) on each defendant, together with the complaint or as soon thereafter as practicable.

Rule 3.1032. Agreement of Parties

Parties who agree to take part in the streamlined discovery pilot project must file a *[Proposed] Consent Order for Streamlined Discovery Pilot Project* (form CIV-200)

signed by all parties to the action stating that all parties agree to serve on all other parties an initial disclosure, with information and documents as provided in this chapter, and agree to be subject to and comply with the rules in this chapter.

Rule 3.1033. Initial Disclosures

(a) Timing

(1) *Timing*. Except when otherwise agreed to in the proposed consent order or subject to (2), plaintiff must serve that party's initial disclosure within 30 days after the filing of the stipulation or a responsive pleading by defendant, whichever is later. Defendant must serve that party's initial disclosure within 45 days after plaintiff's disclosure was served on defendant.

(2) *Continuances.* At any time before the service of the disclosures, parties may stipulate to continue the date for disclosures for up to 120 days for the purpose of conducting settlement discussions or mediation. Further continuance may be obtained by motion to the court with a showing of good cause or requested at an informal discovery conference, case management conference, or trial setting conference.

(b) Content

The initial disclosure must include the following information and attachments:

(1) The name and, if known, address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses—along with the subjects of that information—unless the use would be solely for impeachment.

(2) For inspection or copying, all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.

(3) For inspection and copying, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(4) In a personal injury case, the name and address of each physician, dentist, or other health care provider who treated plaintiff, and the dates of treatment, as well as a copy of all medical records, bills, and evidence of payment.

(5) A description of the types of damages claimed and, if known, a statement of economic damages incurred.

(c) Signatures

Each initial disclosure must be signed by an attorney of record in the attorney's own name or by the party personally. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete as to the information then known or, if it cannot by reasonable effort be complete, explaining why.

(d) Preservation of evidence

Parties must not destroy and must preserve all items that are identified or that fall within the categories identified in the initial disclosure until the case has been completed.

Rule 3.1034. Other Discovery

(a) Initial stay of discovery

Once the parties have agreed to take part in the streamlined discovery pilot project, all further discovery is stayed until the time for initial disclosures has passed and the party propounding discovery has completed and served the required disclosure.

(b) Limits on written discovery requests

Any party seeking to propound more interrogatories or requests for admission than allowed as a matter of right under the Code of Civil Procedure may do so only by stipulation; agreement of the parties at an informal discovery conference, case management conference, or trial setting conference; or order of the court on a showing of good cause on a noticed motion.

(c) Supplemental disclosures

Twice before the initial trial date and once after the initial trial date has been continued, a party may propound a request for a supplemental disclosure to elicit any later-acquired information bearing on a previously made disclosure, subject to the time limits on discovery.

Rule 3.1035. Failure to Disclose

A party or attorney who willfully fails to comply with initial or supplemental disclosure requirements may be subject to the sanctions for misuse of the discovery process—including monetary, issue, and evidentiary sanctions—as provided in Code of Civil Procedure section 2023.030.

Rule 3.1036. Discovery Disputes

(a) Informal conference

On request of a party taking part in a streamlined discovery pilot project, the court will conduct an informal discovery conference to address any discovery matters in dispute between the parties.

(b) Noticed motion

If a discovery matter is not resolved at the informal conference and a party files a noticed motion to resolve the issue, the case will be given preference over other general civil cases for purposes of setting the hearing date.

Rule 3.1037. Trial Setting

If requested by all parties, a case in the streamlined discovery pilot project will be given preference over other general civil cases for purpose of setting a trial date.

Rule 3.1038. Withdrawal From Pilot Project

Any party may request that a case be removed from the streamlined discovery pilot project, either by stipulation of all parties or by a showing of good cause on a noticed motion.

Rule 3.1039. Tracking Cases in Pilot Project

A court taking part in the streamlined discovery pilot project must track all cases in the pilot—by case number, party names, and length of time to disposition—to aid the Judicial Council in evaluating the effectiveness of the pilots.

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **03-27-2020** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
[PROPOSED] CONSENT ORDER FOR STREAMLINED DISCOVERY PILOT PROJECT	CASE NUMBER:

This form is to be signed by all parties consenting to litigate within the streamlined discovery pilot project under rules 3.1030–3.1039 of the California Rules of Court. Before completing this form, all parties should review Streamlined Discovery Pilot Project Information Sheet *(form* CIV-200-INFO*).*

EACH PARTY AGREES AS FOLLOWS:

1. The parties to the action are
   a. plaintiff (*name*)*:*
   b. defendant (*name*)*:*
   c. Other party (*name and party*)*:*
2. A party to this action ☐ is ☐ is not a minor, an incompetent person, or a person for whom a conservator has been appointed.
3. The parties agree that this action will be subject to and they will comply with the streamlined discovery pilot project procedures in California Rules of Court, rules 3.1030–3.1039, including the following:
   a. Each party will make an initial disclosure with information and documents as provided in rule 3.1033.
   b. Unless 3c is checked or the parties stipulate for a continuance under rule 3.1033(a)(2), the following timeline applies:
      (1) Plaintiff will serve the initial disclosure on all other parties within 30 days after the filing of this form or the filing of a responsive pleading by defendant, whichever is later.
      (2) Defendant will serve the initial disclosure on all other parties within 45 days after plaintiff's disclosure was served on defendant.
   c. ☐ The parties agree to the following timeline:
      (1) ☐ Plaintiff will serve the initial disclosure on all other parties by *(describe date or deadline):*
      (2) ☐ Defendant will serve the initial disclosure on all other parties by *(describe date or deadline):*
      (3) ☐ Other *(describe timeline agreed to):*

Plaintiff/Petitioner: Defendant/Respondent:	CASE NUMBER:

3. d. The parties must not destroy and must preserve throughout the case all items that are identified, or fall within a category identified, in the initial disclosure.

   e. All discovery is stayed until the time for initial disclosures has passed and the party propounding discovery has completed and served the required disclosure.

   f. No party may propound more interrogatories or requests for admission than allowed as a matter of right under the Code of Civil Procedure unless the additional items are allowed by written stipulation; by agreement of parties at a discovery conference, case management conference, or trial setting hearing; or by order of the court for good cause.

4. The parties understand and agree that failure to comply with the disclosure requirements may be subject to sanctions for misuse of discovery under Code of Civil Procedure section 2023.030.

5. The parties agree that the court will, at the request of any party, conduct informal discovery conferences to address any discovery matter between the parties. Any noticed motion following such a conference will be given preference in setting a hearing date.

After reading the above, the parties hereby consent to proceed in this case under the streamlined discovery pilot project procedures stated in California Rules of Court, rules 3.1030–3.1039.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF ATTORNEY FOR PLAINTIFF)

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF ATTORNEY FOR DEFENDANT)

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF ATTORNEY FOR *(describe party)*):

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF ATTORNEY FOR *(describe party)*):

☐ It is so **ORDERED**.

☐ The proposed consent order is **DENIED** for good cause.

Date:

JUDICIAL OFFICER

STREAMLINED DISCOVERY PILOT PROJECT
INFORMATION SHEET

1. **Pilot Project.** The Judicial Council of California has authorized a streamlined discovery pilot project in certain courts throughout the state, including the one this case has been filed in. The goal of the pilot project is to decrease litigation costs in civil cases through streamlining civil discovery, leading to greater access to the courts. This streamlining is to be accomplished by bilateral early disclosures of factual information supporting claims or defenses, identity of known witnesses, and production of key documents; limiting written discovery unless good cause is shown for more; and having discovery disputes handled, at least initially, through informal discovery conferences. Participation in the program is voluntary.

2. **Deciding whether to take part.** When an unlimited civil case is filed in a court taking part in the streamlined discovery pilot project, the plaintiff is to serve this information sheet and [*Proposed*] *Consent Order for Streamlined Discovery Pilot Project* (form CIV-200) on all parties in the case with the complaint, or as soon as practicable. The parties should read through this sheet and the applicable rules (California Rules of Court, rules 3.1030–3.1039) and consider whether their case would benefit from being part of the pilot project and its more streamlined discovery procedures. The project is not intended to be used for cases with self-represented parties.

   To encourage participation in the pilot project, participating courts agree to provide informal discovery conferences at the request of any participating party for any discovery disputes that should arise. If a formal noticed motion is required after such a conference, the court will give preference to the parties in setting a date for that hearing. (See rule 3.1036.) In addition, if the parties all agree, the case will be given preference over other general civil cases in trial setting. (See rule 3.1037.)

3. **Initial Disclosures and Discovery.** Agreeing to participate in the streamlined discovery pilot project means agreeing to comply with the rules relating to discovery set out in Cal. Rules of Court, rules 3.1033 through 3.1036. These include the following provisions:

   a. The parties are to make initial disclosures of information at the beginning of the case, without any request from the other side. What is required is set out in rule 3.1033(b) and includes:

      - The identity of each individual likely to have discoverable information, along with the subject of that information;
      - All documents, electronically stored information, and tangible things that the disclosing party has and may use to support its claims or defenses;
      - Any insurance agreement that may be available to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment; and
      - In a personal injury case, the identity of all treating health care providers, dates of treatment, and copies of all medical records and bills.

      The information provided is to be based on a reasonable inquiry and be complete as to the information then known to the disclosing party.

   b. Under the timeline in the rules, plaintiff is to serve the initial disclosure first, within 30 days after the filing of either the proposed consent order or the defendant's responsive pleading, whichever is later; defendant is to serve that party's initial disclosure within 45 days thereafter. However, the parties can agree to their own timeline, as long as they include it in the proposed consent order. (Rule 3.1033(a))

   c. Parties must preserve any items that are identified in, or are within categories that are identified in, the initial disclosures. (Rule 3.1033(d).)

   d. Other discovery cannot begin until after the time for the initial disclosures is completed. The number of interrogatories or requests for admission that a party may put forward is limited to the number allowed as a matter of right within the Code of Civil Procedure, unless the party seeing to ask more either obtains the agreement of the other parties (either in a stipulation or at an informal discovery conference, case management conference, or trial setting conference) or obtains an order of the court on a showing of good cause. (Rule 3.1034(a)–(b).)

   e. A party can ask another party to supplement the disclosure with any later acquired information twice before the initial trial date, and once more if the initial trial date is continued. (Rule 3.1034(c).)

   f. A party or attorney who willfully fails to comply with the disclosure requirements may be subject to the sanctions for misuse of the discovery process set out in Code of Civil Procedure section 2020.030, including monetary, issue, and evidentiary sanctions. (Rule 3.1035.)

Form Approved for Mandatory Use
Judicial Council of California CIV-200-INFO [New January 1, 2021]

Cal. Rules of Court, rules 3.1030–3.1039
www.courts.ca.gov

4. **How to sign up.** For a case to be in the pilot project, all parties must agree to take part. The parties must complete and sign the [*Proposed*] *Consent Order for Streamlined Discovery Pilot Project* (form CIV-200) and file it with the court. The court has the discretion to refuse to let a case into the project with good cause.

5. **How to withdraw.** Because the pilot project is voluntary, parties who decide to withdraw may do so either by a stipulation by all parties or by noticed motion to the court with a showing of good cause. (Rule 3.1038).

Item number:19

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Criminal Law: Mental Competency Proceedings
Amend Cal. Rules of Court, rule 4.130

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: October 28, 2019
Project description from annual agenda: Review enacted legislation that may have an impact on criminal court administration and propose rules and forms as may be appropriate for implementation of the legislation.

If requesting July 1 or out of cycle, explain:

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

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.: 20-123
For business meeting on May 14–15, 2020

Title
Criminal Law: Mental Competency Proceedings

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rule 4.130

Recommended by
Criminal Law Advisory Committee
Hon. J. Richard Couzens, Chair

Agenda Item Type
Action Required

Effective Date
September 1, 2020

Date of Report
March 5, 2020

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 4.130, to reflect recent legislative changes by deleting an advisory committee comment stating that expert reports are publicly accessible court documents, and replacing outdated terminology to describe mental health disorders.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council amend rule 4.130 of the California Rules of Court, effective September 1, 2020, to:

1. Delete the advisory committee comment that states "[t]he expert reports, unless sealed under rule 2.550, are publicly accessible court documents"; and

2. Replace references to a "mental disorder" with "mental health disorder."

The text of the amended rule is attached at pages 3–4.

Relevant Previous Council Action

Rule 4.130 was adopted effective January 1, 2007. It was most recently amended, effective January 1, 2020, to incorporate changes resulting from Assembly Bill 1810 (Stats. 2018, ch. 34), a bill that significantly altered the statutory landscape for mental competency proceedings.

Analysis/Rationale

Effective January 1, 2020, new Penal Code section 1369.5 states that documents submitted to a court in a mental competency proceeding are "presumptively confidential, unless otherwise provided by law." The advisory committee comment that states "[t]he expert reports, unless sealed under rule 2.550, are publicly accessible court documents" conflicts with this new law.

Also effective January 1, 2020, Assembly Bill 46 (Stats. 2019, ch. 9) amended, in relevant part, Penal Code section 1367 to replace references to "mental disorder" with "mental health disorder." The bill's intent was to replace outdated terminology used to describe mental health conditions and individuals with mental health conditions. (Sen. Rules Com., Off. of Sen. Floor Analyses, 2d reading analysis of Sen. Bill No. 46 (2019—2020 Reg. Sess.), June 5, 2019, p. 1.)

Policy implications

This proposal has no major policy implications. It aligns with the Judicial Council's policy to keep rules consistent with related statutes.

Comments

This proposal did not circulate for public comment because the proposed changes are minor and unlikely to create controversy, and therefore may be adopted without circulation. (See Cal. Rules of Court, rule 10.22(d)(2).)

Alternatives considered

The committee discussed whether to add a provision to the rule addressing the presumptive confidentiality of documents submitted in a mental competency proceeding but decided that such a provision was unnecessary because Penal Code section 1369.5 clearly addresses the issue.

Fiscal and Operational Impacts

No fiscal or operational impacts are anticipated as a result of amending rule 4.130. Fiscal and operational impacts to court procedures are a result of the legislative changes.

Attachments and Links

1. Cal. Rules of Court, rule 4.130, at pages 3–4
2. Link A: Pen. Code, § 1369.5, *http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1369.5&lawCode=PEN*
3. Link B: Assem. Bill 46, *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB46*

Rule 4.130 of the California Rules of Court is amended, effective September 1, 2020, to read:

Rule 4.130. Mental competency proceedings

(a)–(c) * * *

(d) Examination of defendant after initiation of mental competency proceedings

(1) * * *

(2) Any court-appointed experts must examine the defendant and advise the court on the defendant's competency to stand trial. Experts' reports are to be submitted to the court, counsel for the defendant, and the prosecution. The report must include the following:

(A) A brief statement of the examiner's training and previous experience as it relates to examining the competence of a criminal defendant to stand trial and preparing a resulting report;

(B) A summary of the examination conducted by the examiner on the defendant, including a summary of the defendant's mental status, a diagnosis under the most recent version of the *Diagnostic and Statistical Manual of Mental Disorders*, if possible, of the defendant's current mental health disorder or disorders, and a statement as to whether symptoms of the mental health disorder or disorders which motivated the defendant's behavior would respond to mental health treatment;

(C) A detailed analysis of the competence of the defendant to stand trial using California's current legal standard, including the defendant's ability or inability to understand the nature of the criminal proceedings or assist counsel in the conduct of a defense in a rational manner as a result of a mental health disorder;

(D)–(G) * * *

(3) * * *

(e)-(f) * * *

(g) Diversion of a person eligible for commitment under section 1370 or 1370.01

(1)–(3) * * *

(4) A finding that the defendant suffers from a mental health disorder or disorders rendering the defendant eligible for diversion, any progress reports concerning the defendant's treatment in diversion, or any other records related to a mental health disorder or disorders that were created as a result of participation in, or completion of, diversion or for use at a hearing on the defendant's eligibility for diversion under this section, may not be used in any other proceeding without the defendant's consent, unless that information is relevant evidence that is admissible under the standards described in article I, section 28(f)(2) of the California Constitution.

(5)–(6) * * *

(h) * * *

Advisory Committee Comment

* * *

~~The expert reports, unless sealed under rule 2.550, are publicly accessible court documents.~~

* * *

Item number: 20

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Criminal Procedure: Automatic Record Relief
Revise forms CR-180, CR-181, CR-400, CR-409, CR-409-INFO

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: October 28, 2019
Project description from annual agenda: Review enacted legislation that may have an impact on criminal court administration and propose rules and forms as may be appropriate for implementation of the legislation.

If requesting July 1 or out of cycle, explain:

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

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue . San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-10

Title
Criminal Procedure: Automatic Record Relief

Proposed Rules, Forms, Standards, or Statutes
Revise forms CR-180, CR-181, CR-400, CR-409, and CR-409-INFO

Proposed by
Criminal Law Advisory Committee
Hon. J. Richard Couzens, Chair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Sarah Fleischer-Ihn, 415-865-7702
Sarah.Fleischer-Ihn@jud.ca.gov

Executive Summary and Origin

The Criminal Law Advisory Committee recommends revising optional criminal forms used to petition for dismissals and reductions of convictions and request sealing of arrest records to reflect statutory changes allowing for automatic record relief.

Background

Proposition 64, effective November 9, 2016, includes resentencing and dismissal provisions that permit persons previously convicted of designated marijuana-related offenses to obtain a reduced conviction or sentence, if they would have received the benefits of the law had it been in effect when the crime was committed. To implement Prop. 64, the Judicial Council approved forms to be used to petition the court for relief and make the appropriate orders under Health and Safety Code section 11361.8 (Link A).

Assembly Bill 1793 (Stats. 2018, ch. 993) (Link B) added section 11361.9 to the Health and Safety Code (Link C), which removed the burden of seeking relief for marijuana-related convictions from a defendant-petitioner and made it the responsibility of government agencies. Section 11361.9 requires the state Department of Justice to identify past convictions potentially eligible for relief under Health and Safety Code section 11361.8 and notify the relevant prosecuting agency, which may or may not challenge granting relief based on ineligibility or a perceived public safety risk. If a court grants relief, it must notify the state Department of Justice, which must update the defendant's criminal information accordingly.

Assembly Bill 1076 (Stats. 2019, ch. 578) (Link D) added sections 851.93 (Link E) and 1203.425 to the Penal Code (Link F), requiring the state Department of Justice to review statewide criminal history records to identify persons who are eligible to have their arrest or criminal conviction records withheld from disclosure without requiring a petition or motion. This new law generally prohibits courts from disclosing information concerning an arrest or conviction dismissed under these new statutes and other existing conviction dismissal statutes. These provisions are subject to a budget appropriation, and if funded would go into effect on January 1, 2021.[1]

A trailer bill to push back the effective date of key provisions of Penal Code sections 851.93 and 1203.425 to August 1, 2022, is pending (Link G). If the trailer bill passes, the committee intends to withdraw the proposal and re-circulate it for public comment closer to the new effective date.

The Proposal

The Judicial Council has petition-based criminal record cleaning forms that would be unnecessary for persons granted automatic record relief. This proposal would update the following criminal forms to notify petitioners that their arrest or conviction may have already been granted automatic record relief, as well as revise the forms to avoid the use of gendered pronouns.

- ***Petition/Application (Health and Safety Code, § 11361.8) Adult Crimes*** **(form CR-400):** Add a notice that the conviction may have already been automatically dismissed or redesignated, explain how to find out if automatic relief was granted, revise items 2 and 4 to avoid the use of gendered pronouns, and make minor technical amendments.

- ***Petition for Dismissal*** **(form CR-180):** Add a notice that the state Department of Justice may have already granted automatic relief under Penal Code section 1203.425 and that a petition for dismissal under Penal Code sections 1203.4 or 1203.4a may be unnecessary if automatic relief has been granted, explain how to find out if automatic relief was granted, and revise items 4 and 7 to avoid the use of gendered pronouns.

- ***Order for Dismissal*** **(form CR-181):** Add a statement that, except as provided in Penal Code section 1203.425(d), if relief is granted under Penal Code sections 1203.4, 1203.4a, 1203.41, or 1203.42, the court will not disclose information concerning a conviction granted relief to any person or entity, in any format, except to the person whose conviction was granted relief or a criminal justice agency, revise item 9 to avoid the use of gendered pronouns, and make minor technical amendments.

[1] As of March 2020, the Governor's proposed budget includes an appropriation to the Department of Justice for automatic record relief purposes.

- ***Petition to Seal Arrest and Related Records (Pen. Code, § 851.91)* (form CR-409) and information sheet (CR-409-INFO):** Add a notice that an arrest may qualify for automatic arrest record relief under Penal Code section 851.93 and that a petition to seal is unnecessary if automatic relief has been granted, explain how to find out if automatic relief was granted, and make minor technical amendments.

Alternatives Considered

Because the form revisions are necessitated by statutory changes, the committee did not consider any alternatives.

Fiscal and Operational Impacts

Expected costs are limited to training, possible case management system updates, and the production of new forms. No other implementation requirements or operational impacts are expected.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Forms CR-400, CR-180, CR-181, CR-409, and CR-409-INFO, at pages 5–13
2. Link A: Health & Saf. Code, § 11361.8, *http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=11361.8.&lawCode=HSC*
3. Link B: Assem. Bill 1793 (Stats. 2018, ch. 993), *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB1793*

4. Link C: Health & Saf. Code, § 11361.9, *http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=11361.9.&lawCode=HSC*
5. Link D: Assem. Bill 1076 (Stats. 2013, ch. 787), *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1076*
6. Link E: Pen. Code, § 851.93, *http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=851.93.&lawCode=PEN*
7. Link F: Pen. Code, § 1203.425, *http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1203.425&lawCode=PEN*
8. Link G: Trailer bill language to the Governor's proposed 2020-21 budget, amending Sections 851.93 and 1203.425 of the Penal Code (RN 20 08745); *https://esd.dof.ca.gov/dofpublic/public/trailerBill/pdf/36*

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

Notice: Petitioner's conviction may have already been automatically dismissed or redesignated. To find out if automatic relief was granted, check with the superior court or public defender's office in the county of conviction, or request petitioner's Record of Arrest and Prosecution (RAP) sheet from the Department of Justice.

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

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

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

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

Dated:

▶ _____
SIGNATURE OF PETITIONER/APPLICANT

Proof of Service for Petition/Application—Adult Crimes (form CR-401) may be used to provide proof of service of this petition/application.

Form Approved for Optional Use
Judicial Council of California
CR-400 [Rev. January 1, 2021]

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

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	**DRAFT** **Not approved by the Judicial Council**
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: DATE OF BIRTH:	CASE NUMBER:
PETITION FOR DISMISSAL **(Pen. Code, §§ 17(b), 17(d)(2), 1203.4, 1203.4a, 1203.41, 1203.42, 1203.43, 1203.49)**	*FOR COURT USE ONLY* DATE: TIME: DEPARTMENT:

Notice: The Department of Justice may have already granted automatic relief if the conviction happened on or after January 1, 2021, and petitioner either 1) completed the term of probation without revocation, or 2) completed the sentence without probation and at least one calendar year has passed since the judgment date. (Pen. Code, § 1203.425.) A petition for dismissal under Penal Code sections 1203.4 or 1203.4a may be unnecessary if automatic relief has been granted. To find out if automatic relief was granted, check with the superior court in which the conviction happened, or request petitioner's Record of Arrest and Prosecution (RAP) sheet from the Department of Justice.

1. On *(date):* , the petitioner *(the defendant in the above-entitled criminal action)* was convicted of a violation of the following offenses or was granted deferred entry of judgment for the following offenses:

Code	**Section**	**Type of offense *(felony, misdemeanor, or infraction)***	**Eligible for reduction to misdemeanor under Penal Code, § 17(b) *(yes or no)***	**Eligible for reduction to infraction under Penal Code, § 17(d)(2) *(yes or no)***

If additional space is needed for listing offenses, use *Attachment to Judicial Council Form* (form MC-025).

2. ☐ **Felony or misdemeanor with probation granted *(Pen. Code, § 1203.4)***

Probation was granted on the terms and conditions stated in the docket of the above-entitled court; the petitioner is not serving a sentence for any offense, on probation for any offense, or under charge of commission of any crime, and the petitioner (*check all that apply*)

a. ☐ has fulfilled the conditions of probation for the entire period thereof.

b. ☐ has been discharged from probation prior to the termination of the period thereof.

c. ☐ should be granted relief in the interests of justice. *(Please note: You may explain why granting a dismissal would be in the interests of justice. You can provide that information by writing in the space below, or by attaching a letter or other relevant documents. If you need more space for your writing, you can use the Attached Declaration (form MC-031) and attach it to this petition.)*

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

3. ☐ **Misdemeanor or infraction with sentence other than probation *(Pen. Code, § 1203.4a)***

Probation was not granted; more than one year has elapsed since the date of pronouncement of judgment. Petitioner has complied with the sentence of the court and is not serving a sentence for any offense or under charge of commission of any crime; and the petitioner *(check one)*:

a. ☐ has lived an honest and upright life since pronouncement of judgment and conformed to and obeyed the laws of the land; ***or***

b. ☐ should be granted relief in the interests of justice. *(Please note: You may explain why granting a dismissal would be in the interests of justice. You can provide that information by writing in the space below or by attaching a letter or other relevant documents. If you need more space for your writing, you can use the Attached Declaration (form MC-031) and attach it to this petition.)*

4. ☐ **Misdemeanor conviction under Penal Code section 647(b) *(Pen. Code, § 1203.49)***

Petitioner has completed a term of probation for a conviction under Penal Code section 647(b) and should be granted relief because the petitioner can establish by clear and convincing evidence that the conviction was the result of petitioner's status as a victim of human trafficking.

(*Please note: You may provide evidence that the conviction was the result of your status as a victim of human trafficking. You can provide that information by writing in the space below or by attaching a letter or other relevant documents. If you need more space for your writing, you can use the Attached Declaration (form MC-031) and attach it to this petition.)*

5. ☐ **Felony county jail sentence under Penal Code section 1170(h)(5) *(Pen. Code, § 1203.41)***

Petitioner is not under supervision under Penal Code section 1170(h)(5)(B); is not serving a sentence for, on probation for, or charged with the commission of any offense; and should be granted relief in the interests of justice, and *(check one)*

a. ☐ more than one year has elapsed since petitioner completed the felony county jail sentence **with** a period of mandatory supervision imposed under Penal Code section 1170(h)(5)(B); ***or***

b. ☐ more than two years have elapsed since petitioner completed the felony county jail sentence **without** a period of mandatory supervision imposed under Penal Code section 1170(h)(5)(A).

(Please note: You may explain why granting a dismissal would be in the interests of justice. You can provide that information by writing in the space below or by attaching a letter or other relevant documents. If you need more space for your writing, you can use the Attached Declaration (form MC-031) and attach it to this petition.)

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

6. ☐ **Felony prison sentence that would have been eligible for a felony county jail sentence after 2011 under Penal Code section 1170(h)(5) *(Pen. Code, § 1203.42)***

Petitioner is not under supervision and is not serving a sentence for, on probation for, or charged with the commission of any offense; more than two years have elapsed since petitioner completed the felony prison sentence; and petitioner should be granted relief in the interests of justice.

(Please note: You may explain why granting a dismissal would be in the interests of justice. You can provide that information by writing in the space below or by attaching a letter or other relevant documents. If you need more space for your writing, you can use the Attached Declaration (form MC-031) and attach it to this petition.)

7. ☐ **Deferred entry of judgment *(Pen. Code, § 1203.43)***

Petitioner performed satisfactorily during the period in which deferred entry of judgment was granted. The criminal charge(s) were dismissed under former Penal Code section 1000.3 on *(date):* . Furthermore *(check one),*

a. ☐ court records are available showing the case resolution; ***or***

b. ☐ petitioner declares under penalty of perjury that the charges were dismissed after he or she completed the requirements for deferred entry of judgment. Petitioner (*check one*)

(1) ☐ has

(2) ☐ has not

attached a copy of petitioner's state summary criminal history information.

8. Petitioner requests that the eligible felony offenses listed above be reduced to misdemeanors under Penal Code section 17(b) and eligible misdemeanor offenses be reduced to infractions under Penal Code section 17(d)(2).

9. Petitioner requests that he or she be permitted to withdraw the plea of guilty, or that the verdict or finding of guilt be set aside and a plea of not guilty be entered and the court dismiss this action under the Penal Code section(s) noted above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE OF PETITIONER OR ATTORNEY)

_____ _____ _____ _____
(ADDRESS OF PETITIONER) (CITY) (STATE) (ZIP CODE)

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	DRAFT Not approved by the Judicial Council
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: DATE OF BIRTH:	
ORDER FOR DISMISSAL **(Pen. Code, §§ 17(b), 17(d)(2), 1203.4, 1203.4a, 1203.41, 1203.42, 1203.43, 1203.49)**	CASE NUMBER:

The court finds from the records on file in this case, and from the foregoing petition, that the petitioner *(the defendant in the above-entitled criminal action)* is eligible for the following requested relief:

1. The court **GRANTS** the petition for reduction of a felony to a misdemeanor (maximum punishment of 364 days per Pen. Code, § 18.5) under Penal Code section 17(b) and/or for reduction of a misdemeanor to an infraction under Penal Code section 17(d)(2) and reduces
   a. ☐ ALL FELONY CONVICTIONS in the above-entitled action.
   b. ☐ ALL MISDEMEANOR CONVICTIONS in the above-entitled action.
   c. ☐ only the following convictions in the above-entitled action *(specify charges and date of conviction)*:

2. The court **DENIES** the petition for reduction of a felony to a misdemeanor under Penal Code section 17(b) and/or for reduction of a misdemeanor to an infraction under Penal Code section 17(d)(2) for
   a. ☐ ALL FELONY CONVICTIONS in the above-entitled action.
   b. ☐ ALL MISDEMEANOR CONVICTIONS in the above-entitled action.
   c. ☐ only the following convictions in the above-entitled action *(specify charges and date of conviction)*:

3. The court **GRANTS** the petition for dismissal regarding the following convictions under Penal Code Section *(check all that apply)*
   ☐ § 1203.4 ☐ § 1203.4a ☐ § 1203.41 ☐ § 1203.42 ☐ § 1203.43 ☐ § 1203.49
   and it is ordered that the pleas of guilty or nolo contendere or verdicts or findings of guilt be set aside and vacated and a plea of not guilty be entered and that the complaint or information be, and is hereby, dismissed for *(check one)*
   a. ☐ ALL CONVICTIONS OR PLEAS FOR DEFERRED ENTRY OF JUDGMENT in the above-entitled action.
   b. ☐ only the following convictions or pleas for deferred entry of judgment in the above-entitled action *(specify charges and date of conviction or plea for deferred entry of judgment)*:

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

4. The court **DENIES** the petition for dismissal under Penal Code Section *(check all that apply)*

   ☐ § 1203.4 ☐ § 1203.4a ☐ § 1203.41 ☐ § 1203.42 ☐ § 1203.43 ☐ § 1203.49 for *(check one)*

   a. ☐ ALL CONVICTIONS OR PLEAS FOR DEFERRED ENTRY OF JUDGMENT in the above-entitled action.

   b. ☐ only the following convictions or pleas for deferred entry of judgment in the above-entitled action *(specify charges and date of conviction or plea for deferred entry of judgment):*

5. In granting this order under the provisions of Penal Code section 1203.49, the court finds that the petitioner was a victim of human trafficking when he or she committed the crime. The court orders *(check one)*

   a. ☐ the relief described in section 1203.4.

   b. ☐ the relief described in section 1203.4, with the following exceptions:

6. If the order is granted under the provisions of Penal Code section 1203.49, the Department of Justice is hereby notified that the petitioner was a victim of human trafficking when he or she committed the crime and notified of the relief ordered.

7. If this order is granted under the provisions of Penal Code section 1203.4, 1203.41, or 1203.42,

   a. the petitioner is required to disclose the above conviction in response to any direct question contained in any questionnaire or application for public office, or for licensure by any state or local agency, or for contracting with the California State Lottery Commission; and

   b. dismissal of the conviction does not *automatically* relieve the petitioner from the requirement to register as a sex offender. (See, e.g., Pen. Code, § 290.5.)

8. If the order is granted under the provisions of Penal Code section 1203.4, 1203.4a, 1203.41, 1203.42, or 1203.49, the petitioner is released from all penalties and disabilities resulting from the offense except as provided in Penal Code sections 29800 and 29900 (formerly sections 12021 and 12021.1) and Vehicle Code section 13555. In any subsequent prosecution of the petitioner for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed. The dismissal does not permit a person to own, possess, or have in petitioner's control a firearm if prevented by Penal Code sections 29800 or 29900 (formerly sections 12021 and 12021.1). Dismissal of a conviction does not permit a person prohibited from holding public office as a result of that conviction to hold public office.

9. In addition, as required by Penal Code section 299(f), relief under Penal Code sections 17(b), 17(d)(2), 1203.4, 1203.4a, 1203.41, 1203.42, or 1203.49 does *not* release petitioner from the separate administrative duty to provide specimens, samples, or print impressions under the DNA and Forensic Identification Database and Data Bank Act (Pen. Code, § 295 et seq.) if petitioner was found guilty by a trier of fact, not guilty by reason of insanity, or pled no contest to a qualifying offense as defined in Penal Code section 296(a).

10. The basis for an order of dismissal granted under the provisions of Penal Code section 1203.43 is the invalidity of defendant's prior plea due to misinformation in former Penal Code section 1000.4 regarding the actual consequences of making a plea and successful completion of a deferred entry of judgment program.

11. Except as provided in Penal Code section 1203.425(d), if this order is granted under Penal Code section 1203.4, 1203.4a, 1203.41, or 1203.42, the court shall not disclose information concerning a conviction granted relief to any person or entity, in any format, except to the person whose conviction was granted relief or to a criminal justice agency.

FOR COURT USE ONLY

Date:

_____
(JUDICIAL OFFICER)

CR-409 Petition to Seal Arrest and Related Records (Pen. Code, § 851.91)

Clerk stamps date here when form is filed.

DRAFT
Not approved by
the Judicial Council

Notice: Arrests that happened on or after January 1, 2021, may qualify for automatic arrest record relief if they meet certain conditions and are (1) an arrest for a misdemeanor (2) an arrest for a felony punishable by imprisonment in county jail or (3) an arrest for which the defendant successfully completed diversion. (Pen. Code, § 851.93.) A petition to seal is unnecessary if automatic relief has been granted. To find out if automatic relief was granted, request the petitioner's Record of Arrest and Prosecution (RAP) sheet from the Department of Justice.

1 Your Information

a. Petitioner *(the person who is filing this petition):*

Name: _____
Last *First* *MI*

Date of birth: _____ *(mm/dd/yyyy)*

Street address: _____
Street

_____ _____ _____
City *State* *Zip*

Mailing address *(if you have a lawyer for this case, give your lawyer's information):*

_____
Street

_____ _____ _____
City *State* *Zip*

Phone: _____

E-mail *(if available):* _____

State Bar number: _____

Fill in the name and street address of the court that you are filing the petition in:

Superior Court of California, County of

Fill this out if a criminal complaint was filed or charged against the petitioner and there is a case number and case name for that criminal case. Do not fill this out if an arrest happened but no criminal complaint was filed or charged in court:

Trial Court Case Number:

Trial Court Case Name:
People of the State of California
v. _____

2 Notice of Court Hearing

A court hearing is scheduled on this petition as follows:

Hearing Date → Date: _____ Time: _____
Dept.: _____ Room: _____

Name and address of court if different from above:

_____

_____

_____

If an interpreter is needed, please specify the language: _____

3 Information About Your Case

a. Date of the arrest you are requesting to be sealed: _____ *(mm/dd/yyyy)*

b. Where did the arrest happen? Include the city and county: _____

c. What law enforcement agency made the arrest? If it was a police department, include the city *(for example, ABC City Police Department)*. If it was a county sheriff, list the county *(for example, XYZ County Sheriff):*

_____

d. What is the arrest report number or police report number, if available?

_____

3 e. Include any other information about the arrest that is available from the prosecutor (district attorney/city attorney) or the court, including the case number that the prosecutor used to review the arrest or used to file a case against you. If you would like to explain the information provided, please do so below, or complete and attach the *Attached Declaration* (form MC-031) or submit other relevant documents.

_____

_____

_____

_____

f. Add any information on offenses or charges based on the arrest. If you would like to explain the information provided, please do so below, or complete and attach the *Attached Declaration* (form MC-031) or submit other relevant documents.

_____

_____

_____

_____

g. If the prosecutor filed a case against you, please include what the charges were *(for example, Pen. Code, § 242, for battery).*

_____

_____

_____

h. Choose one:

☐ I am entitled to have this arrest (the arrest described in item 3 of this petition) sealed as a matter of right because the arrest did not result in a conviction, and I satisfy the requirements of Penal Code section 851.91.

OR

☐ I am requesting to have the arrest sealed in the interests of justice (Pen. Code, § 851.91(c)(2)(B)). *(Describe below how this is in the interests of justice. In deciding whether to grant this request, the court may consider any important factors, including hardship and difficulties caused by the arrest, statements or evidence regarding your good character, statements or evidence regarding the arrest, your record of convictions, or any other important factors. You may provide statements or evidence from you, others, or both.)*

_____

_____

_____

_____

_____

_____

Please attach any additional signed and dated statements with the petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: _____

▶ _____

Signature of petitioner or attorney

CR-409-INFO Information on How to File a Petition to Seal Arrest and Related Records Under Penal Code Section 851.91

This information sheet does not cover all of the questions that may arise in a case. Do *not* deliver this information sheet to the court clerk.

What is a petition to seal arrest and related records?

The petition is a request to the court to seal arrest and related records under Penal Code section 851.91. A separate petition must be filed for each arrest for which sealing is requested.

What information do I include in the petition?

Read the petition carefully and fill out all parts of the petition. The court may deny the petition based on incomplete information.

How will the court make its decision?

To have the arrest sealed as a matter of right, the court will determine whether the arrest did not result in a conviction (Pen. Code, § 851.91(a)(1)). The court will NOT seal the arrest as a matter of right if (1) you may still be charged with any of the offenses upon which the arrest was based; (2) the arrest or case was filed for murder or any other offense for which there is no statute of limitations (except if you have been acquitted or found factually innocent), or (3) you intentionally evaded law enforcement efforts to prosecute the arrest, including by engaging in identity fraud. (Pen. Code, § 851.91(a)(2).)

To have the arrest sealed in the interests of justice (Pen. Code, § 851.91(c)(2)(B)), you must describe how sealing the arrest is in the interests of justice through a personal statement from you and/or statements from others.

What do I do with the petition once I fill it out?

If a criminal case was filed based on the arrest you want to have sealed, take or mail this petition to the clerk's office in the court where the case was filed.

If no criminal case was filed or charged against you, take or mail this petition to the clerk's office in the court that handles criminal matters for the city or county where the arrest happened. If you don't know which court this is, you may want to contact a court in the county to ask. The clerk will give you a court date for the hearing, which should be at least 15 days from the date you file the petition. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

Must anyone else get the petition?

A copy of the petition must be served (delivered by hand or by mail) on the prosecutor of the city or county where the arrest happened *and* the law enforcement agency that made the arrest at least 15 days before the hearing on the petition. After you have served the petition on the prosecutor and the law enforcement agency, you will need to file a "proof of service" with the court.

What happens if the court grants my petition (request)?

If the court grants the petition, it will send a copy of the order to law enforcement and the California Department of Justice to update the arrest record, noting that the arrest is sealed. Records that are sealed under the court's order will not be disclosed except to you or a criminal justice agency (which includes courts, peace officers, prosecuting attorneys, city attorneys pursuing specific actions, defense attorneys, probation officers, parole officers, and correctional officers). Criminal history providers may disclose information to other criminal history providers. For more information, see Penal Code section 851.92.

Are translations of the petition available?

Translations of the petition are available in Spanish, Chinese, Vietnamese, and Korean at the California Courts website at *www.courts.ca.gov/forms.htm.*

Are there other ways to seal or limit arrest records?

Yes. Arrests that happened on or after January 1, 2021, may qualify for automatic arrest record relief if they meet certain conditions and are an arrest (1) for a misdemeanor, (2) for a felony punishable by imprisonment in county jail, or (3) for which the defendant successfully completed diversion. (Pen. Code, § 851.93.) A petition to seal is unnecessary if automatic relief has been granted. To find out if automatic relief was granted, request the petitioner's Record of Arrest and Prosecution (RAP) sheet from the Department of Justice. You may also request the court to deem an arrest a detention under Penal Code section 849.5, request a determination of factual innocence under section 851.8, receive an acquittal and a determination of factual innocence under section 851.85, have your conviction set aside based on a determination of factual innocence under section 851.86, and request relief after completion of a prefiling diversion program under section 851.87.

Item number:21

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Criminal Procedure: Felony Waiver and Plea Form
Revise form CR-101

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: October 28, 2019
Project description from annual agenda: Review enacted legislation that may have an impact on criminal court administration and propose rules and forms as may be appropriate for implementation of the legislation.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue . San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-11

Title Criminal Procedure: Felony Waiver and Plea Form	Action Requested Review and submit comments by June 9, 2020
Proposed Rules, Forms, Standards, or Statutes Revise form CR-101	Proposed Effective Date January 1, 2021
Proposed by Criminal Law Advisory Committee Hon. J. Richard Couzens, Chair	Contact Sarah Fleischer-Ihn, 415-865-7702 Sarah.Fleischer-Ihn@jud.ca.gov

Executive Summary and Origin

The Criminal Law Advisory Committee proposes revisions to *Plea Form, With Explanations and Waiver of Rights—Felony* (form CR-101) to conform to multiple statutory changes that have added or changed relevant sentencing requirements and advisements.

Background

The Judicial Council approved for optional use *Plea Form, With Explanations and Waiver of Rights—Felony* (form CR-101), effective January 1, 2007, to promote increased uniformity in felony plea waiver forms used throughout the state. The form was substantially revised in 2012 in response to criminal justice realignment legislation, and was most recently revised effective January 1, 2020. The form is designed to include all necessary waivers, a notice of the direct consequences of a plea, and common advisements. Several recent bills added or changed relevant sentencing requirements and information:

- Senate Bill 1210 (Stats. 2012, ch. 762) (see Link A) amended Penal Code section 1202.45 (see Link B) to include revocation restitution fines for postrelease community supervision and mandatory supervision. The prior version of the statute addressed parole and probation revocation restitution fines only.

- Former sections 3051 and 3201 of the Welfare and Institutions Code permitted the sentencing court to order, after making certain finding, the confinement of a defendant to a narcotic detention, treatment, and rehabilitation facility. Senate Bill 1021 (Stats. 2012,

ch. 41) (see Link C) prohibited new confinements as of July 1, 2012, made these two statutes inoperative as of April 1, 2014, and repealed them as of January 1, 2015.

- Previously, the sentencing court was required to impose a one-year enhancement of a prison term for each prior separate prison term or county jail felony term, except under specified circumstances. Senate Bill 136 (Stats. 2019, ch. 590) (see Link D) amended Penal Code section 667.5(b) (see Link E) so that the additional one-year term is imposed solely for each prior separate prison term served for a conviction of a sexually violent offense.

- Former Health and Safety Code section 11590 required certain defendants to register as narcotics offenders with a local law enforcement agency. Assembly Bill 1261 (Stats. 2019, ch. 580) (see Link F) repealed this statute as of January 1, 2020.

The committee also recommends revising the form to avoid the use of gendered pronouns.

The Proposal

The committee proposes the following revisions to form CR-101:

- Delete the advisement on narcotics addiction confinement (item 2d on page 2 of the current form);
- Revise the advisement on parole revocation and probation revocation restitution fines to include references to postrelease community supervision and mandatory supervision revocation restitution fines (item 2f on page 2 on the proposed form);
- Delete the reference to being sentenced to a narcotics treatment facility (item 3b on page 3 of the current form);
- Delete the option to require registration as a narcotics offender (item 3d(3) on page 3 of the current form);
- Revise the advisement on sentencing enhancements for prior prison terms or county jail sentences under Penal Code section 1170(h)(5) to state that a sentencing enhancement is imposed solely for each prior separate state prison term served for a conviction of a sexually violent offense (item 3g on page 3); and
- Revise the court's findings (items 1 and 4 on page 7) to avoid the use of gendered pronouns.

The revisions are proposed to delete outdated provisions, conform the form to statutory changes in sentencing, and avoid the use of gendered pronouns.

Alternatives Considered

Given the recent revision of the form, the committee discussed postponing further revisions, but decided to move forward in order to delete outdated provisions and conform the form to statutory changes. The committee also discussed whether to amend the form based on the upcoming change in sex offender registration from lifetime to tiered based largely on the offense, under

Senate Bill 384 (Stats. 2017, ch. 541). After discussion, the committee decided that the existing advisement of lifetime registration was still appropriate since the registration requirement is not terminated as a matter of right, and instead requires the defendant-petitioner to initiate, and the court to grant, a request for termination

Fiscal and Operational Impacts

As an optional form, expected costs are limited to training, possible case management system updates, and the production of new forms. No other implementation requirements or operational impacts are expected.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Form CR-101, at pages 5–11
2. Link A: Senate Bill 1210 (Stats. 2012, ch. 762), *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1210*
3. Link B: Penal Code section 1202.45, *http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1202.45&lawCode=PEN*
4. Link C: Senate Bill 1021 (Stats. 2012, ch. 41), *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1021*
5. Link D: Senate Bill 136 (Stats. 2019, ch. 590), *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB136*

6. Link E: Penal Code section 667.5, *http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=667.5&lawCode=PEN*
7. Link F: Assembly Bill 1261 (Stats. 2019, ch. 580), *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1261*

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY* DRAFT Not approved by the Judicial Council
PEOPLE OF THE STATE OF CALIFORNIA v. Defendant:	
PLEA FORM, WITH EXPLANATIONS AND WAIVER OF RIGHTS—FELONY	CASE NUMBER:

INSTRUCTIONS: (1) Fill out this form only if you want to plead guilty or no contest.
(2) Read this form carefully. For each item, if you understand and agree with what you read, put your initials in the box to the right of the item. For any item that does not apply to you or that you do not understand, leave the box blank.
(3) On page 6, sign and date the form under "DEFENDANT'S STATEMENT."
(4) Keep in mind that the court cannot give legal advice. If you have any questions about anything in this form, ask your attorney.

1. **CHARGES AND MAXIMUM TERM.** I want to plead guilty or no contest ("nolo contendere") to the charges and allegations listed below. I understand that the minimum and maximum penalties for the charges to which I am pleading guilty or no contest are listed below. INITIALS ☐

COUNT	CHARGES (SECTION & DESCRIPTION)	YEARS / MONTHS		PRIOR CONVICTIONS, ENHANCEMENTS, & SPECIAL ALLEGATIONS (SECTION & DESCRIPTION)	YEARS / MONTHS		TOTAL MAXIMUM TIME
		MINIMUM	MAXIMUM		MINIMUM	MAXIMUM	
				AGGREGATE MAXIMUM TIME OF IMPRISONMENT			

2. **PLEA AGREEMENT.** I understand that I must tell the court on this form about any promises anyone has made to me about the sentence I will receive or the sentence recommendations that will be made to the court. My attorney, the court, or the prosecutor has explained to me that if I plead guilty or no contest to the charges and admit the allegations listed above, the court will sentence me as follows:

a. Check one: ☐ **State Prison** (or the Division of Juvenile Justice) ☐ **County Jail** for INITIALS ☐
(1) ☐ years and months or
(2) ☐ Not less than ☐ years and ☐ months and/or not more than ☐ years and ☐ months.
(3) ☐ Other *(specify):*

b. **Probation** for years under conditions to be set by the court, including: ☐
☐ days in the **county jail** or
☐ up to days in the **county jail.**

I understand that a violation of any of the conditions of probation, including failure to complete a drug education or treatment program, if ordered by the court, may cause the court to send me to **county jail or state prison** for up to the **"Aggregate Maximum Time of Imprisonment"** specified in item 1, which may include a period of mandatory supervision under Penal Code section 1170(h)(5)(B) if the court sends me to county jail.

Form Approved for Optional Use
Judicial Council of California
CR-101 [Rev. Jan. 1, 2021]

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:

INITIALS

2. c. **Split Sentence (1170(h)(5)(B)):** years and days in the county jail and years and days on mandatory supervision under conditions set by the court. I understand that if I violate any of the terms or conditions of mandatory supervision, I may be remanded into custody for the entire unserved portion of the sentence. ☐

d. **Open Plea**

1. ☐ I understand the maximum and minimum sentences for the charges and allegations stated on page 1. No one has made any other promises to me about what sentence the court may order. ☐
2. ☐ I understand that I am not eligible for probation.
3. ☐ I understand that I will not be granted probation unless the court finds at the time of sentencing that this is an unusual case where the interests of justice would be best served by granting probation.

e. **Restitution, Statutory Fees, and Assessments**

I understand that the court will order me to pay the following amounts (if an amount is not yet known, "TBD" for "to be determined" is entered next to the $); I must prepare financial disclosure statements to assist the court in determining my ability to pay; and refusal or failure to prepare the required financial disclosure statements may be used against me at sentencing: ☐

1. ☐ $ **to the Victim Restitution Fund**
2. ☐ $ **restitution to actual victims**
3. ☐ $ **restitution to the State of California, Victims of Crime Fund**
4. ☐ $ **court operations assessment**
5. ☐ $ **court facilities assessment**
6. ☐ $ **base fine plus any applicable penalties, assessments, and surcharges**
7. ☐ $ **other** *(specify):*
8. ☐ $ **other** *(specify):*
9. ☐ An (additional) amount to be determined by the court at sentencing or such other hearing as the court may set.

f. **Fines for Revocation of Parole, Postrelease Community Supervision, Mandatory Supervision, or Probation** ☐

I understand that if I am sentenced to **state prison**, the court **will** impose a parole revocation fine or a postrelease community supervision revocation fine, which will be collected only if my parole or postrelease community supervision is later revoked. I also understand that if I am granted probation or mandatory supervision, the court **will** impose a probation revocation fine or mandatory supervision revocation fine, which will be collected only if my probation or mandatory supervision is later revoked.

g. **Dismissal of Other Counts** ☐

I understand that as part of the plea agreement bargain, the following counts will be dismissed after sentencing:

I understand and agree that the sentencing judge may consider facts underlying dismissed counts to determine restitution and to sentence me on the counts to which I am entering a plea. ☐

h. **Other Terms *(specify):*** ☐

3. **CONSEQUENCES OF MY PLEA** INITIALS

a. **No Contest ("Nolo Contendere") Plea** ☐

I understand that a no contest plea is the same as pleading guilty and that if I plead no contest, I will be convicted and my no contest plea could be used against me in a civil case.

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:

INITIALS

b. **Parole and Postrelease Community Supervision** ☐
I understand that if I am sentenced to **state prison**
(1) I will be placed on parole or postrelease community supervision for up to years after my release.
(2) If I abscond or the court tolls my supervision, the total time of parole or postrelease community supervision can be extended.
(3) If I violate any of the terms or conditions of my parole, I can be sentenced to county jail for up to 180 days for each violation, or returned to state prison for up to one year, up to a maximum of years. If I violate any of the terms or conditions of postrelease community supervision, I can be sentenced to county jail for up to 180 days for each violation, for up to a maximum of 3 years.

c. **Effect of Conviction on Other Cases** ☐
I understand that a conviction in this case may constitute a violation of any other current grant of parole, mandatory supervision, postrelease community supervision, or probation in any other case and that I may receive additional punishment as a result of that violation.

d. **Registration** ☐
I understand that I will be required to register with the local police agency or sheriff's department in the city or county in which I reside as

(1) ☐ an arson offender (3) ☐ a sex offender (this registration is a lifelong requirement)
(2) ☐ a gang member (4) ☐ other *(specify):*

and that if I fail to register or to keep my registration current for any reason, new felony criminal charges may be filed against me.

e. **Prints and DNA Samples** ☐
I understand that I must provide biological samples and prints for identification purposes—including buccal (mouth) swab samples, right thumb prints, palm prints of each hand, and blood specimens or other biological samples required by law—and that failure to do so constitutes a new criminal offense.

f. **Serious or Violent Felony** ☐
(1) ☐ I understand that by pleading guilty or no contest to a serious or violent felony ("strike"), the penalty for any future felony conviction will be increased as a result of my convicion in this case, depending on the number of strikes I have, up to a mandatory prison sentence of double the term otherwise provided or a term of at least 25 years to life.
(2) ☐ I understand that if I am convicted of a violent felony, jail or prison conduct/work-time credit I may accrue will not exceed 15%.
(3) ☐ I understand that if I am admitting a prior strike conviction, prison work-time credit that I may accrue will not exceed 20% of the total term of imprisonment.
(4) ☐ I understand that if I am convicted of murder or a third felony conviction of certain offenses, I am ineligible to receive work-time credits. Count is such an offense.

g. **Prior Prison Term for Sexually Violent Offense** ☐
I understand that if I am sentenced to serve a state prison term for this sexually violent offense, as defined in Welfare and Institutions Code section 6600(b), the penalty for any future felony conviction may be increased as a result of my incarceration in this case.

h. **Driver's License and Vehicle Forfeiture** ☐
I understand that my privilege to drive a motor vehicle may be revoked or suspended by the court or the California Department of Motor Vehicles, and my vehicle may be ordered forfeited if it was involved in the offense.

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:

INITIALS

3. i. **Immigration Consequences**
I understand that if I am not a citizen of the United States, my plea of guilty or no contest may result in my deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. ☐

j. **Firearms**
I understand that federal and state laws prohibit a convicted felon from possessing firearms or ammunition for life. ☐

k. **Other Consequences** *(specify):* ☐

4. **RIGHT TO AN ATTORNEY**
I understand that I have the right to an attorney of my choice to represent me throughout the proceedings. If I cannot afford to hire an attorney, the court will appoint one to represent me. ☐

I hereby give up my right to be represented by an attorney. ☐

5. **OTHER CONSTITUTIONAL RIGHTS**
I understand that I am entitled to each of the following rights as to the charges listed in item 1 (on page 1):

a. **Right to a Jury Trial** ☐
I understand that I have a right to a speedy and public jury trial. At the trial, I would be presumed to be innocent, and I could not be convicted unless, after hearing all of the evidence, 12 impartial jurors chosen from the community were unanimously convinced beyond a reasonable doubt that I am guilty. I have a right, through my counsel, to participate in jury selection.

b. **Right to a Court Trial** ☐
I understand that, as an alternative to a jury trial, if the prosecutor agrees, I may give up a jury trial and have a court trial in which the judge alone, without a jury, hears the evidence. I still could not be convicted unless, after hearing all of the evidence, the judge was convinced beyond a reasonable doubt that I am guilty.

c. **Right to Confront and Cross-Examine Witnesses** ☐
I understand that I have the right to confront and cross-examine all witnesses testifying against me. This means that the prosecution must produce the witnesses in court, they must testify under oath in my presence, and my attorney may question them.

d. **Right to Remain Silent and Not to Incriminate Myself** ☐
I understand that I have the right to remain silent, and my silence cannot be considered as evidence against me. I understand that I also have the right not to incriminate myself, and I cannot be forced to testify.

e. **Right to Produce Evidence and to Present a Defense** ☐
I understand that I have a right to present evidence and to have the court issue subpoenas to bring to court all witnesses and evidence favorable to me, at no cost to me. I also have the right to testify on my own behalf.

6. **BEFORE THE PLEA**

a. **Discussion With My Attorney** ☐

Before entering this plea, I have had a full opportunity to discuss the following with my attorney:

(1) The facts of my case;
(2) The elements of the charged offenses, prior convictions, enhancements, and special allegations;
(3) Any defenses that I may have;
(4) My constitutional and statutory rights and waiver of those rights;
(5) The consequences of this plea, including the immigration consequences; and
(6) Anything else I think is important to my case.

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:

INITIALS

6. b. **Questions**
I have no further questions of the court or of my attorney with regard to my plea and admissions in this case, any of the rights, or anything else on this form. ☐

c. **Stipulation to Commissioner**
I understand that I have the right to have a judge take my plea and sentence me. I give up this right and agree to have a commmissioner, sitting as a temporary judge, take my plea and sentence me. ☐

d. **Medications or Controlled Substances**
I am not taking any medication that affects my ability to understand this form and the consequences of my plea, have not recently consumed any alcohol or drugs, and am not suffering from any medical condition, except for the following: ☐

e. **Court Approval of Plea Agreement**
I understand that the plea agreement in item 2 (on pages 1 and 2) is based on the facts before the court. I understand that if the court approves this plea agreement the approval of the court is not binding, and that the court may withdraw its approval of the plea agreement upon further consideration of the matter. I understand that if the court withdraws its approval of this plea agreement I will be allowed to withdraw my plea. (Pen. Code, § 1192.5.) ☐

7. **STATUTORY RIGHT TO A PRELIMINARY HEARING**
I understand that before I have a trial, the law gives me the right to a speedy preliminary hearing at which the prosecution would produce evidence and the court must find reasonable cause to believe I committed the crimes with which I have been charged. I understand that I have all of the above constitutional rights at the preliminary hearing, except for the right to a jury trial. ☐

I give up my right to a preliminary hearing and the constitutional rights listed in item 5 (on page 4).

8. **WAIVER OF CONSTITUTIONAL RIGHTS**
I give up, for each of the charges and allegations listed in item 1 (on page 1), my right to a jury trial, my right to a court trial, my right to confront and cross-examine witnesses, my right to remain silent and not to incriminate myself, and my right to produce evidence and to present a defense, including my right to testify on my own behalf. I understand that I am, in fact, incriminating myself with my plea. ☐

9. **THE PLEA** ☐
I freely and voluntarily plead ☐ GUILTY ☐ NO CONTEST to the charges listed in item 1 (on page 1) and admit the allegations listed in item 1 (on page 1), understanding that this plea and admission will lead to the penalties listed in item 2 (on pages 1 and 2).

a. I offer my plea of guilty or no contest freely and voluntarily and with full understanding of everything in this form. No one has made any threats; used any force against me, my family, or my loved ones; or made any promises to me, except as listed in this form, in order to convince me to plead guilty or no contest. ☐

b. **I understand that the court is required to find a factual basis for my plea to make sure that I am entering a plea to the proper offenses under the facts of the case.**

I offer to the court the following as the basis for my plea of guilty or no contest and any admissions:

(1) **I understand that the court may consider the following as proof of the factual basis for my plea:** ☐

(a) ☐ Preliminary hearing transcript
(b) ☐ Police report
(c) ☐ Probation report
(d) ☐ Welfare investigator's declaration
(e) ☐ Court documents regarding any alleged prior offenses
(f) ☐ Other *(specify):*
(g) ☐ (Specify facts):

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:

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9. b. (2) **I am pleading guilty or no contest to take advantage of a plea agreement (my attorney will stipulate to a factual basis for the plea).** (*People v. West* (1970) 3 Cal.3d 595.) ☐

10. **AFTER THE PLEA**

a. **Surrender**
I understand that the court is allowing me to surrender at a later date to begin serving time in custody. ☐

I agree that if I fail to appear on the date set for surrender or sentencing without a legal excuse, my plea will become an "open plea" to the court, I will not be allowed to withdraw my plea, and I may be sentenced up to the maximum allowed by law. ☐

b. **Sentencing Court**
I understand that I have the right to be sentenced by the same judge or commissioner who takes my plea. I give up that right and agree that any judge or commissioner may sentence me. ☐

c. **Sentencing Date**
I understand that I have the right to be sentenced within 20 court days. I give up that right and agree to be sentenced at a later date. ☐

11. **MANDATORY WARNING** ☐
I understand that if I am charged with violating Vehicle Code section 23103, as specified in Vehicle Code section 23103.5, or Vehicle Code sections 23152 or 23153, the following warning applies:

You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If you continue to drive while under the influence of alcohol or drugs, or both, and as a result of that driving someone is killed, you can be charged with murder.

DEFENDANT'S STATEMENT

I have read or have had read to me this form and have initialed each of the items that applies to my case. If I have an attorney, I have discussed each item with my attorney. By putting my initials next to the items in this form, I am indicating that I understand and agree with what is stated in each item that I have initialed. The nature of the charges, possible defenses, and effects of any prior convictions, enhancements, and special allegations have been explained to me. I understand each of the rights outlined above, and I give up each of them to enter my plea.

_____ _____
(SIGNATURE OF DEFENDANT) DATE

ATTORNEY'S STATEMENT

I am the attorney of record for the defendant. I have reviewed this form with my client. I have explained each of the items in the form, including the defendant's constitutional and statutory rights, to the defendant and have answered all of his or her questions with regard to those rights, the other items in this form, and the plea agreement. I have also discussed the facts of the case with the defendant and have explained the nature and elements of each charge; any possible defenses to the charges; the effect of any prior convictions, enhancements, and special allegations; and the consequences of the plea.

I concur in the plea and admissions and join in the waiver of the defendant's constitutional and statutory rights, and I hereby stipulate that there is a factual basis for the plea and refer the court to the ☐ police report ☐ preliminary hearing transcript ☐ probation report ☐ other *(specify):* (*People v. West* (1970) 3 Cal.3d 595.)

_____ _____
(ATTORNEY'S SIGNATURE) DATE

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:

INTERPRETER'S STATEMENT

I, having been duly sworn or having a written oath on file, certify that I truly translated this form to the defendant in the language noted below.

Language: ☐ Spanish ☐ Other *(specify)*:

(INTERPRETER'S SIGNATURE) DATE

(TYPE OR PRINT INTERPRETER'S NAME) (CERTIFICATION NUMBER)

DISTRICT ATTORNEY'S STATEMENT

I have read this form and understand the terms of the plea agreement.

I ☐ agree ☐ do not agree with the terms of the plea agreement and the indicated sentence.

(ATTORNEY'S SIGNATURE) DATE

COURT'S FINDINGS AND ORDER

The court, having reviewed this form (and any addenda), and having orally examined the defendant, finds as follows:

1. The initialed items in this form have been read to the defendant, and the defendant understands each of them.
2. The defendant understands the nature of the crimes and allegations listed in item 1 (on page 1) and the consequences of the plea and any admissions.
3. The defendant understands the constitutional and statutory rights associated with this plea and expressly, knowingly, and intelligently waives these rights.
4. The defendant's plea, admissions, and waiver of rights are made freely and voluntarily.
5. A factual basis exists for the plea and admissions, or the defendant is pleading pursuant to a plea bargain under *People v. West*.

The court accepts the defendant's plea, admissions, and waiver of rights, and the defendant is hereby convicted based thereon.

It is ordered that this document be filed with the court's records of this case and that the defendant's plea, admissions, and waiver of rights be accepted and entered in the minutes of this court.

(SIGNATURE OF JUDICIAL OFFICER) DATE

Item number:22

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Criminal Procedure: Multicounty Incarceration and Supervision
Amend Cal. Rules of Court, rule 4.452

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: October 28, 2019
Project description from annual agenda: Amend California Rules of Court, rule 4.452, to further clarify procedures related to multicounty incarceration and supervision under Penal Code section 1170(h).

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue . San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-12

Title Criminal Procedure: Multicounty Incarceration and Supervision	Action Requested Review and submit comments by June 9, 2020
Proposed Rules, Forms, Standards, or Statutes Amend Cal. Rules of Court, rule 4.452	Proposed Effective Date January 1, 2021
Proposed by Criminal Law Advisory Committee Hon. J. Richard Couzens, Chair	Contact Sarah Fleischer-Ihn, 415-865-7702 Sarah.Fleischer-Ihn@jud.ca.gov

Executive Summary and Origin

The Criminal Law Advisory Committee recommends amending California Rules of Court, rule 4.452, to (1) clarify that certain provisions apply only to sentences under Penal Code section 1170(h), (2) add procedures for when a subsequent court sentences a defendant to state prison when the prior sentence was under section 1170(h), and (3) clarify that subsequent courts may not increase the custody or mandatory supervision portion of the sentence imposed by the previous court. The amendments were suggested by a prosecutor and a committee member.

Background

Senate Bill 670 (Stats. 2017, ch. 287) (see Link A) amended Penal Code section 1170(h) (see Link B), effective January 1, 2018, requiring courts to determine the county or counties of incarceration and supervision for defendants when imposing judgments concurrent with 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 (see Link C), requiring the Judicial Council to adopt rules of court providing criteria for trial judges to consider at the time of sentencing when determining the county or counties of incarceration and supervision. Accordingly, the Criminal Law Advisory Committee proposed amendments to rule 4.452 to guide the second or subsequent court when determining the county or counties of supervision. The amendments were approved by the Judicial Council, effective July 1, 2019.

The Proposal

This proposal would amend rule 4.452 to further instruct courts on multiple county sentencing by adding the following:

- Clarification that (a)(4), which states that the second or subsequent court has the discretion to specify whether the previous sentence is to be served in custody or on mandatory supervision, applies only if the previously imposed sentences and the current sentence being imposed by the second or subsequent court are under section 1170(h).

- Procedures for when a subsequent court sentences a defendant to state prison when the prior sentence was under section 1170(h), including a referral to the original sentencing court for potential resentencing on any case sentenced under section 1170(h). The referral to the previous court is required because the defendant is entitled to a violation hearing on the section 1170(h) sentence; the subsequent court may not summarily revoke the remaining mandatory supervision and impose a prison term.

- Clarification that subsequent courts may not increase the custody or mandatory supervision portion of the sentence imposed by the previous court.

- Technical, nonsubstantive amendments.

Alternatives Considered

The committee considered a suggestion to add procedures for multicounty sentences involving mandatory supervision under section 1170(h), where the principal term of the prior sentence becomes a consecutive subordinate term as a result of what the second or subsequent court does in the sentencing of the current case. In these circumstances, the length of the prior term is reduced by operation of law rather than by exercise of discretion by the second or subsequent court, and the routine judicial response is for the prior court to restructure the earlier sentence. The committee did not think it was necessary to further clarify this procedure in the rule.

Fiscal and Operational Impacts

The recommended amendments clarify procedures on multiple county sentencing. No additional fiscal and operational impacts are anticipated as a result of amending rule 4.452.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 4.452, at pages 4–6
2. Link A: Senate Bill 670 (Stats. 2017, ch. 287), *http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB670*
3. Link B: Penal Code section 1170, *http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1170.&lawCode=PEN*
4. Link C: Penal Code section 1170.3, *http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1170.3.&lawCode=PEN*

Rule 4.452 of the California Rules of Court would be amended, effective January 1, 2021, 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 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~~ court 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~~ courts in previous cases may not be changed by the ~~judge~~ court 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) If all previously imposed sentences and the current sentence being imposed by the second or subsequent court are under section 1170(h), ~~T~~the second or subsequent ~~judge~~ 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, 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~~ portion of the sentence imposed by the previous court; (iii) increase the total length of the mandatory supervision portion of the sentence 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) If the second or subsequent court imposes a sentence to state prison because the defendant is ineligible for sentencing under section 1170(h), the jurisdiction of the second or subsequent court to impose a prison sentence applies solely to the current case. The defendant must be returned to the original sentencing court for potential resentencing on any previous case or cases sentenced under section 1170(h). The original sentencing court must convert all remaining custody and mandatory supervision time imposed in the previous case to state prison custody time and must determine whether its sentence is concurrent with or consecutive to the state prison term imposed by the second or subsequent court and incorporate that sentence into a single aggregate term as required by this rule. Number (4) does not apply —and the consent of the defendant is not required—for this conversion and resentencing.

~~(5)~~(6) 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)~~(7) In making the determination under ~~subdivision (a)(5)~~ (6), the court must exercise its discretion after consideration of the following factors:

(A)-(H)***

~~(7)~~(8) If after the court's determination in accordance with ~~subdivision (a)(5)~~ (6) 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)~~(9) If after the court's determination in accordance with ~~subdivision (a)(5)~~(6) 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(f), (g), and (h).

Advisory Committee Comment

The restrictions of ~~subdivision~~ (3) do not apply to circumstances where a previously imposed base term is made a consecutive term on resentencing. If the ~~judge~~ court selects a consecutive sentence structure, and since there can be only one principal term in the final aggregate sentence, if a previously imposed full base term becomes a subordinate consecutive term, the new consecutive term normally will become one-third the middle term by operation of law (section 1170.1(a)).

Item number:23

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Criminal Procedure: Ignition Interlock Forms
Revise forms ID-100, ID-110, ID-120, ID-130, ID-140, ID-150

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: October 28, 2019
Project description from annual agenda: Review and update the Judicial Council's ignition interlock forms.

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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INVITATION TO COMMENT

SPR20-13

Title
Criminal Procedure: Ignition Interlock Forms

Proposed Rules, Forms, Standards, or Statutes
Revise forms ID-100, ID-110, ID-120, ID-130, ID-140, ID-150

Proposed by
Criminal Law Advisory Committee
Hon. J. Richard Couzens, Chair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Sarah Fleischer-Ihn, 415-865-7702
Sarah.Fleischer-Ihn@jud.ca.gov

Executive Summary and Origin

The Criminal Law Advisory Committee recommends revising the criminal forms implementing ignition interlock device requirements to conform to statutory changes, increase clarity and usability, and make nonsubstantive technical changes.

Background

In 1993, the Judicial Council adopted six forms to assist courts with ordering and monitoring ignition interlock devices ("IID") in criminal cases. The forms were based on Vehicle Code sections 23575 and 23576. The forms were last amended over 10 years ago and do not reflect subsequent statutory changes.

Historically, Vehicle Code section 23575 outlined the court's role in ordering and monitoring ignition interlock devices for persons convicted of driving under the influence[1] or driving on a suspended or revoked license.[2] Section 23575 previously made installation of IIDs optional for persons convicted of driving under the influence and mandatory for persons convicted of driving on a suspended or revoked license.

Under Senate Bill 1046 (Stats. 2016, ch. 783), section 23575 was amended, effective January 1, 2019, to January 1, 2026, deleting the subdivision applying to driving under the influence but maintaining the subdivision on driving on a suspended or revoked license. The bill added a

[1] Veh. Code, §§ 23152, 23153.
[2] Veh. Code, § 14601.2.

separate code section,[3] effective January 1, 2019, to January 1, 2026, establishing a statewide pilot program mandating installation of IIDs for persons convicted of driving under the influence. Under this statute, courts are required to notify persons convicted of driving under the influence of the requirement to install an IID, but the Department of Motor Vehicles largely monitors installation and maintenance. Under SB 1046, the former version of section 23575 would go back into effect on January 1, 2026. This would again make IID installation for driving under the influence optional and revert monitoring duties back to the court.

The proposed changes to the IID forms comply with both the current version of section 23575 and the version set to go into effect on January 1, 2026. However, because the forms are based on section 23575, they currently only apply to suspended/revoked license referrals, not driving under the influence referrals. There is no Judicial Council form ordering IIDs for driving under the influence convictions under the pilot program.

The forms are currently identified as "ID" forms.[4] The Rules Committee previously recommended shifting the forms to the criminal category, identified with the "CR" designation, which is reflected in the recommended changes.

The Proposal

This proposal would revise the ignition interlock forms to conform to statutory changes, increase clarity and usability, and make nonsubstantive technical changes through the following:

Order to Install Ignition Interlock Device (form ID-100)

Page 1, Order

- Renumber as CR-221;
- State that the defendant may return a copy of the Department of Motor Vehicles' installation verification form in lieu of the Judicial Council's installation verification form, in order to streamline the process;
- Include technical, nonsubstantive changes, including adding a field for defendant's email address and fax number, and adding "State" to the address fields; and
- Conform to the requirements of Vehicle Code sections 23575 and 23576:
    - Require the installed device to be certified;
    - Delete the statement that the order does not reinstate the defendant's driving privilege, and replace with a statement that the order does not allow the defendant to drive without a valid driver's license;
    - Revise the requirement that installation must be within 30 days from the date of conviction, and allow the court to indicate a date instead;
    - Delete the requirement for the defendant to return the completed installation verification form to probation;
    - Revise the requirement that the defendant return a completed installation

[3] Veh. Code, § 23575.3 (Link C).
[4] E.g., forms ID-100 and ID-110.

verification form no later than 30 days from the date of conviction, and allow the court to indicate a date instead;
    - Clarify the duty to take the vehicle to the installer to recalibrate or monitor the device once every 60 days or as otherwise specified;
    - Delete the requirement that the defendant must make payments to the installer and must adhere to the payment plan for installation; and
    - Clarify that the duty to inform an employer applies to motor vehicles owned by the employer and driven by the defendant.

Page 2, Notices

- Delete the statement that failure to comply with any court order is a violation of the order, as unnecessarily broad;
- Delete the statement that failure to maintain current license and registration on any vehicle owned by the defendant is a violation of the order, since it is duplicative of language on page 1; and
- Conform to the requirements of Vehicle Code sections 23575 and 23576:
    - Revise the statement that failure to have a device installed within 30 days of the order date is a violation of the order, to instead state that failure to have ignition interlock devices installed as ordered is a violation of the order;
    - Revise the statement that failure to return the installation verification form is a violation of the order, to instead require proof of installation;
    - Delete the statement that defaulting on a payment plan, absent a showing of good cause, is a violation of the order;
    - Create a separate section notifying the defendant of misdemeanor conduct;
    - Add that operating a vehicle not equipped with a functioning device is a misdemeanor;
    - Update language notifying the defendant that tampering with a device is a misdemeanor;
    - Delete sections on the defendant's rights as to a medical exemption and petitioning the court on whether continued restrictions are necessary; and
    - Delete the requirement that the defendant contact an installer within 48 hours of the order.

Ignition Interlock Installation Verification (form ID-110)

- Renumber as CR-222;
- Delete that the declaration by the installer is under penalty of perjury, as the statute does not require a sworn statement;
- Delete the requirement for the original form to be sent to the court, and add a line directing the defendant to return a completed and signed form to the court;
- Delete the line stating "Distribution: Court, Manufacturer or Manufacturer's Agent, Defendant, Probation Department," and;
- Include technical, nonsubstantive changes, including adding a field for defendant's email

address and fax number, and adding "State" to the address fields.

Ignition Interlock Calibration Verification and Tamper Report (form ID-120)

- Renumber as CR-223;
- Convert this form to a calibration verification form, and move the tamper report provisions to *Ignition Interlock Noncompliance Report* (form ID-130);
- Delete that the declaration by installer is under penalty of perjury, as the statute does not require a sworn statement;
- Update the notice section to the defendant regarding missed appointments and payments;
- Delete the line stating "Distribution: Court, Manufacturer or Manufacturer's Agent, Defendant, Probation Department," and
- Include technical, nonsubstantive changes, including adding a field for defendant's email address and fax number, and adding "State" to the address fields.

Ignition Interlock Noncompliance Report (form ID-130)

- Renumber as CR-224;
- Include the tamper report provision currently in form ID-120;
- Include statement for installer to indicate that defendant failed to comply with a requirement for the maintenance or calibration of the device on three or more occasions, as required by Vehicle Code section 23575;
- Include statement for installer to indicate signs of removal, attempt to bypass, attempt to remove, or tampering as required by Vehicle Code section 23575;
- Delete that the declaration by installer is under penalty of perjury, as the statute does not require a sworn statement; and
- Include technical, nonsubstantive changes, including reformatting, adding a field for defendant's email address and fax number, and adding "State" to the address fields.

Ignition Interlock Removal and Modification to Probation Order (form ID-140):

- Renumber as CR-225; and
- Include technical, nonsubstantive changes, including adding a field for defendant's email address and fax number, and adding "State" to the address fields.

Notice to Employers of Ignition Interlock Restriction (form ID-150):

- Renumber as CR-226;
- Include technical, nonsubstantive changes, including adding a field for defendant's email address and fax number, and adding "State" to the address fields; and
- Conform to Vehicle Code section 23576:
    - Specify that a person may operate a vehicle without a functioning, certified-approved device if certain conditions are met; and
    - Add that if a business entity is totally or partially owned or controlled by the

defendant, then the defendant is not eligible under Vehicle Code section 23576 to drive a vehicle without an ignition interlock device installed.

Alternatives Considered

The committee conducted an informal survey of courts to determine usage of the forms. A moderate number of courts responded that they used the forms, so the committee decided to move forward with the proposed changes.

Three forms—*Ignition Interlock Installation Verification* (form ID-110/CR-222)*, Ignition Interlock Calibration Verification* (form ID-120/CR-223), and *Ignition Interlock Noncompliance Report* (form ID-130/CR-224)—require the installer to sign a declaration under penalty of perjury. Vehicle Code section 23575 does not require a sworn statement by an installer, but it does require the court to monitor the installation and maintenance of a functioning, certified ignition interlock device restriction ordered under the section. Because the section does not require a sworn statement, the committee discussed amending the declaration to state that the information provided is true and correct. A committee member expressed concern that not requiring a sworn statement would limit the court's ability to properly monitor the IID requirement as required by statute, as the court would have limited recourse for a falsified document. The committee decided to amend the declaration at this time and seek additional public comment on the issue.

Fiscal and Operational Impacts

Expected costs are limited to training, possible case management system updates, and the production of new forms. No other implementation requirements or operational impacts are expected.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Is it sufficient for an IID installer to declare that information provided is true and correct, rather than under penalty of perjury? Does this limit the court's ability to properly monitor the IID installation and maintenance as required by statute?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Forms CR-221, CR-222, CR-223, CR-224, CR-225, and CR-226 at pages 8–14
2. Link A: Vehicle Code section 23575, *http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=23575.&lawCode=VEH*
3. Link B: Vehicle Code section 23576, *http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=23576.&lawCode=VEH*
4. Link C: Senate Bill 1046 (Stats. 2016, ch. 783), *http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB1046*

CR-221

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY: STATE: ZIP CODE: BRANCH NAME:	FOR COURT USE ONLY **DRAFT** **Not approved by the Judicial Council**
NAME OF DEFENDANT: STREET ADDRESS: MAILING ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: DRIVER'S LICENSE NO.:	
ORDER TO INSTALL IGNITION INTERLOCK DEVICE	CASE NUMBER:

Under Vehicle Code section 23575, **the court orders:** a functioning, certified Ignition Interlock Device installed on the following vehicles operated by defendant:

	Make	Model	Year	Color	License Plate No. and/or VIN
a.					
b.					
c.					

1. Installation of an ignition interlock device on a vehicle does not allow defendant to drive without a valid driver's license.
2. Installation must be no later than *(date)*:
3. Defendant must present this form to the installer at the time of installation.
4. Defendant must return completed *Ignition Interlock Installation Verification* (form CR-222) or the Department of Motor Vehicles *Verification of Installation - Ignition Interlock* (DL 920) to the court no later than *(date)*:
5. Defendant must take vehicles to the installer to recalibrate or monitor the device:
   ☐ once every 60 days ☐ other *(specify frequency):* following the date of installation.
6. Without a court order, the devices may not be removed prior to *(specify a date no later than three years from the date of conviction):*
7. Defendant's employer requires defendant to drive a motor vehicle owned by the employer within the course and scope of defendant's employment. Defendant must provide the employer with the *Notice to Employers of Ignition Interlock Restriction* (form CR-226) no later than *(specify date)*: . Defendant must keep a copy of the *Notice to Employers of Ignition Interlock Restriction* in defendant's possession or keep the original or a copy in the employer's vehicle.
8. Defendant must maintain current insurance and registration on all vehicles owned.
9. Other *(specify)*:

Date: _____

I acknowledge receipt of this order.

_____
(TYPE OR PRINT NAME OF DEFENDANT)

▶ _____
(DEFENDANT'S SIGNATURE)

Date: _____

_____
JUDICIAL OFFICER OF THE SUPERIOR COURT

Form Approved for Optional Use
Judicial Council of California
CR-221 [Rev. Jan. 1, 2021]

ORDER TO INSTALL IGNITION INTERLOCK DEVICE
(Ignition Interlock Device)

Vehicle Code, §§ 23575, 23576
www.courts.ca.gov

ORDER TO INSTALL IGNITION INTERLOCK DEVICE	CASE NUMBER:

What is a violation of this order?

1. Failure to have ignition interlock devices installed as ordered.
2. Failure to show proof of installation to the court within the time limit specified in this order.
3. Failure to comply three or more times with any requirement for the maintenance or calibration of the ignition interlock devices.
4. If defendant has a valid driver's license, driving any vehicle without an ignition interlock device except as provided below and except for employer-owned vehicles required to be operated within the course and scope of employment. A motor vehicle owned by a business entity that is all or partly owned or controlled by defendant is not a motor vehicle owned by an employer subject to the exemption.

What will happen if you violate this order?

Under Vehicle Code section 23575, if a defendant fails to comply with this court order the court must notify the Department of Motor Vehicles.

Violation of the following is a midemeanor and can be punished by imprisonment in the county jail and/or a fine:

1. Failure to notify any person who rents, leases, or loans a motor vehicle to defendant of the restriction imposed by this order.
2. Requesting or soliciting any person to blow into an ignition interlock device or to start a motor vehicle equipped with the device for the purpose of providing defendant with an operable motor vehicle.
3. Operating a vehicle not equipped with a functioning ignition interlock device.
4. Removing, bypassing, or tampering with an ignition interlock device.

Defendant: Call the ignition interlock device installer and arrange for the installation of the device(s). The court will provide you with a list of manufacturers certified by the Department of Motor Vehicles. Contact a certified manufacturer to locate an installer.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF:	FOR COURT USE ONLY
STREET ADDRESS: MAILING ADDRESS: CITY: STATE: ZIP CODE: BRANCH NAME:	**DRAFT** **Not approved by the Judicial Council**
NAME OF DEFENDANT: STREET ADDRESS: MAILING ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: DRIVER'S LICENSE NO.:	
DATE OF COURT ORDER:	
IGNITION INTERLOCK INSTALLATION VERIFICATION	CASE NUMBER:

1. Manufacturer:
2. Facility location *(address):*
3. Vehicles:

	Make	Model	Year	Color	License Plate No.	VIN:
a.						
b.						
c.						

4. Serial nos. of units: a. b. c.
5. Odometer reading: a. b. c.
6. Date of installation: a. b. c.
7. Date of next monitor check: a. b. c.

I declare that the information provided is true and correct.

Date: _____

_____ (TYPE OR PRINT NAME OF INSTALLER)

_____ (SIGNATURE OF INSTALLER)

Defendant: return a completed and signed form to the court.

For installer use only:

Form Approved for Optional Use
Judicial Council of California
CR-222 [Rev. January 1, 2021]

IGNITION INTERLOCK INSTALLATION VERIFICATION
(Ignition Interlock Device)

Vehicle Code, § 23575
www.courts.ca.gov

CR-223

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY: STATE: ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY* **DRAFT** **Not approved by the Judicial Council**
NAME OF DEFENDANT: STREET ADDRESS: MAILING ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: DRIVER'S LICENSE NO.:	
DATE OF COURT ORDER:	
IGNITION INTERLOCK CALIBRATION VERIFICATION	CASE NUMBER:

1. Defendant's name: _____
2. Installer's name: _____
   Address:
   City: State: Zip Code:
   Telephone no.:
3. Vehicles:

	Make	Model	Year	Color	License Plate No.	VIN:
a.						
b.						
c.						

4. Installation date: a. b. c.
5. Odometer reading: a. b. c.
6. Calibration setting: a. b. c.
7. Unit serial no.: a. b. c.
8. Program to end *(date):* _____
9. ☐ The system is in calibration ☐ a. ☐ b. ☐ c.
10. ☐ The system has been inspected and is functioning properly. ☐ a. ☐ b. ☐ c.
11. Payment of $ + sales tax $ Total collected $ paid by
    a. ☐ Credit card
    b. ☐ Money order/cashier's check/certified check
    c. ☐ Cash/personal check

I declare that the information provided is true and correct.

Date: _____

▶ _____
(SIGNATURE OF INSTALLER)

DEFENDANT: Your next monitoring check is *(date)*: _____. If you have not had your system serviced within a few days after a missed monitoring check, the system will shut down and you will be unable to start your car. It will be your responsibility to have your car towed to the calibration location. You may also owe a missed appointment fee.

Your next payment of $ is due at the above monitoring check. Payment must be made in full before service is performed. If payment is not made, the system may shut down and you may not be able to start your car. This will result in a service call that will be your responsibility. You may be required to make an additional payment for late payments.

I acknowledge receipt of a copy of this form.

Date: _____

▶ _____
(SIGNATURE OF DEFENDANT)

CR-224

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY: STATE: ZIP CODE: BRANCH NAME:	DRAFT Not approved by the Judicial Council
NAME OF DEFENDANT: STREET ADDRESS: MAILING ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: DRIVER'S LICENSE NO.:	
IGNITION INTERLOCK NONCOMPLIANCE REPORT	CASE NUMBER:

1.

Vehicle	Make	Model	Year	Color	License Plate No. and/or VIN
a.					
b.					
c.					

2. ☐ The defendant failed to comply with a requirement for the maintenance or calibration of the ignition interlock device installed in the vehicle indicated below on three or more occasions:

	Date	Describe Noncompliance	Vehicle
a.			☐ a. ☐ b. ☐ c.
b.			☐ a. ☐ b. ☐ c.
c.			☐ a. ☐ b. ☐ c.

3. ☐ The ignition interlock device installed in the vehicle indicated below showed evidence of:

Vehicle	Date	Removal	Attempt to bypass	Attempt to remove	Tampering
a.		☐	☐	☐	☐
b.		☐	☐	☐	☐
c.		☐	☐	☐	☐

4. I declare that the information provided is true and correct.

Date: _____

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF FACILITY MONITOR)

Name of facility monitor *(specify)*:

Name of facility *(specify)*:

Address of facility *(specify)*:

Telephone number of facility *(specify)*:

CR-225

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY: STATE: ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY* **DRAFT** **Not approved by the Judicial Council**
NAME OF DEFENDANT: STREET ADDRESS: MAILING ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: DRIVER'S LICENSE NO.:	
IGNITION INTERLOCK REMOVAL AND MODIFICATION TO PROBATION ORDER (Ignition Interlock Device)	CASE NUMBER:

1. ☐ **Order to change vehicles**. The above-named defendant has approval of the court to change the ignition interlock device *(system serial number:*) to another vehicle.
   a. Remove from vehicle:

Make	Model	Year	Color	License Plate No. and/or VIN

   b. Reinstall in vehicle:

Make	Model	Year	Color	License Plate No. and/or VIN

2. ☐ **Order for additional installation**. The above-named defendant must install an ignition interlock device on the vehicle designated below by *(date):* _____

Make	Model	Year	Color	License Plate No. and/or VIN

3. ☐ **Order to remove device.**
   ☐ Additional orders:

Date: _____

_____
(TYPE OR PRINT NAME)

I acknowledge receipt of this order.

▶ _____
(SIGNATURE OF DEFENDANT)

Date: _____

_____
JUDICIAL OFFICER OF THE SUPERIOR COURT

Form Approved for Optional Use
Judicial Council of California
CR-225 [Rev. January 1, 2021]

Vehicle Code, §§ 23575, 23576
www.courts.ca.gov

CR-226

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY: STATE: ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY* **DRAFT** **Not approved by the Judicial Council**
NAME OF DEFENDANT: STREET ADDRESS: MAILING ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: DRIVER'S LICENSE NO.:	
NOTICE TO EMPLOYERS OF IGNITION INTERLOCK RESTRICTION	CASE NUMBER:

INSTRUCTIONS TO DEFENDANT

You are required to provide this notice to any employer who owns a vehicle that you operate in the course and scope of your employment with that employer. You are also required to keep this notice in your possession or with your employer's vehicle.

NOTICE TO EMPLOYER

1. This is is to inform the employers of the above named defendant that the defendant is required by court order to have installed, on all vehicles that the defendant owns or operates, an ignition interlock device pursuant to Vehicle Code section 23575 et seq.

2. This court order is effective *(date)*:_____ and will expire *(date)*:_____

3. Note: Vehicle Code section 23576 provides:

   "[I]f a person is required to operate a motor vehicle in the course and scope of his or her employment and if the vehicle is owned by the employer, the person may operate that vehicle without installation of a functioning, certified approved ignition interlock device if the employer has been notified by the person that the person's driving privilege has been restricted ... and if the person has proof of that notification in his or her possession, or if the notice, or a facsimile copy thereof, is with the vehicle."

4. If a business entity is totally or partially owned or controlled by the defendant, then the defendant is not eligible under Vehicle Code section 23576 to drive a vehicle without an ignition interlock device installed.

5. This notice satisfies the requirements of Vehicle Code section 23576.

Form Approved for Optional Use
Judicial Council of California
CR-226 [Rev. January 1, 2021]

Vehicle Code, §§ 23575, 23576
www.courts.ca.gov

Item number:24

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Criminal Procedure: Resentencing Recommendations Under Penal Code Section 1170(d)(1)
Adopt Cal. Rules of Court, rule 4.520

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: October 28, 2019
Project description from annual agenda: Review enacted legislation that may have an impact on criminal court administration and propose rules and forms as may be appropriate for implementation of the legislation.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-14

Title
Criminal Procedure: Resentencing Recommendations Under Penal Code Section 1170(d)(1)

Proposed Rules, Forms, Standards, or Statutes
Adopt Cal. Rules of Court, rule 4.520

Proposed by
Criminal Law Advisory Committee
Hon. J. Richard Couzens, Chair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Sarah Fleischer-Ihn, 415-865-7702
Sarah.Fleischer-Ihn@jud.ca.gov

Executive Summary and Origin

The Criminal Law Advisory Committee recommends adopting a new rule of court establishing procedures for resentencing recommendations under Penal Code section 1170(d)(1) (see Link A).

Background

California law allows felony resentencing by the court within 120 days of commitment to state prison, or at any time, on recommendation by the Secretary of the California Department of Corrections and Rehabilitation (CDCR), the CDCR's Board of Parole Hearings, a county correctional administrator, or the district attorney. (Pen. Code, § 1170(d)(1).) Assembly Bill 1812 (Stats. 2018, ch. 36) (see Link B) recently added the following language regarding factors that a court could consider when reviewing a resentencing recommendation:

> The court resentencing under this paragraph may reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice. The court may consider postconviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed

since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice.

(Pen. Code, § 1170(d)(1).)

CDCR created the Recall and Resentencing Recommendation Program to identify and recommend felony resentencing in prison cases under section 1170(d)(1). As of December 31, 2019, CDCR made 1,310 resentencing recommendations to courts in 46 counties based on either a defendant's exceptional conduct, a law enforcement agency referral, sentencing discrepancies based on case law, or changes in the law. Currently, recommendations based on changes in the law are for gun enhancements under Penal Code sections 12022.5(c) and 12022.53(h) (Sen. Bill 620 (Stats. 2017, ch. 682)); prior serious felony enhancements under Penal Code section 667(a)(1) (Sen. Bill 1393 (Stats. 2018, ch. 1013)); and controlled substance enhancements under Health and Safety Code section 11370.2 (Sen. Bill 180 (Stats. 2017, ch. 677)). Overall, courts have responded to 838 of these 1,310 requests, resulting in 383 reductions. Emergency regulations were recently issued on qualifying criteria and procedures. (See Link C.) The emergency regulations state the CDCR's internal screening criteria for each category of recommendations.

The Proposal

Based on the increase in section 1170(d)(1) resentencing recommendations from CDCR, the committee recommends adoption of a new rule of court setting the following procedures for resentencing recommendations. The committee believes that the rule will assist courts by clarifying how resentencing recommendations should be handled.

- Require the recommendation to go before the original sentencing judge who entered judgment of conviction in the case, and require the presiding judge or the presiding judge's designee to assign a judge if the original sentencing judge is unavailable;
- Provide for an initial review by the court to determine the basis of the recommendation, and, for recommendations based on equitable considerations, appoint counsel for the defendant if the court sets a status conference or hearing;
- Provide for courts to summarily deny a recommendation, including notification of the parties and an opportunity to request a status conference or hearing if either disagrees with the court's proposed summary disposition;
- Provide for a court's tentative response, including notification of the parties and an opportunity to object and set the matter for a status conference or hearing;
- Provide guidelines on status conferences, including a provision on the purpose of a status conference, that the defendant need not be present, and, if all parties agree on a new sentence, allowing the court to resentence the defendant in the defendant's absence with a knowing and intelligent waiver of the right to be present;
- Provide guidelines on hearings, including a provision that the defendant's presence may be waived, factors the court may consider at the hearing, and procedures the court must follow if it changes the sentence; and

- State that a supplemental probation report is not required for resentencing unless ordered by the court.

Alternatives Considered

A committee workgroup discussed in depth what factors should trigger appointment of counsel by the court. A workgroup member was concerned that CDCR was not providing courts with sufficient information. On review of CDCR's emergency regulations, recommendation letters, and cumulative case summaries, the workgroup recommended appointment of counsel for defendants whose recommendations are based on equitable considerations, such as changes in sentencing laws and exceptional conduct, and where the court does not summarily deny the recommendation and instead sets a status conference or hearing. The committee agreed with the recommendation. The workgroup has suggested to CDCR that the recommendation letters going to the courts clearly state the basis for the recommendation (e.g., exceptional conduct, change in sentencing law).

The committee discussed whether the rule should direct courts, at hearing, to consider whether consecutive sentences could have been imposed and whether the original sentence was the result of a negotiated disposition where charges or cases were dismissed. Some members thought that including these factors in the rule would give them undue emphasis, especially since they were not reflected in the statute and were perhaps contrary to the statutory language stating "the court resentencing under this paragraph may reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice." Other members thought they were highly relevant factors. Ultimately, the committee decided to include a provision in the rule that the court may consider any factors that were present at the original sentencing, including but not limited to whether consecutive sentences could have been imposed, and the terms of a negotiated plea, including whether charges or cases were dismissed. The committee also included a provision stating that the court must not deny a resentencing recommendation solely because the original sentence resulted from a negotiated plea.

The committee agreed that a defendant has a right to be personally present at resentencing but expressed concern that requiring a defendant to be personally present could cause a loss of housing and programming opportunities because of the defendant's removal from state prison to be transported to and from court. To address the issue, the committee initially discussed including a provision recommending issuance of a removal order that would minimally interfere with a defendant's housing and programming in state prison. However, CDCR does not have a process to minimize the impact of temporarily removing a defendant for resentencing, so the committee decided not to reference a specialized removal order in the rule.

The committee then discussed creating a mechanism in the rule for a defendant to waive the right to be personally present for resentencing in writing but expressed concern about possible statutory conflicts. Penal Code section 977(b)(1) states that a defendant's written waiver of personal presence must be executed in open court, and Penal Code section 1193(a) provides, in

relevant part, that a defendant may waive the right to be present for judgment in a felony conviction in open court and on the record, or in a notarized writing. However, the Supreme Court has upheld out-of-court written waivers for voir dire and a hearing to relieve defense counsel in a capital case because they substantially complied with section 977.[1] Under this reasoning, an out-of-court written waiver that substantially complies with statutory requirements may be sufficient, and accordingly, the committee decided to include a provision allowing a defendant to submit a written waiver of the right to be personally present with language adapted from sections 977(b)(2) and 1193(a). Further, the committee is tracking pending legislation allowing for an out-of-court written waiver for felony judgments, which would provide a clear statutory basis for a defendant to file a written waiver of the right to be present. The committee considered not addressing the issue of waiving personal presence but decided to include a waiver provision in the draft rule, recognizing that it likely will be a point of interest to commenters.

Fiscal and Operational Impacts

This proposal may result in greater costs to the courts because it sets up formal procedures for handling resentencing recommendations. However, the proposed procedures provide a measure of clarity to courts receiving these recommendations.

[1] See *People v. Price* (1991) 1 Cal.4th 324, 406.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Should the rule address a defendant's ability to waive the defendant's physical presence at resentencing?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Proposed Cal. Rules of Court, rule 4.520, at pages 6–10
2. Link A: Penal Code section 1170, *http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1170.&lawCode=PEN*
3. Link B: Assembly Bill 1812 (Stats. 2018, ch. 36), *http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB1812*
4. Link C: Emergency Regulations in Temporary Effect for Penal Code Section 1170(d) Recall and Resentence Recommendation (Cal. Code Regs., tit. 15, §§ 3076, 3076.1, 3076.2, 3076.3, 3076.4, 3076.5), *https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2020/02/Recall-and-Resentence-Emergency-Regulations.pdf?label=Emergency%20Regulations%20in%20Temporary%20Effect%20for%20Penal%20Code%20Section%201170(d)%20Recall%20and%20Resentence%20Recommendation&from=https://www.cdcr.ca.gov/regulations/adult-operations/new-rules-page/*

Rule 4.520 of the California Rules of Court would be adopted, effective January 1, 2021, to read:

Rule 4.520. Recommendations to recall a sentence and resentence a defendant under Penal Code section 1170(d)(1)

(a) Application

This rule applies to recommendations under Penal Code section 1170(d)(1) by the Secretary of the California Department of Corrections and Rehabilitation or the Board of Parole Hearings in the case of state prison inmates, the county correctional administrator in the case of county jail inmates, or the district attorney of the county in which the defendant was sentenced, to recall a previously imposed sentence and resentence a defendant.

(b) Definitions

(1) Equitable considerations include eliminating the disparity of sentences and promoting uniformity of sentencing.

(2) A clerical error is one made in recording the judgment. It can be made by a clerk, counsel, or the court.

(c) Original sentencing judge

(1) A recommendation to recall a sentence and resentence a defendant must go before the original sentencing judge who entered judgment of conviction in the case.

(2) If the original sentencing judge is unavailable, the presiding judge or the presiding judge's designee must assign a judge.

(d) Initial review

(1) The court must conduct an initial review of the request to recall a sentence and resentence a defendant to determine if the recommendation is based on:

(A) An unauthorized sentence;

(B) Clerical error; or

(C) Equitable considerations.

(2) The court must consider specific facts related to equitable considerations specified in the recommendation for resentencing.

(3) When based on equitable considerations, the court must appoint counsel for the defendant if the court sets a status conference or hearing.

(e) Summary disposition

(1) The court may summarily deny a recommendation to recall a sentence and resentence the defendant if it finds that the basis for the recommendation is facially incorrect, or the court may decline to exercise its discretion to recall a sentence and resentence the defendant if the recommendation fails to state sufficient facts warranting resentencing.

(2) If the court intends to summarily deny a recommendation to recall a sentence and resentence the defendant, the court must notify the prosecuting agency and defense counsel of record of such intention and its reasons.

(3) The prosecuting agency or defense counsel may request a status conference or hearing if either disagrees with the court's proposed summary disposition of the recommendation. The matter must be set for a status conference following an objection to the court's proposed summary disposition.

(4) If no party requests a status conference or hearing within 10 court days, the summary disposition of the recommendation to recall a sentence and resentence the defendant must be noted on a minute order.

(5) The court must send copies of a minute order reflecting a summary disposition to the facility where the defendant is housed, the recommending agency, the prosecuting agency, and defense counsel of record.

(f) Tentative response for recommendations based on factors other than equitable considerations

(1) If the recommendation is based on factors other than equitable considerations, the court may prepare a tentative response and send it to the prosecuting agency and defense counsel of record for comment within 10 court days.

(A) If no objection is received, the court must send its response to the recommending agency, with an amended abstract of judgment if the defendant is in state prison and the court corrects the sentence.

(B) If there is an objection, the matter must be set for a status conference or hearing.

(g) Status conference

(1) The purpose of the status conference is to determine whether a hearing should be scheduled on the recommendation to recall the defendant's sentence.

(2) The defendant need not be present for the status conference.

(3) If the parties agree on a new sentence at the status conference, the court may recall the sentence and resentence an absent defendant if the defendant provides a written waiver of the right to be present in accordance with the requirements for a written waiver listed in (g)(4), if defense counsel is present at the sentencing, and if the court approves of the defendant's absence. The defendant may also appear for resentencing through a videoconference system without a written waiver.

(4) The written waiver must substantially state the following:

(A) The defendant has been advised of the right to be personally present for sentencing;

(B) The defendant waives the right to be personally present for sentencing;

(C) The defendant requests the court to sentence the defendant in absentia; and

(D) The defendant agrees that the defendant's interests are represented by the presence of the defendant's attorney the same as if the defendant were personally present.

(5) If there is no resolution at the status conference, the court must set a contested hearing.

(h) Hearing and resentencing

(1) The defendant's presence at the hearing and resentencing may be waived if there is a written waiver of the right to be personally present in accordance with the requirements for a written waiver listed in (g)(4). If the defendant's presence is waived, defense counsel must be present on behalf of the defendant.

(2) The defendant may appear at the hearing and resentencing through a videoconference system without a written waiver.

(3) A court resentencing under Penal Code section 1170(d)(1) must apply the sentencing rules in the California Rules of Court so as to eliminate disparity of sentences and to promote uniformity of sentencing.

(4) The court may consider any factors that were present at the original sentencing, including:

(A) Whether consecutive sentences could have been imposed; and

(B) The terms of a negotiated plea, including whether charges or cases were dismissed. The court must not deny a resentencing recommendation solely because the original sentence resulted from a negotiated plea.

(5) Under Penal Code section 1170(d)(1), the court may consider postconviction factors, including:

(A) The defendant's disciplinary record and record of rehabilitation while incarcerated;

(B) Evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the defendant's risk for future violence; and

(C) Evidence that reflects that circumstances have changed since the defendant's original sentencing so that the defendant's continued incarceration is no longer in the interest of justice.

(6) After the hearing, if the court determines that no change in the sentence is to be made, it must issue an order stating the reasons for the determination and enter the order in the minutes. A copy of the minute order must be sent to the recommending agency.

(7) If the court finds it necessary to correct an unauthorized sentence or clerical error, it must issue an order vacating the sentence, state the reasons for doing so, and indicate the correct sentence. The court must state its reasons either orally on the record or in a written order.

(8) If the court decides to exercise its discretion to recall a sentence and resentence a defendant for equitable reasons, it must state the reasons for doing so, and indicate the new sentence. The court must state its reasons either orally on the record or in a written order.

(9) If the court corrects a sentence or recalls a sentence and resentences the defendant, and the defendant is in state prison, an amended abstract of judgment must be sent by the court to the California Department of Corrections and Rehabilitation.

(i) Probation report

(1) A supplemental probation report is not required for resentencing, but a report must be prepared if ordered by the court based on the request of either party or on the court's own motion.

Item number:25

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Criminal Procedure: Intercounty Probation and Mandatory Supervision Transfer
Amend Cal. Rules of Court, rule 4.530

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: October 28, 2019, amended January 20, 2020
Project description from annual agenda: Amend Cal. Rules of Court, rule 4.530, Intercounty transfer of probation and mandatory supervision
Project Summary: Consider rule changes to 1) require a receiving court to notify a transferring court if the transferred case's disposition changes, e.g., reduced to a misdemeanor or dismissed, 2) modernize the rule and further clarify the roles of transferring and receiving courts through allowing electronic transmission of court files from the transferring court to the receiving court, and 3) allow only the receiving court to make certified copies of court records.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SPR20-15

Title
Criminal Procedure: Intercounty Probation and Mandatory Supervision Transfer

Action Requested
Review and submit comments by June 9, 2020

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 4.530

Proposed Effective Date
January 1, 2021

Proposed by
Criminal Law Advisory Committee
Hon. J. Richard Couzens, Chair

Contact
Sarah Fleischer-Ihn, 415-865-7702
Sarah.Fleischer-Ihn@jud.ca.gov

Executive Summary and Origin

The Criminal Law Advisory Committee recommends amending California Rules of Court, rule 4.530, to state that only the receiving court may certify records from a case and to allow for electronic transmission of a certified copy of the court file. The amendments were suggested by a judicial administrator.

Background

Certifying records

A judicial administrator stated that there was a lack of clarity around whether the transferring or receiving court may certify records from a case, when, for example, a district attorney requests a certified copy of conviction documents. Under Penal Code section 1203.9(b), the receiving court has entire jurisdiction over the case once the transfer is ordered. Hence, the committee recommends amending the rule to clarify that only the receiving court may certify records in the case.

Modernizing the rule to account for electronic case management systems

The rule's requirement for a court to transfer the original file does not fully account for electronic case management systems, where no original paper file exists. The committee recommends amending the rule to account for these systems.

The Proposal

This proposal would amend rule 4.530 by adding subdivisions stating that:

- On transfer, only the receiving court may certify copies from the court file; and that
- A certified copy of the entire court file may be electronically transmitted if an original court file does not exist, and if the receiving court receives a certified copy of the entire court file from the transferring court, it must be deemed an original file.

The amendments would clarify appropriate roles between transferring and receiving courts in certifying transferred case records and accommodate modernized court practices due to electronic case management systems.

Alternatives Considered

The committee agreed that the two proposed changes added clarity to the administration of probation transfers and considered no alternatives.

Fiscal and Operational Impacts

No fiscal or operational impacts are anticipated as a result of amending rule 4.530.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 4.530, at page 3
2. Link A: Pen. Code, § 1203.9, *http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1203.9.&lawCode=PEN*

Rule 4.530 of the California Rules of Court would be amended, effective January 1, 2021, to read:

Rule 4.530. Intercounty transfer of probation and mandatory supervision cases

(a)–(f) * * *

(g) Transfer

(1)–(5)***

(6) A certified copy of the entire court file may be electronically transmitted if an original paper court file does not exist. On receipt of an electronically transmitted certified copy of the entire court file from the transferring court, the receiving court must deem it an original file.

(7)–(8)***

(9) On transfer of the case, only the receiving court may certify copies from the case file.

(h)* * *

Item number:26

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Criminal Forms: Sex Offender Registration Termination
Adopt forms CR 415, CR 416, CR 417, and CR 418; approve form CR 415-INFO

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: October 28, 2019
Project description from annual agenda: Develop forms to implement SB 384, which, in relevant part, establishes three tiers of sex offender registration based on specified criteria and a petition process to request termination from the registry upon completion of a mandated minimum registration period under specified conditions. The petition process goes into effect on July 1, 2021 and it is intended for the forms to go into effect at that time, though they will be presented to the Judicial Council at its September 2020 meeting. Assist criminal courts with any required implementation.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue . San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-16

Title
Criminal Forms: Sex Offender Registration Termination

Proposed Rules, Forms, Standards, or Statutes
Adopt forms CR-415, CR-416, CR-417, and CR-418; approve form CR-415-INFO

Proposed by
Criminal Law Advisory Committee
Hon. J. Richard Couzens, Chair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
July 1, 2021

Contact
Sarah Fleischer-Ihn, 415-865-7702
Sarah.Fleischer-Ihn@jud.ca.gov

Executive Summary and Origin

The Criminal Law Advisory Committee recommends four new mandatory forms and an optional information sheet to be used to petition the court for termination of sex offender registration, acknowledge receipt of a petition by the appropriate law enforcement agencies and district attorney's offices, indicate a district attorney's response to the petition, and make appropriate court orders. The state Department of Justice requested the Judicial Council's assistance with forms to implement relevant parts of the Sex Offender Registration Act (Sen. Bill 384; Stats. 2017, ch. 541).

Background

Under the Sex Offender Registration Act, effective January 1, 2021, sex offender registration will convert from a lifetime requirement to a tier-based registration system with a minimum registration time period of 10 years, 20 years, or lifetime, largely depending on the registrable offense. The state Department of Justice will designate a tier for all current registrants and will notify the registering law enforcement agency. Starting July 1, 2021, registrants may petition the court in the county of registration to terminate the registration requirement if the registrant has been registered for the minimum required time and meets other criteria. The district attorney may request a hearing if they believe the person does not meet the requirements or if community safety would be enhanced by the person's continued registration. Penal Code section 290.5, effective July 1, 2021, outlines the procedure and requirements for the petition process.

The Proposal

The committee proposes adoption of the following four mandatory forms and approval of an information sheet.

Petition to Terminate Sex Offender Registration **(form CR-415)** allows petitioner or counsel to:

- Indicate that petitioner has met the requirements for termination under Penal Code section 290.5(a)(2), including proof of current registration; that petitioner has no pending charges that could extend the time to complete the registration requirements of petitioner's tier or change petitioner's status; and that petitioner is not in custody and not on parole, probation, postconviction supervised release, or any other form of supervised release;
- Identify petitioner's tier designation and indicate whether petitioner has registered for the minimum number of years for that tier designation as required under Penal Code section 290(e);
- If applicable, indicate whether petitioner has met the exceptions requirements outlined in Penal Code section 290.5(b)[1];
- Provide information on any previously filed and denied petitions so the served parties and the court are aware of any time restrictions on filing a subsequent petition under Penal Code section 290.5(a)(4), (b)(2)—(3); and
- State the agencies that the petition was served on and the method of service, to indicate compliance with the service requirements of Penal Code section 290.5(a)(2).

The petition also prompts the petitioner to read the information sheet before using the form, states that the petitioner must continue to register as a sex offender unless and until a court terminates the registration requirement, and prompts the petitioner to provide *Acknowledgment of Receipt by Law Enforcement/District Attorney* (form CR-416) to each law enforcement agency and district attorney served with a copy of the petition.

Information on Filing a Petition to Terminate Sex Offender Registration **(form CR-415-INFO).** This information sheet provides background on eligibility for relief, tier designation, tolling of the registration period, exception categories, and the petition process.

[1] This subdivision includes specified exceptions to tier two's 20-year registration requirement and tier three's lifetime registration requirement. Tier two contains an exception that permits a minimum 10-year registration requirement for specified offenses involving a minor victim, 14 to 17 years of age, that occurred when the offender was under 21. The state Department of Justice has indicated that it will not separately designate tier two registrants in this exception category. There is also an exception for registrants who have been designated as tier three due to an above-average risk level on the sex offender risk-assessment instrument, which permits them to petition for termination after a minimum 20-year registration period. The state Department of Justice has indicated that it *will* separately designate persons in tier three based on a risk-level assessment. The court's role is to determine whether community safety would be enhanced by requiring continued registration and, if the court denies the request based on community safety concerns, the time period after which the person can file another petition.

Acknowledgment of Receipt by Law Enforcement/District Attorney **(form CR-416)** allows law enforcement and the district attorney to acknowledge to the court receipt of the petitioner's *Petition to Terminate Sex Offender Registration* (form CR-415) and petitioner's proof of current registration. Under Penal Code section 290.5(a)(2), receipt of the petition triggers law enforcement's eligibility review, the first of many steps in the termination process.

Response by District Attorney to Petition to Terminate Sex Offender Registration **(form CR-417)** allows the district attorney to:

- State that there is no objection to the petition; or
- Request a hearing based on a community safety argument (Pen. Code § 290.5(a)(2)); or
- Recommend that the court deny the petition based on petitioner's ineligibility.

Order on Petition to Terminate Sex Offender Registration **(form CR-418)** allows the court to take one or more of the following actions:

- Grant the request to terminate sex offender registration under Penal Code section 290 et seq;
- Summarily deny the request based on petitioner's ineligibility;
- Deny the request after hearing based on a finding that community safety would be significantly enhanced by petitioner's continued registration (Pen. Code, § 290.5(a)(2));
- Indicate that its findings after hearing are either stated on the record or set forth in writing in the order; and
- Indicate the time period after which the petitioner may file another petition (Pen. Code, § 290.5(a)(4), (b)(2)—(3)).

The committee recommends an effective date of July 1, 2021, for the proposed forms since the termination petition process goes into effect on that date.

Alternatives Considered

Mandatory forms

The committee discussed whether to recommend mandatory or optional forms. Under Government Code section 68511, designating a form as mandatory prohibits courts from creating an alternative local form. The committee is recommending mandatory forms to promote uniformity throughout the state, especially since a significant number of petitions may involve petitioners with different counties of registration and conviction.

Procedure

Besides registering for the minimum number of years for their tier, petitioners in tiers one and two must also provide proof of current registration and cannot have pending charges, be in custody, or be on supervision. These requirements are not specified for petitioners in the exceptions categories for tiers two and three under Penal Code section 290.5(b), which permit a shortened registration time period if the petitioner meets specified criteria. The committee recommends that the petition include these requirements for petitioners in the tiers two and three

exceptions categories, noting that it is reasonable to have those subject to exceptions comply with similar prerequisites to relief as petitioners in tiers one and two.

Law enforcement response form

The committee discussed whether to develop a form for law enforcement to use in their response to the courts and the district attorney regarding a petitioner's eligibility, noting that many courts prefer consistency across forms. The state Department of Justice indicated that the California Sex and Arson Registry would likely develop a response document for optional use by agencies that could be automatically populated to assist in determining eligibility. Because this option seemed preferable to a Judicial Council form, the committee decided not to develop a law enforcement response form.

Service and receipt of petition and proof of current registration

Receipt of the petition triggers law enforcement's eligibility review, the first of many steps in the termination process. The committee discussed the importance to the court in tracking that both law enforcement and the district attorney received the petition and proof of current registration. The committee considered developing a form for proof of service of the petition and proof of current registration, but concluded that a proof of service form was insufficient to confirm whether the petition and proof of current registration were actually received by law enforcement and the district attorney. The committee ultimately decided to develop a separate acknowledgement of receipt form for law enforcement and the district attorney to confirm receipt of the petition, similar to the acknowledgment requirement for a mailed civil summons and complaint under Code of Civil Procedure section 415.30.

District attorney or prosecuting agency

Penal Code section 290.5 references the role of the district attorney in the registration termination process. The committee discussed whether the forms should use a broader term, such as *prosecuting agency*, since city attorney's offices in some jurisdictions charge and prosecute registrable offenses and may be involved in responding to a petition. The committee decided to follow the statutory language and uses the term *district attorney* in the forms.

Juvenile adjudications

The committee discussed whether to develop forms that included requests to terminate registration based on juvenile adjudications. The Family and Juvenile Law Advisory Committee is tracking the issue and may develop separate forms to be used for those instances.

Fiscal and Operational Impacts

It is anticipated that the volume of petitions for termination under Penal Code section 290.5 will be significant. Courts will have to process and act on the requests for termination by setting and conducting hearings and issuing written orders. The proposed forms are intended to mitigate workload burdens by streamlining some of this process and providing greater thoroughness and consistency in the presentation of the relevant information. Expected costs include training, case management system updates, and the production of new forms.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Are the forms and information sheet written in a way that would be understandable to most self-represented court users?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would 9 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Forms CR-415, CR-415-INFO, CR-416, CR-417, and CR-418, at pages 6–14
2. Link A: Senate Bill 384; Stats. 2017, ch. 541, *http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB384*
3. Link B: Penal Code section 290.5, effective July 1, 2021, *http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=290.5.&lawCode=PEN*

CR-415 Petition to Terminate Sex Offender Registration (Pen. Code, § 290.5)

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

- Before using this form, read *Information on Filing a Petition to Terminate Sex Offender Registration* (form CR-415-INFO).
- Petitioner must continue to register as a sex offender unless and until a court terminates the registration requirement.
- Petitioner must provide *Acknowledgment of Receipt by Law Enforcement/ District Attorney* (form CR-416) to each law enforcement agency and district attorney served with a copy of this petition.

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

For Court use only:

Date:
Time:
Department:

1 Petitioner's Information

a. Name: _____
Last *First* *MI*

Date of birth: _____ *(mm/dd/yyyy)*

The county or counties where petitioner was convicted of an offense requiring registration: _____

b. Attorney Information (if applicable)

Attorney Name: _____

Firm: _____

State Bar No.: _____

c. Contact Information *(IMPORTANT: You may be contacted about this matter at the address, phone, or e-mail listed below.)*

_____
Street

_____ _____ _____ Phone: _____
City *State* *Zip*

E-mail *(if available)*: _____

d. ☐ If there is a hearing, petitioner requests an interpreter in *(language)*: _____

2 Termination Request

☐ Petitioner requests termination of the requirement to register as a sex offender in California.

3 Registration Status

a. ☐ Petitioner is **currently registered** as a sex offender in California in the County of: _____

b. ☐ Proof of current registration is attached.

4 Pending Charges

☐ To my knowledge, there are no pending charges against petitioner that could extend the time to complete the registration requirements of petitioner's tier or change petitioner's tier status.

5 Custody Status

☐ Petitioner is not in custody *(in jail or prison)*.

6 Supervision Status

☐ Petitioner is not on parole, probation, postconviction supervised release, or any other form of supervised release.

Case Number:

7 Tier Designation and Eligibility

Petitioner was designated by the Department of Justice in the following tier and has registered for the following number of years:

a. ☐ Tier 1 (Adult)
   (1) ☐ Petitioner has registered for at least 10 years.

b. ☐ Tier 2 (Adult)
   (1) ☐ Petitioner has registered for at least 20 years; **or**
   (2) ☐ Petitioner has registered for at least 10 years and all of the following apply:
      (a) ☐ Petitioner has not been convicted of a new offense requiring sex offender registration since petitioner was released from custody on the offense requiring sex offender registration;
      (b) ☐ Petitioner has not been convicted of a new offense listed in Penal Code section 667.5(c) (violent felonies) since petitioner was released from custody on the offense requiring sex offender registration; and
      (c) ☐ The offense for which petitioner is required to register as a sex offender in California (1) involved no more than one victim 14 to 17 years of age, (2) occurred when petitioner was under 21 years of age, (3) is not one listed in Penal Code section 667.5(c) (except Penal Code section 288(a)), and (4) is not one listed in Penal Code section 236.1.

c. ☐ Tier 3 *(all of the following apply)*
   (1) ☐ Petitioner's designation is based only on a risk level assessment;
   (2) ☐ Petitioner has registered for at least 20 years;
   (3) ☐ Petitioner has not been convicted of a new offense requiring sex offender registration since petitioner was released from custody on the offense requiring sex offender registration; and
   (4) ☐ Petitioner has not been convicted of a new offense listed in Penal Code section 667.5(c) (violent felonies) since petitioner was released from custody on the offense requiring sex offender registration.

8 Previous Petition

a. Petitioner *(check one)* ☐ has ☐ has not previously filed a petition in California for termination of a sex offender registration requirement that was denied by the court.

b. The previous petition was denied in *(case number)*: _____, in the Superior Court of California, County of _____, on *(date)*: _____

c. The court set _____ (months/years) as the time period after which petitioner may request termination again.

9 Service

A copy of this petition and the proof of current registration was served on the following agencies:

Agency Name	Service
Registering law enforcement agency:	Date of service: _____ Method: ☐ mail ☐ in-person ☐ electronic
District attorney (county of registration):	Date of service: _____ Method: ☐ mail ☐ in-person ☐ electronic
Law enforcement (county of conviction):	Date of service: _____ Method: ☐ mail ☐ in-person ☐ electronic
District attorney (county of conviction):	Date of service: _____ Method: ☐ mail ☐ in-person ☐ electronic

10 Registration Period

☐ Petitioner believes that they have met the requirements to register for the time period required by petitioner's tier designation.

Date: _____

_____ ▶ _____

Printed Name of Petitioner or Attorney *Signature of Petitioner or Attorney*

CR-415-INFO Information on Filing a Petition to Terminate Sex Offender Registration

1 General Information

- Do not file this information sheet with your petition.
- You must continue to register as a sex offender unless and until a court grants your request to terminate the registration requirement.
- You may be required to register as a sex offender in another jurisdiction even if your requirement to register in California is terminated.
- This information sheet is for registration based on convictions in adult criminal court. It does not address registration based on juvenile adjudications.

2 Am I eligible for relief under Penal Code section 290.5?

You *may be* eligible to petition for relief under Penal Code section 290.5 if:

- You are required to register as a sex offender as a result of a California state court conviction;
- Your "tier assignment" has been determined by the Department of Justice;
- You have been assessed as being within Tier 1 or Tier 2; or
- You have been assessed as being within Tier 3 based solely on your assessed level of relative risk.

3 Which tier am I? How is my tier determined?

- Your tier is based on your conviction, risk assessment scores, and other factors. The Department of Justice will determine tier placement for all current registrants and will notify the law enforcement agency where they register. Your minimum required registration period begins on the date you were released from incarceration, placement, or commitment upon being convicted of a registrable offense.
- The period "tolls" during any subsequent period of incarceration, placement, or commitment, except that arrests not resulting in conviction, adjudication, or revocation of probation or parole do not toll the required registration period.

3

- Any misdemeanor conviction for failure to register extends the minimum time period by one year. Any felony conviction for failure to register extends the minimum time period by three years.
- If there have been no tolling or extensions of the minimum registration period, you are eligible to petition for relief after you have registered for the following minimum time periods:

If you are...	You must have registered for at least...
Tier 1 (Adult)	10 years
Tier 2 (Adult)	20 years
Tier 2 (10-Year Registration Exception)	10 years
Tier 3 - Based on Risk Level	20 years

4 Are there any other requirements besides registering for my tier's minimum time period?

If you are assessed as coming within Tier 1 or Tier 2, you are *only* eligible to petition for relief on reaching the end of the minimum registration period, and only if *all of* the following are true:

- You are not the subject of pending criminal charges;
- You are not in custody; *and*
- You are not on parole, probation, post conviction supervised release, or any other form of supervised release.

If you are assessed as coming within Tier 3 solely based on your assessed relative risk level, you are *only* eligible to petition for relief at the end of the minimum period of registration if all of the above factors *and* all of the following are true:

- You were not convicted of a new offense requiring sex offender registration since your release from custody following your conviction for the offense originally giving rise to your duty to register; *and*
- You were not convicted of a new offense listed in Penal Code section 667.5(c) ("violent felony") since your release from custody following your conviction for the offense originally giving rise to your duty to register.

5 If I have been designated as being in Tier 2 (Adult), how do I know if I qualify for the Tier 2 10-year registration exception?

For adult registrants, a small number of Tier 2 offenses qualify for a 10-year registration period, instead of 20 years. Your designation letter or proof of current registration will not tell you whether you qualify. You may qualify if you have registered for 10 years and all of the following apply:

- The offense involved only one victim, between the ages of 14 and 17;
- You were under 21 years of age at the time of the offense;
- The offense is not listed in Penal Code section 667.5(c), violent felonies, with the exception of Penal Code section 288(a), lewd or lascivious act, or in Penal Code section 236.1, false imprisonment and human trafficking;
- You were not convicted of a new offense requiring sex offender registration since your release from custody following your conviction for the offense originally giving rise to your duty to register; and
- You were not convicted of a new offense described in Penal Code section 667.5(c) since your release from custody upon conviction for the offense originally giving rise to your duty to register.

6 At the end of my minimum period of registration, where and how do I file my petition with the court?

- Beginning July 1, 2021, you can file your petition and proof that you are current with your registration in the superior court in the county where you register. If you register with more than one law enforcement agency (for example, campus registration or additional residence address), you must file the petition in the county of your primary residence.
- Make a copy of the petition, proof of current registration, and copies of *Acknowledgment of Receipt by Law Enforcement/District Attorney* (form CR-416) for each law enforcement agency and district attorney's office you (or someone on your behalf) must serve.
- Contact the court clerk or check the court's website to see if any local rules exist regarding filing and/or service of the petition.
- File the petition by:
  - taking it to the court clerk in person;
  - mailing the petition to the court; or
  - depending on the court's local rules and practices, filing the petition electronically.

7 Who else gets a copy of the petition, and how?

You or someone on your behalf must deliver a copy of the petition and the proof that you are current with your registration on:

- The law enforcement agency with which you currently register; and
- The district attorney in the county in which you currently register.

If your registrable offense is from a different county than the one you register in, the petition and the proof of current registration must be delivered to the law enforcement agency and the district attorney of the county of conviction of the registrable offense.

Example: If you were convicted of a registrable offense in Los Angeles County but register in Orange County, you or someone else on your behalf must serve law enforcement and the district attorney in both counties.

Contact every agency that must be served to check if there is a specific person or mailing address that should receive the petition. If the agencies do not get a copy, they will not be able to provide the information the court needs to consider your request, and the court may deny the request or put it over until it receives this information.

There are three main ways to serve the petition:

- **Personal service:** You may serve the petition or ask someone else to do it. Go in person to hand-deliver the petition and proof of current registration to a representative of the law enforcement agency and district attorney's office during business hours. This is the most reliable form of service.
- **Service by mail:** Place copies of the petition and the proof of current registration in a stamped, sealed envelope addressed to the law enforcement agency and district attorney's office. Put first-class postage on the envelope and mail it by depositing the envelope with the U.S. Postal Service or at an office or business mail drop where the mail is picked up every day and deposited with the U.S. Postal Service.
- **Electronic service:** Contact the law enforcement agency and district attorney's office to check if they accept electronic service. If so, the court may require proof of consent and proof of electronic service. You can use *Consent to Electronic Service and Notice of Electronic Notification Address* (form EFS-005-CV) and *Proof of Electronic Service* (form EFS-050), available at **www.courts.ca.gov/forms**.

Your petition may be denied if all law enforcement agencies and district attorney's offices required to be served are not served.

8 Time frame for court's decision

The court will not make a decision until it hears from the law enforcement agency and the prosecuting agency. This may take four months or longer. The court may grant your request, deny your request, or set the request for a hearing if one is requested by the prosecuting agency.

9 Hearing

The prosecuting agency may request a hearing if it does not believe you have registered for the minimum time period required or if it believes that you should continue registering for community safety. At the hearing, the court will make its decision about whether you should continue registering for community safety by reviewing the facts of your case and your conduct since the conviction.

10 Subsequent petition

If the court denies your request, it will let you know how much time must pass before you can make the request again. This depends in part on your tier.

- Tier 1 and 2 (Adult): at least one year from date of denial, but not to exceed five years, based on facts presented at the hearing
- Tier 2 *(10-year registration exception):* at least one year from date of denial
- Tier 3 *(based on risk level)*: at least three years from date of denial

DRAFT
Not approved by
the Judicial Council

CR-416

Acknowledgment of Receipt by Law Enforcement/District Attorney (Sex Offender Registration Termination)

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

1. The petition and proof of current sex offender registration are for:
   a. Name: _____ (*Last* / *First* / *Middle*)
   b. Date of birth: _____ *(mm/dd/yyyy)*

2. I received a copy of a *Petition to Terminate Sex Offender Registration* (form CR-415) and proof of current sex offender registration of the above-named petitioner on *(date):* _____

3. Agency name: _____ and county: _____
   - ☐ Registering law enforcement agency
   - ☐ District attorney's office (county of registration)
   - ☐ Law enforcement agency (county of conviction)
   - ☐ District attorney's office (county of conviction)

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

_____
Printed Name and Title of Agency Representative

_____
Signature of Agency Representative

To the agency: Return this Acknowledgment of Receipt to the court in the registering county within 10 days of receipt.

CR-417 Response by District Attorney to Petition to Terminate Sex Offender Registration

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

1 Petitioner's Information

This is a response to a petition filed by:

a. Name: _____
Last *First* *Middle*

Date of birth: _____ *(mm/dd/yyyy)*

b. Tier *(check one)*:

- ☐ Tier 1 (Adult)
- ☐ Tier 2 (Adult)
- ☐ Tier 2 (10-year registration exception)
- ☐ Tier 3 (based on risk level)
- ☐ Tier 3 (lifetime)

Fill in court name and street address:

Superior Court of California, County of

Case Number:

For Court use only:

Date:
Time:
Department:

2 Response

a. ☐ The district attorney has no objection to this petition;

b. ☐ The district attorney requests a hearing because community safety would be significantly enhanced by the petitioner's continued registration; or

c. ☐ The district attorney requests the petition be denied because *(check one)*:

(1) ☐ Petitioner has not met the minimum time period for registration;

(2) ☐ Petitioner does not qualify for termination because petitioner is a Tier 3 lifetime registrant and does not fall under the risk level exception; or

(3) ☐ Other: _____

Date: _____

_____ ▶ _____
Printed Name *Signature*

CR-418 Order on Petition to Terminate Sex Offender Registration (Pen. Code, § 290.5)

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

1 Name: _____
Last *First* *Middle*

Mailing address: _____
Street

_____ _____ _____
City *State* *Zip*

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

2 ☐ The court **GRANTS** the petition to terminate the sex offender registration requirement under Penal Code section 290 et seq.

3 ☐ The court summarily **DENIES** the petition to terminate the sex offender registration requirement because *(check one)*:

a. ☐ Petitioner has not met the minimum time period for registration;

b. ☐ Petitioner does not qualify for termination because petitioner is a Tier 3 lifetime registrant and does not fall under the risk level exception; or

c. ☐ Other: _____

4 ☐ After hearing, the court **DENIES** the petition to terminate the adult sex offender registration requirement because the court finds that community safety would be significantly enhanced by the petitioner's continued registration.

The court's findings are: ☐ stated orally on the record *or* ☐ set forth below:

a. ☐ **For Tier 1 and Tier 2 denials:** The court has set the time period after which the petitioner may file another petition for termination on *(date)*: _____ for the following reasons:

_____

b. ☐ **For Tier 2 (10-year registration exception) denials**: The court has set the time period after which the petitioner may file another petition for termination at least one year from the date of denial: _____

c. ☐ **For Tier 3 (based on risk level) denials**: The court has set the time period after which the petitioner may file another petition for termination at least three years from the date of denial: _____

Date: _____

_____
Signature of judicial officer

This is a Court Order.

Item number: 27

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Family Law: Implementation of Assembly Bills 677 and 1373 Regarding Adoptions

Committee or other entity submitting the proposal:
Family & Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Diana Glick, 916-643-7012, diana.glick@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda:
Project Title: Legislative Changes from the 2018-2019 Legislative Session, Priority 1

Project Summary: As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration.
c. AB 677 (Choi) Intercountry adoption finalized in a foreign country (Ch. 805, Statutes of 2019) Requires that a foreign adoption be set for re-adoption in California within a set period of time
f. AB 1373 (Patterson) Adoption (Ch. 192, Statutes of 2019) Clarifies when the termination of parental rights as part of an adoption may be waived and expands the ability to use the limited stepparent adoption process when a child is born to a married couple or domestic partners through gestational surrogacy.

Status/Timeline: Proposed for effective date 1/1/2021

Fiscal Impact/Resources: CFCC staff, in consultation with staff from the Legal Services will prepare revised rules and forms as needed. Joint Rules Subcommittee of Trial Court Presiding Judges and Court Executive Advisory Committees (TCPJAC/CEAC JRS) will review proposals for court operations impacts as necessary.

Project Title: Judicial Council forms within the committee's purview that have a gender identity question or term, Priority 2

Project Summary: Revise all gendered terms or gender identity questions to conform to legislative changes providing for nonbinary gender identity as those forms are subject to revision for any other purpose including implementation of statutory changes.

Status/Timeline: Ongoing with each RUPRO cycle

Fiscal Impact/Resources: Legal Services

If requesting July 1 or out of cycle, explain:
N/A

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue . San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-17

Title
Family Law: Implementation of Assembly Bills 677 and 1373 Regarding Adoptions

Proposed Rules, Forms, Standards, or Statutes
Adopt Cal. Rules of Court, rule 5.493; approve form ADOPT-206; revise forms ADOPT-050-INFO, ADOPT-200, ADOPT-210, and ADOPT-215

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn Borack, Cochair
Hon. Mark Juhas, Cochair

Action Requested
Review and submit comments by Tuesday, June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Diana Glick, 916-643-7012
diana.glick@jud.ca.gov

Executive Summary and Origin

The Family and Juvenile Law Advisory Committee proposes the adoption of a new rule of court and revisions to a chapter title in title 5 of the California Rules of Court, in addition to amendments to adoption forms, to implement Assembly Bill 677 (Choi; Stats. 2019, ch. 805) regarding intercountry adoptions. The committee also proposes amendments to adoption forms and the approval of a new, optional form to implement Assembly Bill 1373 (Patterson; Stats. 2019, ch. 192) regarding stepparent adoptions in cases of gestational surrogacy. Both bills became effective January 1, 2020.

Background

Intercountry adoptions

During federal fiscal year 2018, the U.S. Department of State adoptions statistics indicated that 269 children were adopted from foreign countries and brought to California to live with their adoptive families.[1] Of these 269 adoptions, 244 had their adoptions finalized in the foreign

[1] U.S. Department of State, Bureau of Consular Affairs, Adoption Statistics, 2018, *https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/adoption-statistics1.html?wcmmode=disabled*.

country and 25 entered the United States with the intention of finalizing their adoption in this country.[2] With the enactment of the Child Citizenship Act of 2000,[3] the federal government authorized automatic U.S. citizenship for adoptees in certain cases of intercountry adoption, depending on the child's country of origin and age at adoption, whether the adoption was finalized in the child's country of origin, and the visa the child used to enter the United States. If a child does not acquire automatic U.S. citizenship pursuant to the Child Citizenship Act, the federal government requires readoption under state law for purposes of pursuing U.S. citizenship. Prior to the enactment of AB 677, California law mandated readoption under state law for children whose adoption was finalized abroad only when required by the Department of State for U.S. citizenship purposes.[4]

As of January 1, 2020, when an adoption has been finalized in a foreign country, California adoptive parents are required under Family Code section 8919 to file a request for adoption under state law within the earlier of 60 days from the child's entry to the United States or by the child's 16th birthday. Parents are also required to provide a copy of the petition to each adoption agency that provided services to the parents. If the adoptive parents fail to timely file the request for adoption or provide copies to the adoption agency or agencies who provided the adoption services, the adoption agency must, within 90 days of the entry of the child to the United States, initiate the filing with the court and provide a "file-marked copy" of the petition to the adoptive parent and any other adoption agency that provided adoption services, within five business days of filing. The purpose of AB 677 is to ensure that U.S. citizenship is pursued and obtained for children whose adoptions are finalized abroad and to protect adopted children against human trafficking.

Adoptions required in certain cases of gestational surrogacy

The current "stepparent adoption" process contemplates two possible scenarios. The first scenario is the traditional definition of stepparent adoption—when a person marries or enters into a registered domestic partnership with the legal parent of a child after the child is born and seeks to become a legal parent of the child. This process requires a home study and is contained in Family Code sections 9000 through 9007. The second scenario arising under stepparent adoption is a process to confirm parentage when the "stepparent" or person seeking the adoption was married to or in a registered domestic partnership with the birth parent when the child was born. The process allowing for confirmation of parentage was enacted with the Modern Family Act of 2014 (Assem. Bill 2344 (Ammiano); Stats. 2014, ch. 636) and is contained in Family Code section 9000.5. Confirmation of parentage does not require a home study.

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[2] U.S. Department of State, Bureau of Consular Affairs, *2018 Annual Report on Intercountry Adoption* (Mar. 2019) *https://travel.state.gov/content/dam/NEWadoptionassets/pdfs/Tab%201%20Annual%20Report%20on%20Intercountry%20Adoptions.pdf*.

[3] 106 Pub.L. 395 (Oct. 30, 2000) 114 Stat. 1631, *www.congress.gov/106/plaws/publ395/PLAW-106publ395.pdf*.

[4] Readoption under California law was and is still required when a child enters the United States prior to finalization of the adoption, is *placed* with a California adoptive family, and the adoption is finalized in this state. (Fam. Code, § 8911.)

California law also contemplates two types of gestational surrogates: "traditional" surrogates, in which the surrogate's own egg is inseminated with the sperm of the intended parent; and "gestational carriers," who are implanted with a fertilized embryo and do not contribute any genetic material to the child. (Fam. Code, § 7960(f)). Under legislation enacted in 2016 (Assem. Bill 2349 (Chiu); Stats. 2016, ch. 385), intended parents who have entered into a surrogacy agreement with a gestational carrier who resides outside the state of California are authorized to pursue a pre-birth order of parentage and may file an action in California to establish parentage of the child under the Uniform Parentage Act, as enacted in California. (Fam. Code, §§ 7600–7730.) However, some states still prohibit a parent with no genetic ties to the child from establishing parentage under that state's version of the Uniform Parentage Act and require the parent to pursue adoption in order to be listed on the child's birth certificate.

The purpose of AB 1373 was to expand the process allowing intended parents to "confirm parentage" in those cases in which **all** of the following apply:

- The intended parents reside in California;
- The intended parents together entered into a surrogacy agreement with a gestational carrier residing out of state;
- The child's birth was registered in another state;
- The laws of that other state allowed for only one of the two intended parents to be listed on the child's birth certificate;
- The intended parents were married or in a registered domestic partnership when the child was born and remain in that union; and
- The parent who was not able to establish parentage in another state now seeks to adopt the child in order to be listed on the child's birth certificate.

Gender identification questions

California's Gender Recognition Act (Sen. Bill 179, Stats. 2017, ch. 853) contains findings and declarations regarding the fundamentally personal nature of gender identification and the need for options on state-issued identification documents to ensure that gender is accurately reflected. In addition to streamlining processes for name change and gender recognition, the act establishes *nonbinary* as a new option for gender recognition, making California one of only five states in the nation and the District of Columbia to recognize a third gender category.

As requested by the Judicial Council's Rules Committee, the Family and Juvenile Law Advisory Committee indicated on its annual agenda that it would "revise all gendered terms or gender identity questions to conform to legislative changes providing for nonbinary gender identity as those forms are subject to revision for any other purpose including implementation of statutory changes."[5]

[5] Judicial Council of Cal., Family and Juvenile Law Advisory Committee, Annual Agenda—2020 (approved Oct. 28, 2019), *www.courts.ca.gov/documents/famjuv-annual.pdf*.

Best practices for the identification and removal or revision of gender identification questions on Judicial Council forms dictate that the gender identification questions should be asked only when necessary to effectuate the purpose of the form, which includes a statutory requirement to ascertain sex or gender. If it is determined that the question is required, it may need to be revised in order to be legally compliant, use clear and respectful language, and elicit data that satisfies the needs of the form consumer.

The current *Adoption Request* (form ADOPT-200) contains a field in item 4b in which the form user can check a box next to "Boy" or "Girl." There are five Family Code provisions applicable to adoptions—intercountry, stepparent, agency, and independent adoptions—which require that the petition state the sex of the child.[6] Therefore, this item has been reformulated to "Sex of this child" and to include all three gender categories, as follows:

b. Sex of this child ___ Female ___ Male ___ Nonbinary

Indian Child Welfare Act content and questions

In 2016, the federal government finalized comprehensive regulations and issued updated guidelines to implement the Indian Child Welfare Act (ICWA).[7] In 2017, the Attorney General's ICWA Compliance Task Force made recommendations on the implementation of ICWA in California,[8] and in 2018, state legislative changes impacted the ICWA provisions contained in the Welfare and Institutions Code.[9] It was determined that in some areas, federal guidelines were inconsistent with existing California law and practice, thus necessitating a recent proposal to update title 5 of the California Rules of Court and a variety of ICWA and juvenile law forms, which went into effect on January 1, 2020. Specifically, the proposal clarified the application of the standards "reason to believe" and "reason to know" whether a child is an Indian child, and the requirement to conduct additional inquiry.

The current form ADOPT-200 asks whether the child "may have Indian ancestry." Because this question is part of the required inquiry, but is not the sole determinant as to whether additional

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[6] Intercountry adoptions: "The petition shall state the child's sex and date of birth" (Fam. Code, § 8912(b)); Stepparent adoptions: "The petition shall state the child's sex and date of birth and the name the child had before adoption" (Fam. Code, § 9000(c)); Agency adoptions: "The petition shall state the child's sex and date of birth" (Fam. Code, §§ 8714(d), 8714.5(e)); Independent adoptions: "The petition shall state the child's sex and date of birth and the name the child had before adoption" (Fam. Code, § 8802(c)).

[7] See 25 C.F.R. § 23 (2020), www.ecfr.gov/cgi-bin/retrieveECFR?gp=&r=PART&n=25y1.0.1.4.13; U.S. Department of the Interior, Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act* (Dec. 2016), www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf.

[8] *California ICWA Compliance Task Force: Report to the California Attorney General's Bureau of Children's Justice* (2017), www.caltribalfamilies.org/wp-content/uploads/2019/06/ICWAComplianceTaskForceFinalReport2017-1.pdf.

[9] Assem. Bill 3176 (Waldron; Stats. 2018, ch. 833), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB3176.

inquiry is required and whether there is reason to know that a child is an Indian child, this section is proposed to be amended to come into compliance with current federal regulations.

The Proposal

The committee proposes the following:

1. Revise the title of chapter 3 in division 2 of title 5 of the California Rules of Court to allow for the inclusion of additional rules of court related to intercountry adoptions.

2. Adopt rule 5.493 setting forth the responsibilities of adoptive parents, adoption agencies, and the courts with regard to the filing of a request for adoption under California law of a child whose adoption was finalized in another country.

3. Revise *How to Adopt a Child in California* (form ADOPT-050-INFO) to include new statutory requirements for intercountry adoptions and the use of stepparent confirmation of parentage in certain situations of gestational surrogacy.

4. Revise *Adoption Request* (form ADOPT-200), *Adoption Agreement* (form ADOPT-210), and *Adoption Order* (form ADOPT-215) to include new statutory requirements for intercountry adoptions and the use of stepparent confirmation of parentage in certain situations of gestational surrogacy. Both the gender identification question and the item addressing responsibilities under ICWA on form ADOPT-200 are proposed for revision.

5. Approve *Declaration Confirming Parentage in Stepparent Adoption: Gestational Surrogacy* (form ADOPT-206), which is a slightly modified version of *Declaration Confirming Parentage in Stepparent Adoption* (form ADOPT-205), an optional attachment used to confirm parentage.

Each of these proposed revisions and the proposed new rule and form are detailed below.

Revision to chapter title

The committee proposes to change the title of chapter 3 in division 2 of title 5 from "Adoptions under the Hague Adoption Convention" to "Intercountry Adoptions." All existing rules of court addressing adoptions under the rules of the convention would remain as is, but the more general title for this section will allow for the inclusion of new rule 5.493 related to intercountry adoptions.

Rule 5.493

The committee proposes to add new rule 5.493, which sets forth the requirements contained in Family Code sections 8912 and 8919 with respect to the readoption of children born in foreign countries whose adoptions were finalized abroad. Specifically, the proposed rule contains the new statutory requirement to request adoption under California law of a child whose adoption was finalized in a foreign country, the responsibility of agencies to initiate a petition when a

parent fails to make a timely request, and the responsibilities of courts to notify the Department of Social Services at their Sacramento office upon the filing of a petition for adoption.

Form ADOPT-050-INFO, *How to Adopt a Child in California*

The information sheet for adoptions is proposed to be amended to accommodate changes in the law from both bills and the changes to ICWA implementation language. Form ADOPT-050-INFO is an information sheet that provides instructions on the various forms required to be filled out in order to adopt a child in California and includes information regarding stepparent adoptions; confirmation of parentage; adoption of an Indian child; independent, agency, and intercountry adoptions; and open adoptions.

The proposed substantive amendments to this form are as follows:

- Change "In California there are several kinds of adoption. This form includes instructions for:" to "In California there are several kinds of adoption. This information sheet provides steps for the following types:"

- Under "General Information on Adoptions," change the adoption categories to "Independent or agency adoptions in the United States," "Intercountry adoptions," "Stepparent/domestic partner adoptions," and "Stepparent/domestic partner confirmation of parentage." Add the sentence "Page 4 also has information about open adoptions and special requirements for the adoption of Indian children."

- Under "Stepparent/Domestic Partner Adoptions," change the first question to "If you wish to adopt the child of your spouse or domestic partner, you may be eligible for a stepparent adoption. There are two types of stepparent adoptions. Answer these questions to figure out which process is right for you."

    - Combine the existing two questions into one: "Was the adopting parent in a union with the child's legal parent **at the time the child was born** and is the adopting parent **still in a union** with the legal parent?"

    - Add a question: "Did the adopting parent's **spouse or partner give birth to the child** or did the **adopting parent enter into a gestational surrogacy agreement** as an intended parent with the legal parent of the child?"

- Insert horizontal dashed lines and the statement "Additional Forms for Stepparent Adoption to Confirm Parentage" to clarify the two processes.

- Add a reference to new proposed form ADOPT-206, a description indicating when this optional form applies, and a reference to the application of the parentage confirmation process to certain types of gestational surrogacy.

- Change the section title "Independent, Agency, or International Adoptions" to "Independent or Agency Adoptions in the United States."

- Add new section "Intercountry Adoptions." This section incorporates the changes to the law enacted by AB 677 on intercountry adoptions.

- Add new section "Inquiry and Notice Under the Indian Child Welfare Act" along with detailed requirements pursuant to recent federal regulatory and state legislative changes.

- Change the section title "Adopting an Indian Child" to "Adoption of an Indian Child."

- Under the section title "'Open' Adoption," change the text to "If you want your child to have contact with their birth family, use *Contact After Adoption Agreement* (form ADOPT-310) to describe the kind of contact the birth family will have with your child. Fill out this form and bring it to your hearing."

The proposed plain language amendments to this form are:

- Delete *"(page X)"* after each type of adoption covered in the INFO sheet.

- Consolidate the definition of "union" into a single sentence, shrink font and remove italics.

- Change icons next to questions.

- Remove Yes/No options after the questions.

- Remove periods after each numbered action item.

- Under "Adoption of an Indian Child," change the text to "If you are adopting an Indian child, fill out and bring to court the following additional forms."

The additional language proposed here would add two pages to this form, making it a four-page information sheet.

Adoption Request **(form ADOPT-200)**

All items: Bold headings for all items, rename some for consistency and remove punctuation marks like periods and colons. Changed font of headings to Arial throughout. In some cases, change Yes/No questions to statements with a check box to indicate that the statement applies to the adoption request. The caption was amended to include additional code provisions contemplated in the form.

Item 1

- Change "Your name(s) (*adopting parent(s)*)" to the heading "Adopting parent(s)" to reduce the number of parentheses and italics and because the item asks for more than names.
- Add "Name" to items 1a and 1b.

Item 2

- Add heading "County of filing." Change "I/We filed this Adoption Request in this court because it is in the county (check all that apply):" to "This Adoption Request is filed in this court because (check all that apply)."
- Reword each option by removing "where" from the beginning and adding "in this county."
- Move the Hearing Date box directly under the Case Number box to allow all item 3 options to display on the same page.

Item 3

- Indent the joinder questions under the "Agency" option, allowing the form user to select only one type of adoption.
- Under the "Intercountry" option, move "This adoption may be subject to the Hague Adoption Convention (form ADOPT-216 must be filed with this request)" to renumbered item 13, "Intercountry adoption questions," and add the joinder options.
- Change the "Stepparent" option to "Stepparent adoption." Convert the text under that item to an option that reads "Stepparent adoption to confirm parentage." Replace the instruction text with "See form ADOPT-050-INFO to determine whether you are eligible for the stepparent adoption to confirm parentage process."

Item 4

- In item 4b, delete the options "Boy" and "Girl" and substitute "Sex" followed by the options "Female," "Male," and "Nonbinary." This makes the form language consistent with the Gender Recognition Act of 2017 (SB 179), while remaining in compliance with various adoption statutes requiring the collection of information on "sex" on the petition.
- Add new item 4h to collect information from former item 13 regarding the conception of the child through assisted reproduction.
- Add new item 4i, "The child is a dependent of the court," and add juvenile case number and county fields. Former item 7 would be deleted.

Item 5

- Convert the instruction into a heading.

Item 6

- Move former item 9 regarding birth parents to item 6.
- Add the heading "Birth parents."
- Combine questions, with a single line for parents' names.

Item 7

- Add the heading "Legal guardian."
- Change the instruction to "If yes, attach Letters of Guardianship and fill out below)," remove italics, and place on the same line as the Yes/No question.
- Put items 7a through 7c in two columns.

Item 8

- Add the heading "Inquiry and notice under the Indian Child Welfare Act."
- Reword the questions and information relative to inquiry and notice under ICWA based on recent statutory changes to title 5 of the California Rules of Court and Welfare and Institutions Code.

Item 9

- Add new heading "Adoption of an Indian child" (this mirrors the same heading on form ADOPT-050-INFO).
- Add item 9a allowing the form user to indicate that this is an adoption of an Indian child and instructing the user to fill out two additional forms.
- Add item 9b (formerly item 10c) allowing the user to indicate that this is a tribal customary adoption.

Item 10

- Add new heading "Agency adoption questions" to signal that only those who are pursuing an agency adoption need to answer the questions.
- Move former item 10c to item 9, "Adoption of an Indian child."
- Move former item 10d to item 13, "Intercountry adoption questions."

Item 11

- Add new heading "Independent adoption questions" and retain items 11a through 11d.

Item 12

- Add new heading "Stepparent adoption and confirmation of parentage questions."
- Amend item 12c to state "The adopting parent married or entered into a registered domestic partnership with the legal parent" instead of referring to "the adopting parents."
- Amend item 12d to add a check box to indicate whether proposed new form ADOPT-206 is attached.
- Add item 12f to account for the possibility of adding a third parent without termination of either existing parent's rights, using the stepparent adoption process.

Item 13

- Add new heading "Intercountry adoption questions."
- Add item 13a (former item 3) containing the statement regarding the Hague Adoption Convention.
- Add item 13b (former item 10d) but change to "This is an adoption conducted under the requirements of the Hague Adoption Convention and the child has already moved with the adopting parent(s) to another Hague Convention member country or will be moving at the conclusion of this adoption." The Yes/No options will be removed from this question, so it will only be checked when applicable.
- Pursuant to AB 667, add item 13c to ask the date the child entered the United States and provide a cross-reference to form ADOPT-050-INFO for a list of documents to attach to the adoption request for an intercountry adoption finalized in another country.

Item 15: Add new heading "Consent for adoption."

Item 17: Add new heading "Requests to court."

Item 18: Change "he or she must sign here" to "the lawyer must sign here."

Adoption Agreement (form ADOPT-210)

This form is typically signed in front of a judge at the hearing. Minor changes to items 1 and 2 were made to conform to plain language changes in form ADOPT-200. The caption was amended to include additional code provisions contemplated in the form.

Item 1

- Change "Your name(s) (*adopting parent(s)*)" to the heading "Adopting parent(s)" to reduce the number of parentheses and italics and because the item asks for more than names.
- Add "Name" to items 1a and 1b.

Item 2

- Add the heading "Information about the child."
- Correct the typo in the instruction heading so that it reads "Signing this form."
- Change the third bulleted item to add "or established parentage over a child born through gestational surrogacy."

Adoption Order (form ADOPT-215)

This form requires only minor amendments to align with legislative changes.

Item 1

- Change "Your name(s) (*adopting parent(s)*)" to the heading "Adopting parent(s)" to reduce the number of parentheses and italics and because the item asks for more than names.
- Add "Name" to items 1a and 1b.

Item 2: Add the heading "Information about the child."

Item 4

- In the final check box, change the instruction to read "Check this box only if this is an adoption confirming parentage of a parent who was married to or in a state-registered domestic partnership with the legal parent at the time the child was born)."

Item 12: Delete the term "independent" to allow for the possibility of a traditional stepparent adoption involving an additional parent, pursuant to this option on form ADOPT-200 (new item 12f).

Declaration Confirming Parentage in Stepparent Adoption: Gestational Surrogacy (form ADOPT-206)

This proposed new form is an adaptation of existing form ADOPT-205, which is designed for optional use in a stepparent parentage confirmation process. The title includes the term "Gestational Surrogacy" to indicate that the form may be used in a case in which AB 1373 would apply. The rest of the form was modified by removing the term "birth parent" and replacing it with "parent who established parentage through a gestational surrogacy process" or, in some contexts, "legal parent." In item 4, the words "outside the state of California" were added to the statement about the child's birth. Because this is a different application of the confirmation of parentage process and the terms are long and unwieldy, the committee proposes this separate optional attachment for these very specific cases.

Alternatives Considered

One alternative would have been to fully examine and reconsider the contents and organization of form ADOPT-200, which encompasses most of the various avenues for adopting a child in California, including independent, agency, intercountry, and stepparent adoptions. Creating separate form sets for intercountry adoptions or stepparent adoptions to confirm parentage may serve to clarify all of the various processes. Ultimately, the committee determined that the overall number of intercountry adoptions statewide each year did not justify the staff and committee time that would have been required to undertake a complete overhaul of these forms. Likewise, for the forms that are impacted by the legislation adding a new category of stepparent adoptions, a very narrow group of adoptive parents are impacted by the changes, so it was determined that for this proposal, the most important task is to ensure compliance of the forms and the process with current law, and the most efficient way to do this is through minor amendments to the existing forms.

Fiscal and Operational Impacts

Court personnel may need training to understand their responsibilities when an international adoption agency initiates an adoption request under the new law. Courts that maintain paper versions of the forms will incur the costs of replacing old forms with the revised forms. Because there are amendments to forms ADOPT-210 and ADOPT-215, both of which have been translated into Spanish, the Judicial Council will incur costs in updating these translated versions should the forms ultimately be amended by the Judicial Council.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Do the rule and forms accurately reflect the processes established in legislation?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 5.493, at pages 13-15
2. Forms ADOPT-050-INFO, ADOPT-200, ADOPT-206, ADOPT-210, and ADOPT-215, at pages 16–31
3. Link A: Assembly Bill 677
   http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB677
4. Link B: Assembly Bill 1373
   http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1373

Rule 5.493 of the California Rules of Court would be adopted, effective January 1, 2021, to read:

Title 5. Family and Juvenile Rules

Division 2. Rules Applicable in Family and Juvenile Proceedings

Chapter 3. ~~Adoptions under the Hague Adoption Convention~~ Intercountry Adoptions

Rules 5.490–5.492 * * *

Rule 5.493. Requirement to request adoption under California law of a child born in a foreign country when the adoption is finalized in the foreign country (Fam. Code, §§ 8912, 8919)

(a) Responsibility to file request

(1) A resident of California who has finalized an intercountry adoption in a foreign country must:

(A) File a request to readopt the child in California within the earlier of 60 days from the adoptee's entry into the United States or the adoptee's 16th birthday; and

(B) Provide a copy of the adoption request to each adoption agency that provided the adoption services to the adoptive parent.

(2) If the adopting parent fails to timely file a request to readopt the child under California law, the adoption agency that facilitated the adoption must:

(A) File the request within 90 days of the child's entry into the United States; and

(B) Provide a file-marked copy of the request to the adoptive parent and to any other adoption agency that provided services to the adoptive parent within five business days of filing.

(3) If an adoption agency files a request in accordance with (2), the adoptive parent or parents will be liable to the adoption agency for all costs and fees incurred as a result of good faith actions taken by the adoption agency to fulfill the requirement set forth in this rule.

(b) Contents of request

(1) A request to adopt under California law a child born in a foreign country whose adoption was finalized in a foreign country must include all of the following:

(A) A certified or otherwise official copy of the foreign decree, order, or certification of adoption that reflects finalization of the adoption in the foreign country;

(B) A certified or otherwise official copy of the child's foreign birth certificate;

(C) A certified translation of all documents described in this subdivision that are not written in English;

(C) Proof that the child was granted lawful entry into the United States as an immediate relative of the adoptive parent or parents;

(D) A report from at least one postplacement home visit by an intercountry adoption agency or a contractor of that agency licensed to provide intercountry adoption services in the state of California; and

(E) A copy of the home student report previously completed for the international finalized adoption by an adoption agency authorized to provide intercountry adoption services, in accordance with Family Code section 8900.

(2) If an adoption agency initiates a request in accordance with (a)(2), the filing must consist of the following:

(A) A signed cover sheet containing the name, date of birth, and date of entry to California of the child, the names and address of adoptive parents, and the name and contact information for the adoption agency;

(B) Blank copies of all forms required to initiate the request for adoption under California law; and

(C) Any document required in (b)(1) that is in the possession of the adoption agency.

(c) Clerk's notice of request and order

(1) When a request for adoption under California law of a child whose adoption was finalized in a foreign country is filed, the court clerk must immediately notify the California Department of Social Services in Sacramento in writing of the pendency of the proceeding and of any subsequent action taken.

(2) If a request for adoption under California law is initiated under (a)(2), the clerk of the court must file-stamp the request to allow the adoption agency to fulfill its obligations under (a)(2)(B).

(3) Within 10 business days of an order granting a request for adoption under California law, the clerk of the court must submit to the State Registrar the order granting the request.

General Information on Adoptions

Seek legal advice about your family's options before beginning any adoption. Every family is different and adoption may not be necessary for some families. Visit the California Court's Online Self-Help Center adoption page to get copies of adoption forms, look for organizations that provide legal help with adoptions, and learn how to complete the adoption process on your own if you do not have a lawyer: **www.courts.ca.gov/selfhelp-adoption.htm.** You can also get copies of adoption forms at your local court clerk's office.

In California there are several kinds of adoption. This information sheet provides steps for the following types:

- Independent or agency adoptions in the United States
- Intercountry adoptions
- Stepparent/domestic partner adoptions
- Stepparent/domestic partner confirmation of parentage

Page 4 also has information about open adoptions and special requirements for the adoption of Indian (Native American) children.

Stepparent/Domestic Partner Adoptions

If you wish to adopt the child of your spouse or domestic partner, you may be eligible for a stepparent adoption. There are two types of stepparent adoptions. Answer these questions to figure out which process is right for you:

→ Was the adopting parent in a union with the child's legal parent **at the time the child was born** and is the adopting parent **still in a union** with the legal parent? (A "union" means a marriage, a California registered domestic partnership, or a registered domestic partnership or civil union from another state that is legally equivalent to a marriage.)

→ Did the adopting parent's **spouse or partner give birth to the child** or did the **adopting parent enter into a gestational surrogacy agreement** as an intended parent with the legal parent of the child?

If you answered "No" to **either** question, complete items 1 through 4 below for a stepparent/domestic partner adoption.
If you answered "Yes" to **both** questions, complete items 1 and 2, only, for a stepparent adoption to confirm parentage.

1 Fill out court forms

☐ ADOPT-200	*Adoption Request*	This tells the judge about you and the child you are adopting.
☐ ADOPT-210	*Adoption Agreement*	This tells the judge that you and the child, if over 12, agree to the adoption. Fill it out, but do not sign it until the judge asks you to sign it.
☐ ADOPT-215	*Adoption Order*	The judge signs this form if your adoption is approved.
☐ ICWA-010(A)	*Indian Child Inquiry Attachment*	This lets the judge know that you have asked whether the child may have Indian ancestry.
☐ ICWA-020	*Parental Notification of Indian Status*	This shows that the child's parents have been asked about Indian ancestry.

Additional Forms for Stepparent Adoption to Confirm Parentage

☐ ADOPT-205 (or an equivalent declaration)	*Declaration Confirming Parentage in Stepparent Adoption*	This tells the court how you conceived your child and whether there are any other parents. Only use this if you are seeking a stepparent adoption to confirm parentage. See above for more information on this type of adoption. Both the birth parent and the adopting parent must complete a separate declaration.
-OR-		
☐ ADOPT-206 (or an equivalent declaration)	*Declaration Confirming Parentage in Stepparent Adoption: Gestational Surrogacy*	This tells the court how you conceived your child and whether there are any other parents. Only use this if you are seeking a stepparent adoption to confirm parentage when you have used a gestational carrier, the child was born outside of California, and the state where the child was born only allowed one intended parent to be named a legal parent on the child's birth certificate.

2 Take your forms to court

Take the completed forms to the court clerk in the county where you live. The court will charge a filing fee. Or take the forms to your lawyer or adoption agency, if you are using one.

3 The social worker writes a report

In most adoptions, a social worker writes a report. This report gives important information to the judge about the adopting parents and the child. The social worker will ask you questions. You may have to fill out forms. You may be required to pay a fee for this report. The social worker will file the report with the court and send you a copy. When you get the report, ask the clerk for a date for your adoption hearing.

4 Go to court on the date of your hearing

Bring:

☐ The child you are adopting ☐ Form ADOPT-210 ☐ Form ADOPT-215
☐ A camera, if you want a photo of you and your child with the judge *(optional)* ☐ Friends/relatives *(optional)*

Independent or Agency Adoptions in the United States

If this is an independent or agency adoption in the United States, complete items 1 through 4 below.

Note: The rights of the existing parents usually terminate with adoptions. In an independent adoption, if the existing and adopting parents agree, the rights of the existing parent(s) do not have to be terminated.

1 Fill out court forms

☐ ADOPT-200	*Adoption Request*	This tells the judge about you and the child you are adopting.
☐ ADOPT-210	*Adoption Agreement*	This tells the judge that you and the child, if over 12, agree to the adoption. Fill it out, but do not sign it until the judge asks you to sign it.
☐ ADOPT-215	*Adoption Order*	The judge signs this form if your adoption is approved.
☐ ADOPT-230	*Adoption Expenses*	This lets the judge know what payments were made that relate to the child you are adopting.
☐ ICWA-010(A)	*Indian Child Inquiry Attachment*	This lets the judge know that you have asked whether the child may have Indian ancestry.
☐ ICWA-020	*Parental Notification of Indian Status*	This proves that the child's parents have been asked about Indian ancestry.

2 Take your forms to court

Take the completed forms to the court clerk in the county where you live. The court will charge a filing fee. Or take the forms to your lawyer or adoption agency, if you are using one.

3 The social worker writes a report

In most adoptions, a social worker writes a report. This report gives important information to the judge about the adopting parents and the child. The social worker will ask you questions. You may have to fill out forms. You may be required to pay a fee for this report. The social worker will file the report with the court and send you a copy. When you get the report, ask the clerk for a date for your adoption hearing.

4 Go to court on the date of your hearing

Bring: ☐ The child you are adopting ☐ Form ADOPT-210 ☐ Form ADOPT-215 ☐ Form ADOPT-230
☐ A camera, if you want a photo of you and your child with the judge *(optional)* ☐ Friends/relatives *(optional)*

Intercountry Adoptions

If this is an intercountry (international) adoption, complete items 1 through 4 below.
Note: You must follow this process to adopt your child under California law, even if the adoption was previously finalized in a foreign country. If the child's adoption was finalized in a foreign country, you must file the *Adoption Request* within the earlier of 60 days of the child's arrival to the United States, or the child's 16th birthday.

1 Fill out court forms

☐ ADOPT-200	*Adoption Request*	This tells the judge about you and the child you are adopting.
☐ ADOPT-210	*Adoption Agreement*	This tells the judge that you and the child, if over 12, agree to the adoption. Fill it out, but do not sign it until the judge asks you to sign it.
☐ ADOPT-215	*Adoption Order*	The judge signs this form if your adoption is approved.
☐ ADOPT-230	*Adoption Expenses*	This lets the judge know what payments were made that relate to the child you are adopting.
☐ ICWA-010(A)	*Indian Child Inquiry Attachment*	This lets the judge know that you have asked whether the child may have Indian ancestry.
☐ ICWA-020	*Parental Notification of Indian Status*	This proves that the child's parents have been asked about Indian ancestry.

2 Postadoption or postplacement visits and reports

If the child's adoption was finalized in a foreign country, there will be at least one postadoption visit provided by the international adoption agency. The report of this visit must be submitted to the court as described below. If the child was born in a foreign country and placed with a California family for adoption in this state, the adoption agency must provide postplacement supervision with up to four visits. These reports are also provided to the court.

3 Attach documentation

If the child's adoption was finalized in a foreign country, you must attach the following documents to your *Adoption Request*:

- ☐ A certified or otherwise official copy of the foreign decree, order, or certification of adoption that reflects finalization of the adoption in the foreign country
- ☐ A certified or otherwise official copy of the child's foreign birth certificate
- ☐ A certified translation of all required documents that are not written in English
- ☐ Proof that the child was granted lawful entry into the United States as an immediate relative of the adoptive parent or parents
- ☐ A report from at least one postplacement home visit by an intercountry adoption agency or a contractor of that agency licensed to provide intercountry adoption services in the State of California
- ☐ A copy of the home study report previously completed for the international finalized adoption by an adoption agency authorized to provide intercountry adoption services, in accordance with Family Code section 8900

4 Take your forms to court

Take the completed forms and any required documents to the court clerk in the county where you live. The court will charge a filing fee. Or take the forms to your lawyer or adoption agency, if you are using one.

5 Provide a copy of the forms and documents

If the child's adoption was finalized in a foreign country, provide a copy of the forms and documentation you filed with the court to any adoption agency that provided services to you for your international adoption.

6 Go to court on the date of your hearing

Bring: ☐ The child you are adopting ☐ Form ADOPT-210 ☐ Form ADOPT-215 ☐ Form ADOPT-230
☐ A camera, if you want a photo of you and your child with the judge *(optional)* ☐ Friends/relatives *(optional)*

Inquiry and Notice Under the Indian Child Welfare Act

- ☐ The adopting parent(s) must ask specific questions of the child and other people in the child's life in order to determine whether the child may be an Indian child. They must make the inquiry required under law and attach *Indian Child Inquiry Attachment* (ICWA-010(A)) to their *Adoption Request*. For more information about the duty of inquiry, see form ICWA-005-INFO.
- ☐ The adopting parent(s) must attach a completed version of *Parental Notification of Indian Status* (form ICWA-020) OR make a good faith attempt to provide the form to the parents, Indian custodian, or guardian of the child and inform them that they are required to complete and submit the form to the court.
- ☐ If there is **reason to believe** that the child is or may be an Indian child, additional inquiry is required. For more information about the duty of inquiry, see form ICWA-005-INFO.
- ☐ If, after additional inquiry, there is **reason to know** that the child is an Indian child, notice must be provided of the adoption request to the child's tribe or tribes, parents, Indian custodian, and the Bureau of Indian Affairs, using *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030). This form must be served by registered or certified mail, with return receipt requested.
- ☐ If it is determined that the child **is an Indian child** or this is a tribal customary adoption, see Adoption of an Indian Child, below.

Adoption of an Indian Child

If you are adopting an Indian child, fill out and bring to court the following additional forms:

- ☐ *Adoption of Indian Child,* form ADOPT-220
- ☐ *Parent of Indian Child Agrees to End Parental Rights,* form ADOPT-225

If you are adopting through a tribal customary adoption:

- ☐ Attach a copy of the tribal customary adoption order to *Adoption Request,* form ADOPT-200
- ☐ Attach a copy of the tribal customary adoption order to *Adoption Order,* form ADOPT-215

"Open" Adoption

If you want your child to have contact with their birth family, use *Contact After Adoption Agreement* (form ADOPT-310) to describe the kind of contact the birth family will have with your child. Fill out this form and bring it to your hearing.

ADOPT-200 Adoption Request

Clerk stamps date here when form is filed.

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If you are adopting more than one child, fill out an adoption request for each child.

1 Adopting parent(s)

a. Name: _____

b. Name: _____

Relationship to child: _____

Street address: _____

City: _____ State: _____ Zip: _____

Telephone number: _____

Lawyer (if any) *(name, address, telephone numbers, e-mail address, and State Bar number):*

_____

_____

_____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

2 County of filing

This *Adoption Request* in filed in this court because *(check all that apply):*

- ☐ The adopting parent or parents live in this county;
- ☐ The child was born in or the child now lives in this county;
- ☐ An office of the agency that placed the child for adoption is located in this county;
- ☐ An office of the department or public adoption agency that is investigating the request is located in this county;
- ☐ The placing birth parent or parents lived in this county when the adoptive placement agreement, consent, or relinquishment was signed;
- ☐ The placing birth parent or parents lived in this county when the request was filed;
- ☐ The child was freed for adoption in this county.

(To be completed by the clerk of the superior court if a hearing date is available.)

Hearing Date →

Hearing is set for:

Date: _____

Time: _____

Dept.: _____ Room: _____

Name and address of court if different from above:

_____

_____

To the person served with this request: If you do not come to this hearing, the judge can order the adoption without your input.

(Note: If the child is a dependent of the court, the *Adoption Request* must be filed in the county where the child was freed for adoption or the county where the adopting parent or parents reside. See Fam. Code, § 8714.)

3 Type of adoption

Check one of the following:

- ☐ Agency *(name):* _____ ☐ Relative ☐ Nonrelative
  - ☐ Joinder is being filed at same time as this *Adoption Request*. ☐ Joinder will be filed.
- ☐ Tribal customary adoption *(attach tribal customary adoption order)*
- ☐ Independent: ☐ Relative ☐ Nonrelative ☐ Additional Parent(s)
- ☐ Intercountry *(name of agency):* _____
  - ☐ Joinder is being filed at same time as this *Adoption Request*. ☐ Joinder will be filed.
- ☐ Stepparent adoption
- ☐ Stepparent adoption to confirm parentage. See form ADOPT-050-INFO to determine whether you are eligible for the stepparent adoption to confirm parentage process.

Your name: _____ **Case Number:**

4 Information about the child

a. The child's new name will be: _____

b. Sex: ☐ Female ☐ Male ☐ Nonbinary

c. Date of birth: _____ Age: _____

d. Child's address (*if different from address of adopting parent or parents*):
Street: _____ City: _____ State: _____ Zip: _____

e. Place of birth (*if known*): City: _____ State: _____ Country: _____

f. If the child is 12 or older, does the child agree to the adoption? ☐ Yes ☐ No

g. Date child was placed in the physical care of the adopting parents: _____

h. ☐ The child was conceived by assisted reproduction in compliance with Family Code section 7613.

i. ☐ The child is a dependent of the court. Juvenile Case No. _____ County: _____

5 Child's name before adoption (fill out ONLY for independent, stepparent, or tribal customary adoption)

Child's name before adoption: _____

6 Birth parents

Names of birth parents, if known: _____

7 Legal guardian

Does the child have a legal guardian? ☐ Yes ☐ No *(If yes, attach* Letters of Guardianship *and fill out below.)*

a. Date guardianship ordered: _____ c. Case number: _____

b. County: _____

8 Inquiry and notice under the Indian Child Welfare Act

a. ☐ The adopting parent(s) have made the inquiry required under law and attach *Indian Child Inquiry Attachment* (form ICWA-010(A)). For more information about the duty of inquiry, see form ICWA-005-INFO.

b. ☐ A completed version of *Parental Notification of Indian Status* (form ICWA-020) is attached OR a good faith attempt has been made to provide the form to the parents, Indian custodian, or guardian of the child and inform them that they are required to complete and submit the form to the court.

c. ☐ There is **reason to know** that this child is an Indian child. Notice of the adoption request will be provided to the child's tribe or tribes, parents, Indian custodian, and the Bureau of Indian Affairs, using *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030).

9 Adoption of an Indian child

a. ☐ This is an adoption of an Indian child. The adopting parents have filled out and attached *Adoption of Indian Child* (form ADOPT-220) and will bring *Parent of Indian Child Agrees to End Parental Rights* (form ADOPT-225) to the hearing.

b. ☐ This is a tribal customary adoption under Welfare and Institutions Code section 366.24. Parental rights have been modified under and in accordance with the attached tribal customary adoption order, and the child has been ordered placed for adoption.

10 Agency adoption questions

a. I/We have received information about the Adoption Assistance Program, the Regional Center, mental health services available through Medi-Cal or other programs, and federal and state tax credits that might be available. ☐ Yes ☐ No

b. All persons with parental rights agree that the child should be placed for adoption by the California Department of Social Services or a county adoption agency or a licensed adoption agency (Fam. Code, § 8700) and have signed a relinquishment form approved by the California Department of Social Services, and the time to revoke the relinquishment has expired or been waived. ☐ Yes ☐ No
If no, list the name and relationship to child of each person who has not signed the relinquishment form or whose time to revoke the relinquishment has not expired or been waived:

_____

Your name: _____ **Case Number:**

11 Independent adoption questions

a. A copy of the Independent Adoptive Placement Agreement from the California Department of Social Services is attached. (This is required in most independent adoptions; see Fam. Code, § 8802.) ☐ Yes ☐ No

b. All persons with parental rights agree to the adoption and have signed the Independent Adoptive Placement Agreement or consent on the appropriate California Department of Social Services form. ☐ Yes ☐ No
(If no, list the name and relationship to child of each person who has not signed the agreement form):

_____

c. I/We will file promptly with the department or delegated county adoption agency the information required by the department in the investigation of the proposed adoption. ☐ Yes ☐ No

d. ☐ This is an independent adoption involving additional parent(s): ☐ All persons with existing parental rights agree to this adoption and will maintain their existing parental rights. ☐ An agreement waiving termination of parental rights, signed by both the existing parent(s) and the adopting parent(s) is attached.

12 Stepparent adoption and confirmation of parentage questions

a. The birth parent *(name):* _____ ☐ has signed a consent ☐ will sign a consent.

b. The birth parent *(name):* _____ ☐ has signed a consent ☐ will sign a consent.

c. The adopting parent married or entered into a registered domestic partnership with the legal parent on *(date)*:
_____. *(For court use only. This does not affect social worker's recommendation. There is no waiting period.)*

d. ☐ I am seeking a stepparent adoption to confirm my parentage. At the time the child was born, I was married to or in a state-registered domestic partnership with the parent who gave birth or whose parentage was established through a gestational surrogacy process, and we remain in that union. See attached:
- ☐ Form ADOPT-205 *Declaration Confirming Parentage in Stepparent Adoption*
- ☐ Form ADOPT-206 *Declaration Confirming Parentage in Stepparent Adoption: Gestational Surrogacy*
- ☐ Declaration describing the circumstances of the child's conception.

e. The investigation or written report will be completed as follows *(choose one)*:
- ☐ I will choose someone to do an investigation or written report. I understand that the person I choose must be a licensed clinical social worker, a licensed marriage and family therapist, or work for a licensed private adoption agency. I will pay this person or agency directly.
- ☐ I would like the court to choose someone to do an investigation. I understand that the court can charge me money for this investigation.

f. ☐ This is a stepparent adoption involving an additional parent: ☐ All persons with existing parental rights agree to this adoption and will maintain their existing parental rights. ☐ An agreement waiving termination of parental rights, signed by both the existing parent(s) and the adopting parent(s) is attached.

13 Intercountry adoption questions

a. ☐ This adoption may be subject to the Hague Adoption Convention (*form ADOPT-216 must be filed with this request*).

b. ☐ This is an adoption conducted under the requirements of the Hague Adoption Convention and the child has already moved with the adopting parent(s) to another Hague Convention member country or will be moving at the conclusion of this adoption.
Child will be moving or has moved to (name of country): _____
Adopting parent(s): ☐ seek(s) a California adoption ☐ will be petitioning for a Hague Adoption Certificate ☐ will be seeking a Hague Custody Declaration.

c. ☐ This is an intercountry adoption that was finalized in another country before the child entered the United States with the adopting parent(s).
Date the child entered the United States: _____
See form ADOPT-050-INFO for a list of documents to attach to this *Adoption Request*.

Your name: _____ **Case Number:**

14 Contact after adoption

Contact After Adoption Agreement (form ADOPT-310) ☐ is attached ☐ will not be used

☐ will be filed at least 30 days before the adoption hearing ☐ is undecided at this time.

☐ This is a tribal customary adoption. Postadoption contact is governed by the attached tribal customary adoption order.

15 Consent for adoption

Complete all sections that apply to your adoption:

a. ☐ The consent of the ☐ birth parent ☐ presumed father is not necessary because *(check the applicable reasons under Fam. Code, § 8606):*

(1) ☐ The parent has been judicially deprived of the custody and control of the child.

(2) ☐ The parent has voluntarily surrendered the right to custody and control of the child in a judicial proceeding in another jurisdiction, under a law of that jurisdiction providing for the surrender.

(3) ☐ The parent has deserted the child without providing information to identify the child.

(4) ☐ The parent has relinquished the child under Family Code section 8700.

(5) ☐ The parent has relinquished the child for adoption to a licensed or authorized child-placing agency in another jurisdiction.

b. ☐ A court ended the parental rights of:

Name: _____ Relationship to child: _____ on *(date):* _____

Name: _____ Relationship to child: _____ on *(date):* _____

(Enter the date of the court order ending parental rights and attach a copy of the order.)

c. ☐ The child is the subject of a tribal customary adoption order under Welfare and Institutions Code section 366.24, which has modified the parental rights of *(Attach a copy of the order):*

Name: _____ Relationship to child: _____ on *(date):* _____

Name: _____ Relationship to child: _____ on *(date):* _____

Name: _____ Relationship to child: _____ on *(date):* _____

d. ☐ I/We will ask the court to end the parental rights of *(attach copy of* Petition to Terminate Parental Rights *or* Application for Freedom From Parental Custody, *if filed):*

Name: _____ Relationship to child: _____

Name: _____ Relationship to child: _____

e. ☐ Adopting parent has custody of the child by court order or by agreement with the other parent, and each of the following persons with parental rights has not contacted the child and has not paid for the child's care, support, and education for one year or more when able to do so. (Fam. Code, § 8604(b).)

Name: _____ Relationship to child: _____

Name: _____ Relationship to child: _____

Name: _____ Relationship to child: _____

f. ☐ The child has been abandoned as follows:

(1) ☐ The child has been left by the child's parent or parents with no way to identify the child.

(2) ☐ The child has been left in the custody of another person by both parents or the sole parent for six months without providing for the child's support, or without communication from the parent or parents, with the intent to abandon the child.

(3) ☐ One parent has left the child in the care and custody of the other parent for one year or longer without providing for the child's support or without communication from the parent, with the intent to abandon the child.

(If any of the above boxes are checked, adopting parent must also check item 15d and file an Application for Freedom From Parental Custody. *See Fam. Code, § 7822(a).)*

Your name: _____ **Case Number:**

15 g. ☐ The consent of the presumed father is not required because he did not become a presumed father before the mother's relinquishment or consent became irrevocable or the mother's parental rights were terminated. (Fam. Code, § 8604(a).)

h. ☐ Each of the following persons with parental rights has died:
Name: _____ Relationship to child: _____
Name: _____ Relationship to child: _____

16 **Suitability for adoption**

Each adopting parent:

a. Is at least 10 years older than the child or meets the criteria in Family Code section 8601(b);
b. Will treat the child as his or her own;
c. Will support and care for the child;
d. Has a suitable home for the child; *and*
e. Agrees to adopt the child.

17 **Requests to court**

☐ I/We ask the court to approve the adoption and to declare that the adopting parents and the child have the legal relationship of parent and child, with all the rights and duties of this relationship, including the right of inheritance.

☐ I/We ask the court to date its order approving the adoption as of an earlier date *(date):* _____ for the following reason (Fam. Code, § 8601.5):

_____

_____

(Enter a date no earlier than the date parental rights were ended.)

☐ This is a tribal customary adoption. I/We ask the court to approve the adoption and to declare that the adopting parents and the child have the legal relationship of parent and child, with all of the rights and duties stated in the attached tribal customary adoption order and in accordance with Welfare and Institutions Code section 366.24.

18 If a lawyer is representing you in this case, the lawyer must sign here:

Date: _____ _____ ▶ _____
Type or print lawyer's name *Signature of lawyer for adopting parent(s)*

19 I declare under penalty of perjury under the laws of the State of California that the information in this form and all its attachments is true and correct to my knowledge. This means that if I lie on this form, I am guilty of a crime.

Date: _____ _____ ▶ _____
Type or print your name *Signature of adopting parent*

Date: _____ _____ ▶ _____
Type or print your name *Signature of adopting parent*

NOTICE—ACCESS TO AFFORDABLE HEALTH INSURANCE: Do you or someone in your household need affordable health insurance? If so, you should apply for Covered California. Covered California can help reduce the cost you pay toward high-quality affordable health care. For more information, visit *www.coveredca.com*. Or call Covered California at 1-800-300-1506 (English) or 1-800-300-0213 (Spanish).

Your name: _____

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ADOPT-206

Case Number:

Declaration Confirming Parentage in Stepparent Adoption: Gestational Surrogacy

☐ This form is attached to Form ADOPT-200, *Adoption Request.*

This optional form may be attached to the form ADOPT-200 if the adopting parent was married to or in a state-registered domestic partnership with the parent who established parentage through a gestational surrogacy process. You may instead attach a declaration in another format containing substantially the same information. The legal parent through surrogacy and the adopting parent must complete separate declarations.

1 I *(write your name)* _____ declare as follows:

2 Relationship between the legal parent and the adopting parent seeking to confirm parentage *(check one):*

a. ☐ I am the parent of a child born through a gestational surrogacy process. Only my parentage was established through the Uniform Parentage Act or another proceeding related to the surrogacy. Before the birth of the child, I married or entered into a state-registered domestic partnership (including a domestic partnership or civil union from out-of-state that is legally equivalent to a marriage) with the adopting parent who is seeking to confirm parentage, *(name)*_____ , and we remain in that union.

b. ☐ I am the adopting parent seeking to confirm parentage. I married or entered into a state-registered domestic partnership with the parent whose parentage has been established for a child born through a gestational surrogacy process, *(name)*_____ , and we remain in that union.

3 We were married/registered as domestic partners on *(date you entered into your earliest union)* _____, before our child was born. A copy of our marriage certificate, registered domestic partner certificate, or certificate of out-of-state domestic partnership or civil union is attached.

4 Our child *(name of child to be adopted)* _____ was born on *(date)* _____ outside of the state of California. A copy of our child's birth certificate is attached.

5 ☐ Our child was conceived through assisted reproduction in compliance with Family Code section 7613 as described below. (*Describe how your child was conceived and whether you used a known or unknown donor. A letter from your sperm bank or a written donor agreement verifying conception by assisted reproduction should be attached. If you used a known donor without a sperm bank or written donor agreement, you should seek legal advice before submitting this form.)*

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Your name: _____

Case Number:

6 ☐ *If there are any other persons who are or may be the child's parents, describe these persons' relationship to the child, including their names, the ways in which these persons act as parents to the child, and whether these persons consent to the adoption:* _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____ _____ ▶ _____

Type or print your name *Sign name*

ADOPT-210 Adoption Agreement

Clerk stamps date here when form is filed.

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Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 Adopting parent(s)

a. Name: _____

b. Name: _____

Relationship to child: _____

Address *(skip this if you have a lawyer):* _____

City: _____ State: _____ Zip: _____

Telephone number: _____

Lawyer (if any) *(name, address, telephone numbers, e-mail address, and State Bar number):* _____

2 Information about the child

Child's name before adoption: _____

Child's name after adoption: _____

Date of birth: _____ Age: _____

Signing this form:

- *Adoptions usually require a hearing where most signatures on this form must be completed in front of a judge.*
- *Item 4b may be signed before the hearing.*
- *If this is a stepparent adoption to confirm parentage involving a spouse or registered domestic partner who gave birth to the child or established parentage over a child born through gestational surrogacy during the union, usually no hearing is required and you may sign this form in front of a proper witness. See item 8a for instructions on having your signature properly witnessed. If the court orders a hearing in this case, you must sign this form at the hearing in front of the judge.*
- *All other signatures must be signed at a hearing, in front of a judge, unless waived by the judge for good cause.*

3

I am the child listed in 2 and I agree to the adoption. *(Not required in the case of a tribal customary adoption under Welf. & Inst. Code, § 366.24.)*

Date: _____ _____ ▶ _____

Type or print your name — *Signature of child (child must sign if 12 or older; optional if child is under 12)*

4

*If there is only **one** adopting parent, read and sign below.*

a. I am the adopting parent listed in 1, and I agree that the child will:

(1) Be adopted and treated as my legal child (Fam. Code, § 8612(b)) *and*

(2) Have the same rights as a natural child born to me, including the right to inherit my estate.

Date: _____ _____ ▶ _____

Type or print your name — *Signature of adopting parent*

b. I am married to, or am the registered domestic partner of, the adopting parent listed in (1), and I am not a party to this adoption. I agree to his or her adoption of the child.

Date: _____ _____ ▶ _____
Type or print your name *Signature of spouse or registered domestic partner (may be signed before hearing)*

5 *If there are **two** adopting parents, read and sign below.*
We are the adopting parents listed in (1), and we agree that the child will:

a. Be adopted and treated as our legal child (Fam. Code, § 8612(b)) and
b. Have the same rights as a natural child born to us, including the right to inherit our estate.

I agree to the other parent's adoption of the child.

Date: _____ _____ ▶ _____
Type or print your name *Signature of adopting parent*

I agree to the other parent's adoption of the child.

Date: _____ _____ ▶ _____
Type or print your name *Signature of adopting parent*

6 *If this is a tribal customary adoption, read and sign below.*
I/we are the adopting parents listed in (1), and I/we agree that the child will:

a. Be adopted and treated as my/our legal child (Fam. Code, § 8612(b)) and
b. Have the same rights and duties stated in the tribal customary adoption order dated _____ *(copy attached).*

If two adopting parents, we agree to the other parent's adoption of the child.

Date: _____ _____ ▶ _____
Type or print your name *Signature of adopting parent*

Date: _____ _____ ▶ _____
Type or print your name *Signature of adopting parent*

7 *For stepparent adoptions only:*
If you are the legal parent of the child listed in (2), read and sign below.
I am the legal parent of the child and am the spouse or registered domestic partner of the adopting parent listed in (1), and I agree to his or her adoption of my child.

Date: _____ _____ ▶ _____
Type or print your name *Signature of legal parent*

Your name: _____ **Case Number:**

8 **Executed *(check one):***

a. ☐ This form was signed outside of a hearing. *(Select this option only for a stepparent adoption involving a spouse or partner who gave birth to the child during the union, where the court did not order a hearing for good cause.)*

(1) ☐ This form was signed **in** California.
This form was signed in front of the following type of witness *(check one):*
- ☐ Notary public *(the notary acknowledgment is attached)*
- ☐ Court clerk
- ☐ Probation officer
- ☐ Qualified court investigator
- ☐ Authorized representative of a licensed adoption agency
- ☐ County welfare department staff member

(2) ☐ This form was signed **outside** of California.
This form was signed in front of the following type of witness *(check one):*
- ☐ Notary public *(the notary acknowledgment is attached)*
- ☐ Other person authorized to perform notarial acts *(proof of notarization is attached)*
- ☐ Authorized representative of an adoption agency that is licensed in the state or country where this form was signed

(3) Witness information
This form was signed in: *(county)* _____ *(state)* _____ *(country)* _____
Name of witness: _____
Agency witness works for *(if applicable):* _____
Date: _____
Witness signature: ▶ _____

b. ☐ This form was signed at a hearing in front of a judicial officer. *(The judge will date and sign the form below.)*

Date: _____

_____
Judge (or Judicial Officer)

ADOPT-215 Adoption Order

Clerk stamps date here when form is filed.

DRAFT
NOT APPROVED BY THE JUDICIAL COUNCIL

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 Adopting parent(s)

a. Name: _____

b. Name: _____

Relationship to child: _____

Street address: _____

City: _____ State: _____ Zip: _____

Daytime telephone number: _____

Lawyer (if any) *(name, address, telephone number, e-mail address, and State Bar number):* _____

2 Information about the child

Child's name after adoption: _____

First name: _____

Middle name: _____

Last name: _____

Date of birth: _____ Age: _____

Place of birth *(if known):* _____

City: _____ State: _____ Country: _____

3 Name of adoption agency *(if any):* _____

4 Hearing details

Hearing date: _____ Dept.: _____ Div.: _____ Rm.: _____

Judicial officer: _____ Clerk's office telephone number: _____

People present at the hearing:

- ☐ Adopting parent(s)
- ☐ Lawyer for adopting parent(s)
- ☐ Child
- ☐ Child's lawyer
- ☐ Parent keeping parental rights: _____
- ☐ Other people present *(list each name and relationship to child):*
  - a. _____
  - b. _____

  If there are more names, attach a sheet of paper, write "ADOPT-215, Item 4" at the top, and list the additional names and each person's relationship to child.

☐ The hearing is waived pursuant to Family Code section 9000.5 *(Check this box only if this is an adoption confirming parentage of a parent who was married to or in a state-registered domestic partnership with the legal parent at the time the child was born.)*

Judge will fill out section below.

5 The judge finds that the child *(check all that apply):*

a. ☐ Is 12 or older and agrees to the adoption

b. ☐ Is under 12

c. ☐ Is not required to consent because this is a tribal customary adoption.

Your name: _____ **Case Number:**

6 The judge has reviewed the report and other documents and evidence and finds that each adopting parent:

a. Is at least 10 years older than the child or meets the criteria in Fam. Code, § 8601(b);
b. Will treat the child as his or her own;
c. Will support and care for the child;
d. Has a suitable home for the child; *and*
e. Agrees to adopt the child.

7 ☐ This case is an adoption by a relative petitioned under Family Code section 8714.5.

☐ The adopting relative ☐ The child, who is 12 or older, has requested that the child's name before adoption be listed on this order. (Fam. Code, § 8714.5(g).) The child's name before adoption was:

First name: _____ Middle name: _____ Last name: _____

8 ☐ The child is an Indian child. The judge finds that this adoption meets the placement requirements of the Indian Child Welfare Act or that there is good cause to give preference to these adopting parents. The clerk will fill out **13** below.

9 ☐ The judge approves the *Contact After Adoption Agreement* (ADOPT-310)

☐ As submitted ☐ As amended on ADOPT-310

10 This is a tribal customary adoption. The tribal customary adoption order of the _____ tribe dated _____ containing ___ pages and attached hereto is fully incorporated into this order of adoption.

11 ☐ This is an adoption under the Hague Adoption Convention. *Verification of Compliance with Hague Adoption Convention Attachment* (form ADOPT-216) is attached and fully incorporated into this order.

12 ☐ This is an adoption involving an additional parent or parents. ☐ All persons with existing parental rights agreed to this adoption and will maintain their existing parental rights. ☐ An agreement waiving termination of parental rights, signed by both the existing parent(s) and the adopting parent(s), was filed with the court.

13 The judge believes the adoption is in the child's best interest and orders this adoption.

The child's name after adoption will be:

First name: _____ Middle name: _____ Last name: _____

The adopting parent or parents and the child are now parent and child under the law, with all the rights and duties of the parent-child relationship or, in the case of a tribal customary adoption, all the rights and duties set out in the tribal customary adoption order and Welfare and Institutions Code section 366.24.

☐ The judge believes it will serve public policy and the best interest of the child to grant the request of the adopting parent or parents for the court to make this order effective as of *(date):* _____.

Date: _____ _____

(Date of Signature) *Judge (or Judicial Officer)*

Clerk will fill out section below.

14 **Clerk's Certificate of Mailing**

For the adoption of an Indian child, the clerk certifies:

I am not a party to this adoption. I placed a filed copy of:

☐ *Adoption Request* (form ADOPT-200) ☐ *Adoption of Indian Child* (form ADOPT-220)

☐ *Adoption Order* (form ADOPT-215) ☐ *Contact After Adoption Agreement* (form ADOPT-310)

in a sealed envelope, marked "Confidential" and addressed to:

Chief, Division of Social Services
Bureau of Indian Affairs
1849 C Street, NW
Mail Stop 310-SIB
Washington, DC 20240

The envelope was mailed by U.S. mail, with full postage, from:

Place: _____ on *(date):* _____

Date: _____ Clerk, by: _____, Deputy

Item number: 28

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Family Law: Changes to Supervised Visitation Standard and Form
Amend standard 5.20; revise form FL-324

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Gabrielle Selden 415-865-8085, Shelly La Botte 916-643-7065

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Project Summary: As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration.

d. AB 1165 (Bauer-Kahan) Child custody: supervised visitation (Ch. 823, Statutes of 2019)
Revises requirements for professional providers of supervised visitation services in child custody matters.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

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www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-18

Title
Family Law: Changes to Supervised Visitation Standard and Form

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Stds. Jud. Admin., standard 5.20; revise form FL-324

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Action Requested
Review and submit comments by June 10, 2020

Proposed Effective Date
January 1, 2021

Contact
Gabrielle D. Selden, 415-865-8085
gabrielle.selden@jud.ca.gov

Shelly LaBotte, 916-643-7065
shelly.labotte@jud.ca.gov

Executive Summary and Origin

The Family and Juvenile Law Advisory Committee proposes changes to one standard of judicial administration and one form relating to supervised visitation providers to comply with the statutory changes to Family Code section 3200.5, enacted by Assembly Bill 1165 (Bauer-Kahan; Stats. 2019, ch. 823).

Background

Family Code section 3200 was adopted in 1996 to provide specific guidelines for the Judicial Council in developing standards concerning supervised visitation providers in contested child custody cases in family court. In response, effective January 1, 1998, the Judicial Council adopted standard 5.20 of the California Standards of Judicial Administration. In 2012, the Legislature enacted Family Code section 3200.5, which incorporated much of the language in standard 5.20, but elevated many of the suggested best practices provisions of standard 5.20 to mandatory requirements in section 3200.5. The legislation requires that any standards for supervised visitation providers adopted by the Judicial Council conform to sections 3200 and 3200.5.

The most recent changes to Family Code section 3200.5 create additional requirements for professional supervised visitation providers. Effective January 1, 2021, in addition to current requirements, a professional supervised visitation provider must:

- Complete a Live Scan criminal background check before providing supervised visitation services;
- Register as a TrustLine provider;[1]
- Complete a minimum of 12 hours of classroom instruction in the subjects listed in the statute;
- Complete training on conflicts of interest, including the acceptance of gifts;
- Complete a minimum of 3 hours of training on the screening, monitoring, and termination of visitation; 3 hours on the developmental needs of children; 3 hours on issues relating to substance abuse, child abuse, sexual abuse, and domestic violence; and 1 hour on basic knowledge of family law;
- Complete training relating to child abuse reporting laws through an online training course required for mandated reporters provided by the state Department of Social Services; and
- Sign the *Declaration of Supervised Visitation Provider* (form FL-324) to declare that the professional provider meets the training and qualifications, and sign a separate, updated form FL-324 each time the provider submits a report to the court.

According to the author of AB 1165:

> The combination of the enhanced requirements will help ensure that paid visitation monitors are adequately trained to look for warning signs, to understand whether and how they can intervene or report problems, when they might need to terminate a visitation in the interest of child safety, and ensure that these monitors pose no risks to children.[2]

The Proposal

Amendments to Standard 5.20

Standard 5.20 would be amended to conform to the amendments to Family Code section 3200.5. Specifically, the standard would be amended as follows:

- Subdivision (b) (Definitions) would be amended to include the definition of "TrustLine provider." This subdivision would also be reorganized to include all terms that are

[1] TrustLine was created by the California Legislature in 1987. It is a state registry of in-home child care providers, tutors, in-home counselors, and child care staff at ancillary child care centers who have passed a background screening. For more information, visit *www.trustline.org*. Under the Health and Safety Code, a person will be prohibited from being a professional supervised visitation provider if that person he or she is either denied TrustLine registration by the Department of Social Services or the person's TrustLine registration is revoked.

[2] Off. of Assem. Floor Analysis, analysis of Assem. Bill No. 1165 (Sept. 5, 2019), p. 2, *https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB1165*.

defined in other subdivisions of the standard, including "nonprofessional provider" in (d) and "professional provider" in (e).

- Subdivision (e) (Qualifications of professional providers) would be changed to require that a professional provider complete a Live Scan criminal background check before providing supervised visitation services. Other changes would be as follows:
  - Subdivision (e)(11) would be changed to require a professional provider to register as a TrustLine provider;
  - Subdivision (e)(11)(A) and (B) would be added to specify that a person is ineligible to be a professional provider if the state Department of Social Services denies or revokes that person's TrustLine registration;
  - Subdivision (e)(13) would be amended to require the professional provider to sign and submit to the court a *Declaration of Supervised Visitation Provider* (form FL-324); and
  - Subdivision (e)(14) would be added to specify that the professional provider must sign a separate, updated form FL-324 each time the provider submits a report to the court;
- Subdivision (f) (Training for providers) would be amended as follows:
  - The title of this subdivision would be changed to "Training for professional providers" because the majority of training requirements in this subdivision pertain only to professional providers under Family Code section 3200.5;
  - Subdivision (f)(1), which does not discuss required training for professional providers but recommends that courts provide informational materials to all providers, would be moved to the end of the standard and relettered as (r);
  - Subdivision (f)(2) would be relettered as (f)(1) and amended to require that, before providing services, a professional provider must complete 24 hours of training, including at least 12 hours of classroom instruction in the subjects listed in (f)(1)(A) through (K);
  - Subdivision (f)(1)(H) would clarify that training on conflicts of interest include the acceptance of gifts;
  - Subdivision (f)(2) would be added to provide that at least 3 hours of the 24 hours required must be on the screening, monitoring, and termination of visitation; 3 hours must be on the developmental needs of children; 3 hours must be on issues relating to substance abuse, child abuse, sexual abuse, and domestic violence; and 1 hour must be on basic knowledge of family law;
  - Subdivision (f)(3) would be added to require a professional provider to complete training relating to child abuse reporting laws through an online training course required for mandated reporters that is provided by the state Department of Social Services; and

In addition, subdivision (r) (Informational materials and procedures) would be added and would contain the language moved from existing (f)(1). It would also include a new subdivision (r)(2) that, by January 1, 2022, each court should develop local rules that establish procedures for processing and maintaining form FL-324, along with the professional provider's original report required by (j)(3) of standard 5.20.

The proposed new language in (r)(2) would address issues that courts, statewide providers, and grantee programs have raised to Judicial Council staff. They seek guidance about form FL-324; specifically, what the provider and the court should do with the form now that Family Code section 3200.5 requires that the provider "shall sign a separate, updated form each time the professional provider submits a report to the court."

Because these issues concern internal local court procedures, it would not be appropriate to include a specific process in the standard. Instead, the committee proposes that courts adopt, by January 1, 2022, a local rule for processing and maintaining the form and report.

Revisions to form FL-324

Declaration of Supervised Visitation Provider (form FL-324) would be revised as required to reflect the amendments to Family Code section 3200.5. Specifically, the following revisions would be made to the form:

- Item 2 would include new check boxes for the provider to indicate completion of a Live Scan criminal background check and registration as a TrustLine provider; and
- The form would be changed from optional to mandatory use because it is specifically identified in Family Code section 3200.5 as the form needed to comply with the statute.

The form would also be revised to include technical and organizational changes. For example, references to "Plaintiff" and "Defendant" in the header would be deleted to conform form FL-324 to others in the FL series. In addition, to limit the form to one page, the language in items 1, 2, and 3 would be modified to avoid redundancy while maintaining the substantive meaning of those items.

Alternatives Considered

The committee proposes changes described in this report to conform standard 5.20 and form FL-324 to the specific statutory mandates of Family Code section 3200.5 No other alternatives were considered.

Fiscal and Operational Impacts

The legislative mandate would result in additional costs to professional supervised visitation providers for one-time fees to complete a Live Scan background check and register with TrustLine. For Live Scan, there is a fee required to be paid to the state Department of Justice for the criminal history record checks. Other fees may vary, including fees to cover the Live Scan

operator's cost for rolling the fingerprint images.[3] Currently, the fee payable to the Department of Social Services for TrustLine registration is $124.

In addition, the requirement for classroom training could result in increased costs for professional providers' training. However, this is mandated by law, and there is a strong interest in maintaining a pool of professional providers who are adequately trained and skilled in providing family court-ordered supervised visitation and exchange services.

The impact to the courts includes costs to accept and review updated form FL-324 submitted by professional providers of supervised visitation. This step, however, is legislatively mandated to inform the court and the parties that the provider was qualified and met the training requirements to make the report at the time it was submitted to the court.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?
- Should the standard be amended to require courts to have a local rule to handle form FL-324? Is there an alternative that your court would suggest?

Attachments and Links

1. Cal. Standards of Judicial Administration, standard 5.20, at pages 6–8
2. Form FL-324, at page 9
3. Link A: Assembly Bill 1165, *https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1165*

[3] For a list of Live Scan processing fees, visit *https://oag.ca.gov/sites/all/files/agweb/pdfs/fingerprints/forms/fees.pdf*.

Standard 5.20 of the California Standards of Judicial Administration would be amended, effective January 1, 2021, to read:

Standard 5.20. Uniform standards of practice for providers of supervised visitation

(a) * * *

(b) Definitions

~~Family Code section 3200 defines the term "provider" as including any individual or supervised visitation center that monitors visitation. Supervised visitation is contact between a noncustodial party and one or more children in the presence of a neutral third person.~~

(1) A "nonprofessional provider" is any person who is not paid for providing supervised visitation services.

(2) A "professional provider" is any person who is paid for providing supervised visitation services, or an independent contractor, employee, intern, or volunteer operating independently or through a supervised visitation center or agency.

(3) A "provider" is defined by Family Code section 3200 as including any individual or supervised visitation center that monitors visitation.

(4) "Supervised visitation" is contact between a noncustodial party and one or more children in the presence of a neutral third person.

(5) "TrustLine provider." For purposes of this rule, a "TrustLine provider" is a professional supervised visitation provider who is registered on "TrustLine," a database that is administered by the California Department of Social Services.

(c) * * *

(d) Qualifications of nonprofessional providers

~~A "nonprofessional provider" is any person who is not paid for providing supervised visitation services.~~ Unless otherwise ordered by the court or stipulated by the parties, the nonprofessional provider must:

(1)–(2) * * *

(e) Qualifications of professional providers

~~A "professional provider" is any person paid for providing supervised visitation services, or an independent contractor, employee, intern, or volunteer operating independently or through a supervised visitation center or agency.~~ The professional provider must:

(1)–(9) * * *

(10) ~~Meet the training requirements stated in (f); and~~ Complete a Live Scan criminal background check, at the expense of the provider or the supervised visitation center or agency, before providing visitation services;

(11) ~~Sign a declaration or *Declaration of Supervised Visitation Provider* (form FL-324) stating that all requirements to be a professional provider have been met.~~ Be registered as a TrustLine provider under chapter 3.35 (commencing with section 1596.60) of division 2 of the Health and Safety Code. Notwithstanding any other law, a person is ineligible to be a professional provider if the state Department of Social Services either:

(A) Denies that person's TrustLine registration under Health and Safety Code sections 1596.605 or 1596.607; or

(B) Revokes that person's TrustLine registration under Health and Safety Code section 1596.608;

(12) Meet the training requirements listed in (f);

(13) Sign a *Declaration of Supervised Visitation Provider* (form FL-324) stating that all requirements to be a professional provider have been met; and

(14) Sign a separate, updated form FL-324 each time the professional provider submits a report to the court.

(f) Training for professional providers

~~(1) Each court is encouraged to make available to all providers informational materials about the role of a provider, the terms and conditions of supervised visitation, and the legal responsibilities and obligations of a provider under this standard.~~

~~(2)~~(1) ~~In addition,~~ Before providing services, professional providers must ~~receive~~ complete 24 hours of training, including at least 12 hours of classroom instruction in the following subjects:

(A)–(G) * * *

(H) Conflicts of interest, including the acceptance of gifts;

(I)–(K) * * *

(2) Of the 24 hours of training required in (1), the training must include at least:

(A) Three hours on the screening, monitoring, and termination of visitation;

(B) Three hours on the developmental needs of children;

(C) Three hours on issues relating to substance abuse, child abuse, sexual abuse, and domestic violence; and

(D) One hour on basic knowledge of family law.

(3) On or after January 1, 2021, to complete the required training in child abuse reporting laws under (1)(B), a professional provider must complete an online training required for mandated reporters that is provided by the state Department of Social Services. This mandatory online training is not intended to increase the total of 24 hours of training required in (1).

(g)–(q) * * *

(r) Informational materials and procedures

(1) Each court is encouraged to make available to all providers informational materials about the role of a provider, the terms and conditions of supervised visitation, and the legal responsibilities and obligations of a provider under this standard.

(2) By January 1, 2022, each court must develop local rules that establish procedures for processing and maintaining form FL-324, along with the professional provider's original report required by (j)(3) of this standard.

SUPERVISED VISITATION PROVIDER *(Name and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*:	*DRAFT:* *Not approved by the Judicial Council* *03/19/2020*
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER: RESPONDENT: OTHER PARTY/PARENT:	
DECLARATION OF SUPERVISED VISITATION PROVIDER	CASE NUMBER:

1. I submit this form to declare that I comply with all applicable requirements for a provider of supervised visitation as defined under Family Code section 3200.5.
2. ☐ I declare that I am a professional provider of supervised visitation; I am paid for providing supervised visitation services as an independent contractor, employee, intern, or volunteer operating independently or through a supervised visitation center or agency; and I meet the qualifications for this position under Family Code section 3200.5 as follows *(check all that apply):*
   - ☐ I am 21 years of age or older.
   - ☐ I have no record of a conviction for driving under the influence (DUI) within the last five years.
   - ☐ I have not been on probation or parole for the last 10 years.
   - ☐ I have no record of a conviction for child molestation, child abuse, or other crimes against a person.
   - ☐ I have proof of automobile insurance for transporting the child.
   - ☐ I have had no civil, criminal, or juvenile restraining orders within the last 10 years.
   - ☐ There is no current or past court order in which I am the person being supervised.
   - ☐ I agree to speak the language of the party being supervised and of the child, or I will provide a neutral interpreter over the age of 18 years of age who is able to do so.
   - ☐ I agree to adhere to and enforce the court order regarding supervised visitation.
   - ☐ I completed a Live Scan criminal background check before providing services.
   - ☐ I am registered as a TrustLine provider.
   - ☐ I meet the training requirements set forth under Family Code section 3200.5(d).
3. ☐ I declare that I am a nonprofessional provider of supervised visitation; I am not being paid to provide supervised visitation services; and *(check all that apply):*
   - ☐ I meet the qualifications under Family Code section 3200.5 as follows *(check all that apply):*
     - ☐ I have no record of a conviction for child molestation, child abuse, or other crimes against a person.
     - ☐ There is no current or past court order in which I am the person being supervised.
     - ☐ I agree to adhere to and enforce the court order regarding supervised visitation.
     - ☐ I will be transporting the child. ☐ I will not be transporting the child.
     - ☐ I will be transporting the child and I have proof of automobile insurance.
   - ☐ The court has ordered or the parties have stipulated to different qualifications *(see attachment).*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

_____ ▶ _____

(TYPE OR PRINT NAME) SIGNATURE OF DECLARANT

NOTICE: See standard 5.20 of the California Standards of Judicial Administration for further requirements that may apply.

Item number: 29

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Family Law: Changes to Spousal Support and Property Division Forms
(Approve form FL-349; revise forms FL-157, FL-343, and FL-345)

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Gabrielle Selden 415-865-8085, Gregory Tanaka 415-865-7671

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Item 3 of the annual agenda. Project Summary: Under current law spousal support orders terminate upon the remarriage of the obligee unless there is a stipulated order to the contrary, but as the Court of Appeal noted in In re Marriage of Martin (2019) 32 Cal.App.5th 1195, the Judicial Council form order for spousal support requires that a box terminating support upon remarriage be checked in order for that to apply. The court expressly directed the council to revise the form to make that a mandatory order with a check box only for those stipulating that it not apply.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

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www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-19

Title
Family Law: Changes to Spousal Support and Property Division Forms

Proposed Rules, Forms, Standards, or Statutes
Approve form FL-349; revise forms FL-157, FL-343, and FL-345

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Action Requested
Review and submit comments by June 10, 2020

Proposed Effective Date
January 1, 2021

Contact
Gabrielle D. Selden, 415-865-8085
gabrielle.selden@jud.ca.gov
Gregory Tanaka, 415-865-7671
gregory.tanaka@jud.ca.gov

Executive Summary and Origin

The Family and Juvenile Law Advisory Committee proposes revising two optional forms (FL-157, FL-343) and approving one new optional form (FL-349) relating to spousal support, as well as revising one optional form (FL-345) relating to property division in family law cases.

Form FL-157 would be revised to reflect the changes made to Family Code section 4320 by Assembly Bill 929 (Rubio; Stats. 2018, ch. 938). The proposed changes to form FL-343 respond to suggestions made specifically about this form by the court in *In re the Marriage of Craig and Cynthia Martin*. Proposed new form FL-349 responds to the needs of judicial officers who are required to make findings under Family Code section 4320 when issuing or modifying a judgment for spousal or partner support. Proposed revisions to form FL-345 respond to requests made by judicial officers to simplify a specific item relating to the assignment of debts in a judgment.

The Proposal

Spousal or Partner Support Declaration Attachment (form FL-157)

This optional form helps a party seeking a judgment for spousal or partner support comply with the factors that the courts must consider before issuing a judgment under Family Code section 4320. The form includes each statutory factor that the court must consider in ordering support and provides space for the party to write facts that address each factor.

The committee proposes revising this form to include the amendments to Family Code section 4320 enacted by AB 929. That bill amended section 4320(i) by describing the types of documented evidence of domestic violence that a party may submit for the court to consider before issuing a judgment for support. Specifically, the documented evidence of domestic violence under section 4320 can include but is not limited to (1) a plea of nolo contendere (no contest), (2) emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, (3) any history of violence against the supporting party by the supported party, (4) issuance of a protective order after a hearing under Family Code section 6340, and (5) a finding by the court during the pendency of a divorce, separation, or child custody proceeding that the spouse or domestic partner has committed domestic violence.

To conform to the changes to Family Code section 4320 enacted by AB 929, a new item titled "Family Code section 4320(i)" would be added to form FL-157 as item 13 and include the kind of "documented evidence of any history of domestic violence … between the parties" that is listed in the statute.

The committee also proposes a minor change to match the form's title in the footer with the correct title. The title in the footer appears as "Spousal or Partnership Support Declaration Attachment." The word "Partnership" in the footer would be changed to "Partner."

Spousal, Partner, or Family Support Order Attachment **(form FL-343)**

The committee proposes extensive changes to form FL-343, including a major reorganization that would expand the form from two to three pages.[1] As noted below, the major substantive changes proposed to the form relate to the termination of support and findings that the court must make under Family Code section 4320 before ordering support.

Termination of support

This form can be used by the court to make temporary orders and judgments for spousal or domestic partner support. The committee proposes several changes to this form.

The first change would be to make revisions that are consistent with the opinion of the Court of Appeal in *In re Marriage of Craig and Cynthia Martin* (2019) 32 Cal.App.5th 1195. In that case, the court urged the Judicial Council and local courts to change the language in their forms relating to Family Code section 4337.

Section 4337 provides that "[e]xcept as otherwise agreed by the parties in writing, the obligation of a party under an order for the support of the other party terminates upon the death of either party or the remarriage of the other party."

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[1] Generally, when more extensive changes are proposed to Judicial Council forms, to ensure that the form is easy read, proposed changes are not highlighted. To better analyze the proposed changes, commenters may want to review the current form FL-334 at *courts.ca.gov/documents/fl343.pdf*.

Form FL-343 currently includes a check box at item 6b to incorporate the language of section 4337. Item 6b provides that "[s]upport must be paid by check, money order, or cash. The support payor's obligation to pay support will terminate on the death of either party, remarriage, or registration of a new domestic partnership of the support payee."

Because section 4337 applies by operation of law, the court stated that a party should not have to check a box (affirmatively "opt-in") to have section 4337 apply to the party's case. Instead, the court stated that:

> …logic suggests that the parties should affirmatively opt-out of the statutory requirement in order to waive section 4337's application. We urge the Judicial Council of California and the local courts to revise their forms so that the parties must specifically check a box to waive section 4337's application.

In response, the committee proposes striking the current language in item 6b and reorganizing the text under a new heading. In the revised form, items 6a and 6b would be added, as follows:

6. **Termination (end) of support**
   a. By law, unless the parties otherwise agree in writing, the support payor's obligation to pay support will end on the death of either party, remarriage, or registration of a new domestic partnership of the support payee.

   b. □ Parties' agreement
      (1) □ The parties agree that the support payor's obligation to pay support will not end as described in a, but will continue on the death or either party, remarriage, or registration of a new domestic partnership of the supported party.
      (2) □ The parties agree that the support payor's obligation to pay support will end on *(specify):*

Findings on Family Code section 4320 factors

The second substantive change to the form would be to include a new item 3d for the court to indicate that its findings under Family Code section 4320 are either specified on the form itself, included in a numbered attachment, or specified in proposed new form FL-349, which would be attached to form FL-343.

The proposed changes to form FL-343 relating to section 4320 factors (along with proposed new form FL-349 [described below] would help judicial officers comply with their obligations before issuing or modifying an order for spousal or domestic partner support. Whereas Family Code section 4320 states that the court must "consider" each factor, case law provides that courts must make findings.

For example, the court in *In re Marriage of Geraci* (2006) 144 Cal.App.4th 1278 stated that "the trial judge must both recognize and *apply* each applicable statutory factor in setting spousal support. … Failure to do so is reversible error."

More recently, in *In re Marriage of Shimkus* (2016) 244 Cal.App.4th 1262, the court held that before terminating spousal support based on the changed circumstances, the trial court was required to issue a statement of decision and make findings on all of the statutory factors for ordering spousal support, since the court determined that obligor's counsel had made a request for findings.

Reorganization of form

The committee also proposes reorganizing the content of the items under more specific subject headings, breaking content up under the specific heading to make it easier to read and understand, and adding a third page to allow more space for the court to make its orders or the parties to write their agreement.

***Property Order Attachment to Judgment* (form FL-345)**

From time to time, committee staff receive suggestions to improve rules of court and Judicial Council forms from court professionals outside the regular invitation to comment cycle. These suggestions are recorded and considered for inclusion with other relevant proposals.

Staff received requests from judicial officers to change language in form FL-345, at item 2, Division of community property debts, relating to the assignment of debts in a judgment. Rather than circulating the form in its own invitation to comment, the committee proposes including it with forms FL-157 and FL-343 because, like those forms, FL-345 also relates to orders issued in a judgment.

Judicial officers requested that the following underlined sentences in item 2f be stricken from the form because they are not court orders:

> Each party will be solely responsible for paying the debts assigned to him or her and will hold the other harmless from those debts. <u>The parties understand that the creditors are not bound by this judgment. If a creditor seeks payment from the party who is not listed as responsible for the debt, that party can file a motion to seek reimbursement from the defaulting party.</u>

In response to the comment, the first sentence of 2f would be incorporated into another item on the form. However, the committee would appreciate comments about whether the form should still include language in the above section to inform the parties about how a creditor is not bound by the judgment, but that the person who has to pay the debt can go back to court and seek an order for reimbursement.

***Findings re Spousal or Partner Support Under Family Code Section 4320—Attachment* (form FL-349)**

As previously described, this new form would respond to the request of judicial officers who need to make findings before issuing or modifying a judgment for spousal or domestic partner support.

The five-page form would serve as an attachment to *Findings and Order After Hearing* (form FL-340), *Restraining Order After Hearing* (form DV-130), *Judgment* (form FL-180), the parties' written agreement, or another document specified by the party. The form itself would organize all Family Code section 4320 factors under the following headings: "Preliminary Findings," "Findings Regarding the Supported Party," "Findings Regarding the Supporting Party," "Documented Evidence of Domestic Violence and Criminal Convictions," and "Findings on Other Factors."

Alternatives Considered

Form FL-343

The committee considered different ways to revise the form before proposing the specific language to respond to the suggestions from the court in *In re the Marriage of Craig and Cynthia Martin*. Because of the clear direction from the court, the committee did not consider delaying the proposed changes to a future cycle.

The committee also considered removing references to "family support" from the form because of the changes made to the Internal Revenue Code with the enactment of the Tax Cuts and Jobs Act (TCJA) of 2018.[2] For federal tax purposes, family support used to be treated like spousal support (taxable as income to the recipient and tax deductible to the payor). After December 31, 2018, initial orders for spousal support are no longer taxable as income to the recipient and tax deductible to the payor for federal purposes. Modifications of spousal support, however, would maintain pre-TCJA tax treatment, unless the parties otherwise expressly agree in writing.

Although the federal tax laws changed relating to spousal and family support, state law did not change. California Revenue and Taxation Code was not amended to reflect the new federal tax treatment of spousal support. Thus, spousal support (or domestic partner support) and family support will continue to be taxable as income to the recipient and tax deductible to the payor for state tax purposes after December 31, 2018. So, despite the change to the federal tax laws, the committee decided to maintain references on the form to "family support" because the form could still be used by a party seeking an initial order for family support for *state* tax purposes. Similarly, it might be used to modify support orders. The committee seeks comments on whether this form continues to be used for family support.

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[2] The Tax Cuts and Jobs Act (Pub.L. No. 115-97 (Dec. 22, 2017) 131 Stat. 2054) amended the spousal support provisions of the Internal Revenue Code (IRC) by repealing the income tax deduction to the person who pays spousal support under a divorce or separation instrument. In addition, the new law repeals the corresponding inclusion of spousal support in the gross income of the recipient. These amendments apply to (1) any divorce or separation instrument executed after December 31, 2018, and (2) any modification of a divorce or separation instrument that expressly provides that the amendments made by this section of the IRC apply to such modifications.

Forms FL-157, and FL-345

The committee considered proposing changes to these optional forms in a later cycle, but believed it was appropriate to combine them with the proposed changes to FL-343.

Fiscal and Operational Impacts

The committee anticipates that this proposal will result in minor costs incurred by the courts to revise the form, train staff, and create new codes for case management programs. Those costs would likely be outweighed by the time saved by the court in obtaining the information necessary to make appropriate orders and findings.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Should references to "family support" be removed from form FL-343?
- Questions about form FL-345:
  (1) Should the information on the current form FL-345 (underlined below) continue to be included on the form?
  <u>The parties understand that the creditors are not bound by this judgment. If a creditor seeks payment from the party who is not listed as responsible for the debt, that party can file a motion to seek reimbursement from the defaulting party.</u>
  (2) If it should be included, please provide suggestions on the best way to convey the information.

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Forms FL-157, FL-343, FL-345, and FL-349, at pages 8–21
2. Link A: In re the Marriage of Martin, *https://law.justia.com/cases/california/court-of-appeal/2019/e069481.html*
3. Link B: Assem. Bill 929, *https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB929*

PETITIONER: RESPONDENT:	CASE NUMBER:

SPOUSAL OR PARTNER SUPPORT DECLARATION ATTACHMENT

☐ ***Declaration for Default or Uncontested Judgment*** **(form FL-170)** ☐ ***Supporting Declaration for Attorney's Fees and Costs Attachment*** **(form FL-158)**

☐ **Other** *(specify):*

1. **Spousal or domestic partner support.** I request that the court *(check all that apply)*
   a. ☐ enter a judgment for spousal or domestic partner support for ☐ Petitioner ☐ Respondent.
   b. ☐ modify the judgment for spousal or domestic partner support for ☐ Petitioner ☐ Respondent.
   c. ☐ deny the request to modify the judgment for spousal or domestic partner support.
   d. ☐ terminate jurisdiction to award spousal or domestic partner support to ☐ Petitioner ☐ Respondent.

2. ☐ **Attorney fees and costs.** I request that the court *(check one)*
   a. ☐ order my attorney fees and costs to be paid by ☐ my spouse or domestic partner ☐ a joined party *(specify):*

   b. ☐ deny the request for attorney fees and costs.

FACTS IN SUPPORT OF MY REQUEST

3. **Length of marriage or domestic partnership (legal relationship)** (Family Code section 4320(f))

		Length of legal relationship
a. (1)	Date of marriage:	
(2)	Date of separation:	
(3)	Time from date of marriage to date of separation:.....	_____ years _____ months
b. (1)	Date domestic partnership was registered:	
(2)	Date of separation:	
(3)	Time from date of registration of the domestic partnership to date of separation:	_____ years _____ months
c.	If applicable, total combined years and months for the marriage (3a(3)) and the domestic partnership (3b(3)):.....	_____ years _____ months

4. **Standard of living of the marriage or domestic partnership** (Family Code section 4320(a)) ☐ See Attachment 4

The standard of living established during the marriage or domestic partnership was *(describe, for example, type and frequency of vacations, value of home and other real estate, value of investments, type of vehicles owned, credit card use or nonuse):*

Form Approved for Optional Use
Judicial Council of California
FL-157 [Rev. January 1, 2021]

Family Code, §§ 270, 2030, 2032, 4320, 6344, 7640
www.courts.ca.gov

PETITIONER: RESPONDENT:	CASE NUMBER:

5. **Family Code section 4320(a)(1)**

a. The supported party has the following training, job skills, and work history: ☐ See Attachment 5a

b. The current job market for the job skills of the supported party described in item 3(a)(1) is: ☐ See Attachment 5b

6. **Family Code section 4320(a)(2)** ☐ See Attachment 6

Provide any facts that indicate the supported party's earning ability is, or is not, lower than it might be if the supported party had not had periods of unemployment because of the time needed to attend to domestic duties:

7. **Family Code section 4320(b)** ☐ See Attachment 7

Provide any facts that indicate that the supported party contributed to the education, training, career position, or license of the supporting party:

8. **Family Code section 4320(c)** ☐ See Attachment 8

a. The supporting party ☐ does ☐ does not have the ability to pay spousal or domestic partner support.

b. The supporting party's current gross income from employment or self-employment is:

c. The supporting party's current income from investments, retirement, other sources is:

d. The supporting party's current assets and their values and balances are:

PETITIONER: RESPONDENT:	CASE NUMBER:

8. e. The supporting party's standard of living is *(describe, for example, type and frequency of vacations, value of home and other real estate, value of investments, type of vehicles owned, credit card use or nonuse):*

9. **Family Code section 4320(d)**

The supported party ☐ does ☐ does not need support to maintain the standard of living enjoyed during the marriage or domestic partnership.

10. **Family Code section 4320(e)** ☐ See Attachment 10a

a. The supported party's assets and obligations, including separate property, are *(list values and balances):*

b. The supporting party's assets and obligations, including separate property, are *(list values and balances):*

☐ See Attachment 10b

PETITIONER: RESPONDENT:	CASE NUMBER:

11. Family Code section 4320(g) ☐ See Attachment 11

Provide any facts indicating whether the supported party is able to work without unduly interfering with the interests of the children in the supported party's care:

12. Family Code section 4320(h)

a. Petitioner's age is: Respondent's age is:

b. Petitioner's current health condition is *(describe):* ☐ See Attachment 12b

c. Respondent's current health condition is *(describe):* ☐ See Attachment 12c

13. Family Code section 4320(i)

Provide all documented evidence of any history of domestic violence, as defined in Family Code section 6211, between the parties or perpetrated by either party against either party's child, including but not limited to:

a. A plea of nolo contendere ("no contest") ☐ See Attachment 13a

b. Emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party. ☐ See Attachment 13b

c. Any history of violence against the supporting party by the supported party. ☐ See Attachment 13c

d. Issuance of a protective order after hearing under Family Code section 6340. ☐ See Attachment 13d

e. A finding by a court during the pendency of a divorce, separation, or child custody proceeding, or other proceeding under Family Code sections 6200–6409, that the spouse or domestic partner has committed domestic violence. ☐ See Attachment 13e

14. Additional factors (Family Code section 4320(j)–(n)) ☐ See Attachment 14

The court will also consider the following factors before making a judgment for spousal or domestic partner support:

a. The immediate and specific tax consequences for each party;

b. The balance of the hardships on each party;

c. The criminal conviction of an abusive spouse in reducing or eliminating support in accordance with Family Code section 4325;

d. The goal that the supported party will be self-supporting within a reasonable period of time; and

e. Any other factors the court determines are just and equitable.

Describe below any additional information that will assist the court in considering the above factors:

PETITIONER: RESPONDENT:	CASE NUMBER:

SPOUSAL, PARTNER, OR FAMILY SUPPORT ORDER ATTACHMENT

TO ☐ ***Findings and Order After Hearing*** **(form FL-340)** ☐ ***Judgment*** **(form FL-180)**
☐ ***Restraining Order After Hearing (CLETS-OAH)*** **(form DV-130)** ☐ **Other** *(specify):*
☐ **Parties' Stipulation (Written Agreement)**

☐ **THE COURT FINDS**
☐ **THE PARTIES STIPULATE (AGREE)**

1. **Temporary spousal or partner support**
   a. ☐ Modifies an order entered on *(date):*
   b. **Net income.** The parties' monthly income and deductions are as follows *(complete (1), (2), or both):*

	Total gross monthly income	Total monthly deductions	Total hardship deductions	Net monthly disposable income
(1) Petitioner: ☐ receiving TANF/CalWORKS	$	$	$	$
(2) Respondent: ☐ receiving TANF/CalWORKS	$	$	$	$

   c. ☐ A printout of a computer calculation of the parties' financial circumstances is attached for all required items not filled out above *(for temporary support only).*

2. **Judgment for spousal or partner support**
   a. ☐ Modifies a judgment entered on *(date):*
   b. ☐ The parties were married for *(specify):* months and years.
   c. ☐ The parties were registered as domestic partners or the equivalent for *(specify):* months and years.
   d. Findings on Family Code section 4320 factors. The court considered the parties' declarations and supporting documents regarding each Family Code section 4320 factor as stated in testimony, in *Spousal or Partner Support Declaration Attachment* (form FL-157) or in a similar written declaration filed with the court. The court's findings on the factors are
      (1) ☐ included in Attachment 2d.
      (2) ☐ included in *Findings re Spousal or Partner Support Factors Under Family Code Section 4320—Attachment* (form FL-349).
      (3) ☐ specified below:

PETITIONER: RESPONDENT:	CASE NUMBER:

2. e. ☐ The parties are both self-supporting.
   f. ☐ The standard of living established during the marriage or domestic partnership was *(describe):* ☐ See Attachment 2f.

THE COURT ORDERS

3. **Jurisdiction**
   a. ☐ The issue of spousal or partner support for the ☐ petitioner ☐ respondent is reserved for later determination.
   b. ☐ The court terminates jurisdiction over the issue of spousal or partner support for the ☐ petitioner ☐ respondent.
   c. ☐ The court's jurisdiction over the issue of spousal or partner support will end on *(specify date):*

4. **Support amount and payment terms**
   a. The ☐ petitioner ☐ respondent must pay to the ☐ petitioner ☐ respondent
      as ☐ temporary ☐ permanent ☐ spousal support ☐ family support ☐ partner support
      the following amount each month: $
   b. Support payments will begin *(date):*
   c. Support payments are:
      (1) ☐ payable through *(specify end date):*
      (2) ☐ payable on the: day of each month.
      (3) ☐ Other *(specify):*

5. **Earnings assignment**
   a. ☐ An earnings assignment for the support will issue as requested by ☐ petitioner ☐ respondent.
      Note: The payor of spousal, family, or partner support is responsible for the payment of support directly to the recipient until support payments are deducted from the earnings, and for any support not paid by the assignment.
   b. ☐ Service of the earnings assignment is stayed provided the payor is not more than *(specify number):* days late in paying spousal, family, or partner support.

6. **Termination (end) of support**
   a. By law, unless the parties otherwise agree in writing, the support payor's obligation to pay support will end on the death of either party, remarriage, or registration of a new domestic partnership of the support payee.
   b. ☐ **Parties' agreement**
      (1) ☐ The parties agree that the support payor's obligation to pay support will not end as described in 6a, but will continue on the death of either party, remarriage, or registration of a new domestic partnership of the supported party.
      (2) ☐ The parties agree that the support payor's obligation to pay support will end on *(specify):*

THIS IS A COURT ORDER.

PETITIONER: RESPONDENT:	CASE NUMBER:

7. ☐ **Family support orders.** This order is for family support.
   a. Both parties must complete and file with the court a *Child Support Case Registry Form* (form FL-191) within 10 days of the date of this order.
   b. The parents must notify the court of any change of information submitted within 10 days of the change by filing an updated form.
   c. A *Notice of Rights and Responsibilities (Health-Care Costs and Reimbursement Procedures) and Information Sheet on Changing a Child Support Order* (form FL-192) must be attached to the court order.

8. ☐ **Notice of change of employment**
   The parties must promptly inform each other of any change of employment, including the employer's name, address, and telephone number.

9. ☐ **Duty to become self-supporting**
   a. Notice: It is the goal of this state that each party must make reasonable good-faith efforts to become self-supporting as provided in Family Code section 4320. Failure to make reasonable good-faith efforts may be one of the factors considered by the court as a basis for modifying or terminating support.
   b. ☐ The ☐ petitioner ☐ respondent should make reasonable good-faith efforts to become self-supporting.
   c. ☐ Other *(specify):*

10. ☐ **Attachment to *Restraining Order After Hearing* (form DV-130)**
   a. This form is attached to *Restraining Order After Hearing (CLETS-OAH) (Order of Protection)* (form DV-130).
   b. The orders issued on this form (FL-343) do not expire on termination of the restraining orders issued on form DV-130.
   c. The parties must promptly inform each other of any change of employment, including the employer's name, address, and telephone number.

11. ☐ **Other orders *(specify):***

NOTICE: Any party required to pay support must pay interest on overdue amounts at the "legal" rate, which is currently 10 percent.

THIS IS A COURT ORDER.

PETITIONER: RESPONDENT:	CASE NUMBER:

PROPERTY ORDER ATTACHMENT TO JUDGMENT

1. **Division of community property assets**
   a. ☐ There are no community property assets.
   b. ☐ The court finds that the net value of the community estate is less than $5,000 and that the ☐ petitioner ☐ respondent cannot be found. Under Family Code section 2604, the entire community estate is awarded to the ☐ petitioner ☐ respondent.
   c. ☐ The petitioner will receive the following assets: ☐ See Attachment 1c.

   d. ☐ The respondent will receive the following assets: ☐ See Attachment 1d.

   e. The ☐ petitioner ☐ respondent will be responsible for preparing and filing a *Qualified Domestic Relations Order* (QDRO) to divide the following plan or retirement account(s) *(specify):*

   The fee for preparation of the QDRO will be shared as follows:

   f. ☐ Other orders:

   g. ☐ Each spouse will receive the assets listed above as his or her sole and separate property. The parties must execute any and all documents required to carry out this division.
   h. The court reserves jurisdiction to divide any community assets not listed here and enforce the terms of this order.
2. **Division of community property debts**
   a. ☐ There are no community property debts.
   b. ☐ All community debts have been paid by the ☐ petitioner ☐ respondent.
   The ☐ petitioner ☐ respondent must reimburse the other party: $
   The payment plan is as follows:

   c. ☐ The petitioner
   (1) is assigned the debts listed below;
   (2) is solely responsible for paying the debts listed below; and
   (3) will hold the respondent harmless from the debts. ☐ See attachment 2c.

Form Approved for Optional Use
Judicial Council of California
FL-345 [Rev. January 1, 2021]

PETITIONER: RESPONDENT:	CASE NUMBER:

d. ☐ The respondent
(1) is assigned the debts listed below;
(2) is solely responsible for paying the debts listed below; and
(3) will hold the petitioner harmless from the debts.

☐ See attachment 2d.

e. ☐ Other orders:

f. The court reserves jurisdiction to divide any community debts not listed here.

3. ☐ **Equalization of division of property and debt orders.** To equalize the division of the community property assets and debts, the ☐ petitioner ☐ respondent must pay to the other the sum of: $, payable as follows:

4. **Separate property**
a. ☐ The court confirms the following assets or debts as the sole separate property, or sole responsibility, of the petitioner:

b. ☐ The court confirms the following assets or debts as the sole separate property, or sole responsibility, of the respondent:

5. ☐ The settlement agreement between the parties dated: is attached and made a part of this judgment.

6. ☐ **Sale of property.** The following property will be offered for sale and sold for the fair market value as soon as a willing buyer can be found, and the net proceeds from the sale will be ☐ divided equally ☐ other *(specify):*

7. ☐ Other orders *(specify):*

PETITIONER: RESPONDENT:	CASE NUMBER:

FINDINGS RE SPOUSAL OR PARTNER SUPPORT UNDER FAMILY CODE SECTION 4320—ATTACHMENT

TO ☐ ***Findings and Order After Hearing*** **(form FL-340)** ☐ ***Judgment*** **(form FL-180)**
☐ ***Restraining Order After Hearing (CLETS-OAH)*** **(form DV-130)** ☐ **Other** *(specify):*
☐ **Parties' Stipulation (Written Agreement)**

THE COURT FINDS

PRELIMINARY FINDINGS:

1. **Standard of living of the marriage or domestic partnership** (Family Code section 4320(a)) ☐ See Attachment 1
The standard of living established during the marriage or domestic partnership was *(describe):*

2. **Length of marriage or domestic partnership (legal relationship)** (Family Code section 4320(f))

Length of legal relationship

a. (1) Date of marriage:
(2) Date of separation:
(3) Time from date of marriage to date of separation:..... _____ years _____ months

b. (1) Date domestic partnership was registered:
(2) Date of separation:
(3) Time from date of registration of the domestic partnership to date of separation: _____ years _____ months

c. If applicable, total combined years and months for the marriage (2a(3)) and the domestic partnership (2b(3))..... _____ years _____ months

3. **Goal to become self-supporting** (Family Code section 4320(*l*)) ☐ See Attachment 3
With respect to the goal that the supported party will become self-supporting within a reasonable period of time, the court finds:

a. this ☐ is ☐ is not a marriage or domestic partnership of long duration under Family Code section 4336.

b. ☐ the supported party should make reasonable efforts to become self-supporting.

c. ☐ Other *(specify):*

Form Approved for Optional Use
Judicial Council of California
FL-349 [New January 1, 2021]

Family Code, §§ 270, 2030, 2032, 4320, 6344, 7640
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PETITIONER: RESPONDENT:	CASE NUMBER:

4. **Age and health of the parties** (Family Code section 4320(h))
   a. The supported party's age is:
   b. The supporting party's age is:
   c. The supported party's current health condition is *(describe):* ☐ See Attachment 4c

   d. The supporting party's current health condition is *(describe):* ☐ See Attachment 4d

FINDINGS REGARGING THE SUPPORTED PARTY:

5. **Earning capacity** (Family Code section 4320(a)(1)–(2))
   The supported party's earning capacity ☐ is ☐ is not sufficient to maintain the standard of living established during the marriage or domestic partnership.

6. ☐ Findings regarding the supported party's earning capacity.
   a. The supported party's marketable skills (training, job skills, and work history) are *(describe):* ☐ See Attachment 6a

   b. The current job market for the job skills of the supported party is *(describe):* ☐ See Attachment 6b

   c. The supported party would need the following time and expense to acquire the education or training to develop the skills for the job market described in (b) *(describe):* ☐ See Attachment 6c

   d. To develop other, more marketable job skills or employment, the supported party would need the following retraining or education *(describe):* ☐ See Attachment 6d

PETITIONER: RESPONDENT:	CASE NUMBER:

7. **Earning ability** (Family Code section 4320(a)(2)) ☐ See Attachment 7

   a. The supported party ☐ has ☐ has not had periods of unemployment because of the time needed to attend to domestic duties. *(Complete (b) if the supported party had such periods of unemployment.)*

   b. Because the supported party had periods of unemployment to attend to domestic duties, the supported party's present or future earning ability ☐ is ☐ is not lower *(explain):*

8. **Contributions to supporting party's education and training** (Family Code section 4320(b)) ☐ See Attachment 8

   The supported party ☐ did ☐ did not contribute to the education, training, career position, or license of the supporting party.

9. **Care for children** (Family Code section 4320(g)) ☐ See Attachment 9

   The supported party ☐ is ☐ is not able to be gainfully employed without unduly interfering with the interests of the children in the supported party's care *(If needed, use the space below to clarify the finding.)*

10. **Assets and obligations** (Family Code section 4320(e)) ☐ See Attachment 10

    The supported party's assets and obligations, including separate property, are *(list values and balances):*

11. **Other findings** regarding the supported party *(specify):* ☐ See Attachment 11

PETITIONER: RESPONDENT:	CASE NUMBER:

FINDINGS REGARDING THE SUPPORTING PARTY:

12. **Earning capacity** (Family Code section 4320(a)(1)) ☐ See Attachment 12
The supporting party's earning capacity ☐ is ☐ is not sufficient to maintain the standard of living established during the marriage or domestic partnership.

13. **Ability to pay support** (Family Code section 4320(c))
a. The supporting party ☐ is ☐ is not able to pay spousal or domestic partner support.
b. The supporting party's current gross income from employment or self-employment is:
c. The supporting party's current income from investments, retirement, other sources is:
d. The supporting party's current assets and their values and balances are: ☐ See Attachment 13d

e. The supporting party's standard of living is *(describe, for example, type and frequency of vacations, value of home and other real estate, value of investments, type of vehicles owned, credit card use or nonuse):* ☐ See Attachment 13e.

14. **Assets and obligations** (Family Code section 4320(e)) ☐ See Attachment 14
The supporting party's assets and obligations, including separate property, are *(list values and balances):*

15. **Other findings** regarding the supporting party *(specify):* ☐ See Attachment 15

PETITIONER: RESPONDENT:	CASE NUMBER:

DOCUMENTED EVIDENCE OF DOMESTIC VIOLENCE AND CRIMINAL CONVICTIONS

16. **Documented history of domestic violence** (Family Code section 4320(i)) ☐ See Attachment 16

a. There ☐ is ☐ is not documented evidence of any history of domestic violence, as defined in Family Code section 6211, between the parties or perpetrated by either party against either party's child.

b. ☐ The court received the following documented evidence of domestic violence in this case:

(1) ☐ A plea of nolo contendere ("no contest").

(2) ☐ Emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party.

(3) ☐ Any history of violence against the supporting party by the supported party.

(4) ☐ Issuance of a protective order after hearing under Family Code section 6340.

(5) ☐ A finding by a court during the pendency of a divorce, separation, or child custody proceeding, or other proceeding under Family Code sections 6200–6409, that the spouse or domestic partner has committed domestic violence.

(6) ☐ Other *(specify):*

17. **Documented evidence of criminal conviction** (Family Code section 4320(m)) ☐ See Attachment 17

a. There ☐ is ☐ is not documented evidence of a criminal conviction of a party against the other party in the case that would entitle the injured spouse or domestic partner to a prohibition of any permanent award for support—or medical, life, or other insurance benefits or payments—to the other spouse or domestic partner under Family Code section 4324.5

☐ Based on the criminal conviction described in a, the injured spouse or domestic partner, who is the ☐ supported ☐ supporting party is entitled to a prohibition of any permanent award for support—or medical, life, or other insurance benefits or payments—to the other spouse or domestic partner.

b. There ☐ is ☐ is not documented evidence of a criminal conviction of a party against the other party in the case as described in Family Code section 4325.

☐ Based on the criminal conviction, the ☐ supported ☐ supporting party is prohibited from an award of spousal or domestic partner support from the other spouse or domestic partner under Family Code section 4325.

FINDINGS ON OTHER FACTORS

18. **Tax consequences for each party** (Family Code section 4320(j)) ☐ See Attachment 18
The immediate and specific tax consequences for each party are:

19. **Balance of hardships for each party** (Family Code section 4320(k)) ☐ See Attachment 19
The balance of the hardships for each party is:

20. **Other factors** (Family Code section 4320(n)) ☐ See Attachment 20
Other factors the court finds are just and equitable in ordering spousal or domestic partner support are *(describe):*

Item number: 30

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Family Law: Changes to Child Custody Evaluations Rule and Form
Amend Cal. Rules of Court, rule 5.220; adopt form FL-329

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Gabrielle Selden 415-865-8085, Gregory Tanaka 415-865-7671

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Project Summary: As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration.

e. AB 1179 (Rubio) Child custody: allegations of abuse: report (Ch. 127, Statutes of 2019)

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-20

Title
Family Law: Changes to Child Custody Evaluations Rule and Form

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 5.220; adopt form FL-329

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Action Requested
Review and submit comments by June 10, 2020

Proposed Effective Date
January 1, 2021

Contact
Gabrielle D. Selden, 415-865-8085
gabrielle.selden@jud.ca.gov

Gregory Tanaka, 415-865-7671
gregory.tanaka@jud.ca.gov

Executive Summary and Origin

The Family and Juvenile Law Advisory Committee proposes amending one rule of court and adopting a new mandatory form to comply with recent statutory changes to Family Code section 3118. The recent amendments enacted by Assembly Bill 1179 (Rubio; Stats. 2019, ch. 127) create new requirements for the confidential written report that is filed with the court and served on the parties following a child custody evaluation, assessment, or investigation in which the court has determined that there is a serious allegation of child sexual abuse or an allegation of child abuse in any other circumstance.

Background

In contested proceedings in family court involving child custody or visitation rights, a judicial officer may appoint a court-connected or private evaluator under Family Code section 3111 to provide recommendations to the court if the judicial officer determines the appointment is in the best interests of the child. Under section 3118, in cases involving serious allegations of child sexual abuse, the court *must* appoint an evaluator to conduct an evaluation, investigation, or assessment. For serious allegations of child abuse that arise in a proceeding for child custody and visitation rights, the court is not required to, but may appoint an evaluator or investigator to conduct an evaluation, investigation, or assessment under section 3118.

Section 3118(b)(5) and (6)(A)–(H) lists the minimum information that the evaluator or investigator must cover in the confidential written report. They are summarized as follows:

1. A written statement explaining why a forensic examination is not needed if the evaluator did not request a forensic medical examination of the child;
2. Documentation of material interviews of the child, parents, and other witnesses;
3. A summary of any law enforcement investigator's investigation;
4. Relevant background material, including, but not limited to a summary of written reports from any therapist treating the child for suspected child sexual abuse;
5. The written recommendations of the evaluator or investigator about the therapeutic needs of the child and how to ensure the child's safety;
6. A summary of other child abuse investigations, if any, and disposition and any relevant dependency court orders or findings;
7. Any information from a child protective agency or law enforcement agency about the presence of domestic violence or substance abuse in the family;
8. If any family members are known to be eligible for assistance from the Victims of Crime Program due to child abuse or domestic violence; and
9. Any other information believed to be helpful for the court in determining what is in the best interests of the child.

Effective January 1, 2021, subdivision (b)(6) requires that the report on the above topics be made on a form adopted by the Judicial Council. To comply with the legislation, the Judicial Council must adopt one new form and amend rule 5.220 as described in the following section.

The Proposal

Rule 5.220

Rule 5.220 would be reorganized to differentiate the requirements for confidential evaluation reports written to comply with Family Code section 3111 and those that must comply with Family Code section 3118. Specifically, the rule would include a new subdivision (g) titled *Confidential written report; requirements*, in which (g)(1) would list the requirements for section 3111 reports and (g)(2) would list the requirements for section 3118 reports. Subdivision (g)(2) would reference the name and number of the proposed new Judicial Council form FL-329 among other requirements. In addition, because both new subdivisions would include the language in current subdivision (i) relating to another required form, subdivision (i) would be deleted to avoid redundancy in the rule.

Other technical changes would include relettering affected subdivisions in the rule and updating (b) by deleting the reference to section 2032 in the Code of Civil Procedure and updating it to section 2032.010.

Confidential Child Custody Evaluation Report (form FL-329)

This form would comply with section 3118 by serving as the standardized template for all information necessary to provide a full and complete analysis of the allegations raised in the proceeding. The proposed new mandatory form would include the previously listed categories of

information (subdivisions (b)(6)(A)–(H)) at items 3–7 and 9–11. In addition, the form would include the required contents of an evaluation specified in rule 5.220, at items 8 and 12.

Alternatives Considered

Because section 3118(i) requires the Judicial Council to adopt a mandatory form on or before January 1, 2021, the committee did not consider any alternative methods to implement the statutory mandate. The committee did consider whether form FL-329 should be drafted as a mandatory form for child custody evaluations, assessments, or investigations conducted under Family Code section 3111 as well as section 3118. The committee, however, concluded that this would be beyond the scope of legislation, as AB 1179 did not amend Family Code section 3111. Absent clear direction from the Legislature, the committee proposes a mandatory form that would apply only to reports drafted in response to a section 3118 evaluation, assessment, or report.

The committee did consider whether to propose revisions to two additional forms*: Notice Regarding Confidentiality of Child Custody Evaluation Report* (form FL-328) and *Child Custody Evaluation Information Sheet* (form FL-329-INFO), as the forms include information about the child custody evaluation process. However, because both forms refer to the child custody evaluation report in very general terms, the committee decided that revisions to the forms were not essential to comply with the legislative mandate.

Fiscal and Operational Impacts

The impact to the courts includes costs to copy the new and revised forms, as well as the cost to educate court-connected child custody evaluators on the new procedures for completing a child custody evaluation, investigation, or assessment. However, these costs would be outweighed by the benefit of producing reports that satisfy the requirements of Family Code section 3118.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 5.220, at pages 5–7
2. Form FL-329, at pages 8–10
3. Link A: Assem. Bill 1179, *https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1179*

Rule 5.220 of the California Rules of Court would be amended, effective January 1, 2021, to read:

Rule 5.220. Court-ordered child custody evaluations

(a) Authority

This rule of court is adopted under Family Code sections 211 and 3117.

(b) Purpose

Courts order child custody evaluations, investigations, and assessments to assist them in determining the health, safety, welfare, and best interests of children with regard to disputed custody and visitation issues. This rule governs both court-connected and private child custody evaluators appointed under Family Code section 3111, Family Code section 3118, Evidence Code section 730, or ~~Code of Civil Procedure section 2032.~~ chapter 15 (commencing with section 2032.010) of title 4, part 4 of the Code of Civil Procedure.

(c)–(d) * * *

(e) Scope of evaluations

All evaluations must include:

(1)–(2) * * *

~~(3) A written or oral presentation of findings that is consistent with Family Code section 3111, Family Code section 3118, or Evidence Code section 730. In any presentation of findings, the evaluator must:~~

~~(A) Summarize the data-gathering procedures, information sources, and time spent, and present all relevant information, including information that does not support the conclusions reached;~~

~~(B) Describe any limitations in the evaluation that result from unobtainable information, failure of a party to cooperate, or the circumstances of particular interviews;~~

~~(C) Only make a custody or visitation recommendation for a party who has been evaluated. This requirement does not preclude the evaluator from making an interim recommendation that is in the best interest of the child; and~~

~~(D) Provide clear, detailed recommendations that are consistent with the health, safety, welfare, and best interest of the child if making any recommendations to the court regarding a parenting plan.~~

(f) Presentation of findings

All evaluations must include a written or oral presentation of findings that is consistent with Family Code section 3111, Family Code section 3118, or Evidence Code section 730. In any presentation of findings, the evaluator must:

(1) Summarize the data-gathering procedures, information sources, and time spent, and present all relevant information, including information that does not support the conclusions reached.

(2) Describe any limitations in the evaluation that result from unobtainable information, failure of a party to cooperate, or the circumstances of particular interviews.

(3) Only make a custody or visitation recommendation for a party who has been evaluated. This requirement does not preclude the evaluator from making an interim recommendation that is in the best interests of the child.

(4) Provide clear, detailed recommendations that are consistent with the health, safety, welfare, and best interests of the child if making any recommendations to the court regarding a parenting plan.

(g) Confidential written report; requirements

(1) *Family Code section 3111 evaluations*. An evaluator appointed under Family Code section 3111 must:

(A) File and serve a report on the parties or their attorneys as required by Family Code section 3111.

(B) Attach a *Notice Regarding Confidentiality of Child Custody Evaluation Report* (form FL-328) as the first page of the child custody evaluation report when a court-ordered child custody evaluation report is filed with the clerk of the court and served on the parties or their attorneys, and any counsel appointed for the child, to inform them of the confidential nature of the report and the potential consequences for the unwarranted disclosure of the report.

(2) *Family Code section 3118 evaluations*. An evaluator appointed to conduct a child custody evaluation, investigation, or assessment based on (1) serious allegations of child sexual abuse; or (2) allegations of child abuse under Family Code section 3118 must:

(A) Provide a full and complete analysis of the allegations raised in the proceeding and address the health, safety, welfare, and best interests of the child.

(B) Comply with (A) by filing and serving *Confidential Child Custody Evaluation Report* (form FL-329) on the parties or their attorneys as required by section 3118.

(C) Attach *Notice Regarding Confidentiality of Child Custody Evaluation Report* (form FL-328) as the first page of the child custody evaluation report in (B) to inform the parties or their attorneys of the confidential nature of the report and the potential consequences for the unwarranted disclosure of the report.

~~**(i) Service of the evaluation report**~~

~~A *Notice Regarding Confidentiality of Child Custody Evaluation Report* (form FL-328) must be attached as the first page of the child custody evaluation report when a court-ordered child custody evaluation report is filed with the clerk of the court and served on the parties or their attorneys, and any counsel appointed for the child, to inform them of the confidential nature of the report and the potential consequences for the unwarranted disclosure of the report.~~

~~**(f) (j)**~~ **(h) (k)** * * *

EVALUATOR: LICENSE NO. *(if applicable):* NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS:	*FOR COURT USE ONLY* **CONFIDENTIAL** *DRAFT* NOT APPROVED BY JUDICIAL COUNCIL 4.02.20 GST/GS
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	
CONFIDENTIAL CHILD CUSTODY EVALUATION REPORT	CASE NUMBER:

NOTICE: (1) This form must be used for a child custody evaluation, investigation, or assessment based on serious allegations of child sexual abuse or allegations of child abuse under Family Code section 3118.

(2) *Notice Regarding Confidentiality of Child Custody Evaluation Report* (form FL-328) must be attached as the cover page of this report.

1. The *Order Appointing Child Custody Evaluator* (form FL-327) filed on (*date)* _____ is attached.
2. The names and dates of birth of the children are *(specify):* ☐ Additional children are listed on Attachment 2.

Child's name	Date of birth

3. **Dependency court orders** that might affect custody *(if any):* ☐ Below: ☐ Attached

Court (county, state)	Case number	Date order filed

4. **Summary of child welfare agency investigation and recommendations**
   a. The children in 2 and the children's parents are or have been the subject of a child abuse investigation *(select one):*
      ☐ Yes ☐ No *(skip b–c)*
   b. Social worker contact information:
      Name:
      Telephone No.:
      Address:
      Email address:
   c. The status or disposition of the investigation and recommendations made regarding the child's safety, including information regarding child abuse, domestic violence, or substance abuse, is as follows:
      ☐ Below: ☐ See Attachment 4c.

5. **Summary of law enforcement investigation and recommendations**
   (Summarize information obtained related to any recommendations made, criminal background checks of the parents and any suspected perpetrator that is not a parent, including information regarding child abuse, domestic violence, or substance abuse.)
   ☐ Below: ☐ See Attachment 5.

Form Adopted for Mandatory Use
Judicial Council of California
FL-329 [New January 1, 2021]

Family Code, §§ 3118, 3025.5;
Cal.Rules of court, rule 5.220
www.courts.ca.gov

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

6. **Forensic medical examination of the child.**
Did you request a forensic medical examination of the child? ☐ yes ☐ no *(If you answered "no," explain why the examination is not needed)* ☐ See Attachment 6.

7. **Relevant background material.** *(Provide a summary, including any written report from a therapist treating the child for suspected child sexual abuse (excluding any privileged communication), a multidisciplinary child interview team, or reports from other professionals, and results of any forensic medical examination and any other medical examination or treatment.)*
☐ Below: ☐ See Attachment 7.

8. **Documentation of material interviews.** *(Summarize any interviews of the parents, children, and other witnesses who provided relevant information.)*
☐ Below: ☐ See Attachment 8.

9. **Limitations in the evaluation.** *(Describe any limitations in the evaluation that result from unobtainable information, failure of a party to cooperate, or the circumstances of particular interviews.)*
☐ Below: ☐ See Attachment 9.

10. **Other.** Additional information the evaluator believes would be helpful to the court in determining the best interests of the child *(specify):*
☐ Below: ☐ See Attachment 10.

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

11. **Evaluator recommendations** regarding the therapeutic needs of the child and how to ensure the safety of the child *(specify)*:

☐ Below: ☐ See Attachment 11.

12. **Victims of Crime Program.** Recommendations for known family members who may be eligible for assistance from the Victims of Crime Program due to child abuse or domestic violence *(specify, if any):*

☐ Below: ☐ See Attachment 12.

13. **Summary of procedures**

(Summarize the data-gathering procedures, information sources, and time spent, and present all relevant information, including information that does not support the conclusions reached.)

☐ Below: ☐ See Attachment 13.

14. Number of pages attached: _____

Date:

_____
(NAME OF EVALUATOR)

▶ _____
SIGNATURE OF EVALUATOR

Item number:31

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Recommend JC approval (has circulated for comment)**

RUPRO Meeting: April 9-10, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Juvenile Law: Psychotropic Medication Information Release
Adopt Cal. Rules of Court, rule 5.642; amend rules 5.640, 5.706, 5.708, and 5.810; approve forms JV-228 and JV-228-INFO; adopt form JV-229; revise forms JV-221, JV-223, JV-224, and JV-287

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Kerry Doyle, 415-865-8791, kerry.doyle@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Family and Juvenile Law Advisory Committee Annual Agenda: Item 1: As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration.
Item 1o. SB 377 (McGuire) Juveniles: psychotropic medications: medical information (Ch. 547, Statutes of 2019) Requires the Judicial Council to include in its forms for authorizing the administration of psychotropic drugs to a child dependent or ward of the court to include a request for authorization by the child or the child's attorney to release the child's medical information to the Medical Board of California to ascertain whether there is excessive prescribing of psychotropic medication

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

Item No.:
For business meeting on: May 14–15, 2020

Title
Juvenile Law: Psychotropic Medication Information Release

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rule 5.642; amend rules 5.640, 5.706, 5.708, and 5.810; approve forms JV-228 and JV-228-INFO; adopt form JV-229; revise forms JV-221, JV-223, JV-224, and JV-287

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Agenda Item Type
Action Required

Effective Date
September 1, 2020

Date of Report
March 26, 2020

Contact
Kerry Doyle, 415-865-8791
kerry.doyle@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee recommends adopting one rule of the California Rules of Court and amending four rules, approving two forms, adopting one form, and revising four forms, to conform to recent statutory changes regarding children for whom the juvenile court has approved requests for prescription of psychotropic medications, which were enacted by Senate Bill 377 (McGuire; Stats. 2019, ch. 547).

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective September 1, 2020:

1. Amend rule 5.640 of the California Rules of Court to add three new forms (discussed below) to the list of the documents the applicant must provide the child's attorney when providing

notice of the request for psychotropic medication, and to add "Indian custodian" whenever there is a reference to "parent or legal guardian."

2. Adopt rule 5.642 to provide the requirements for processing the forms, including providing the forms to the child and child's attorney, signing the authorization form, and sending the authorization form to the California Department of Social Services (CDSS).

3. Amend rules 5.706 and 5.708 to require the social worker to provide before the hearing a blank copy of *Withdrawal of Release of Information to Medical Board of California* (form JV-229) to the child if the child has signed *Position on Release of Information to Medical Board of California* (form JV-228) if it is the last hearing before the child turns 18 years of age or if the social worker is recommending termination of juvenile court jurisdiction.

4. Amend rule 5.810 to require the probation officer to provide before the hearing a blank copy of *Withdrawal of Release of Information to Medical Board of California* (form JV-229) to the child if the child has signed *Position on Release of Information to Medical Board of California* (form JV-228) if it is the last hearing before the child turns 18 years of age or if the social worker is recommending termination of juvenile court jurisdiction.

5. Approve *Position on Release of Information to Medical Board of California* (form JV-228) for the child or child's attorney to indicate whether the child authorizes CDSS to release the child's identification information to the Medical Board of California (the board) so it can ascertain whether there is excessive prescribing of psychotropic medication.

6. Approve *Background on Release of Information to Medical Board of California* (form JV-228-INFO) to give to the child and child's attorney to explain why form JV-228 is being provided, what information may be revealed to the board, the confidentiality of the information revealed to the board, and a description of the process to withdraw any authorization.

7. Adopt *Withdrawal of Release of Information to Medical Board of California* (form JV-229) as a mandatory form for the child or child's attorney to use to withdraw any authorization to release information to the board.

8. Revise *Proof of Notice on Application* (form JV-221) to include the three additional documents that must be served on the child and child's attorney by the applicant.

9. Revise *Order on Application for Psychotropic Medication* (form JV-223) to add a new item for the court to indicate whether the authorization is for three or more concurrent psychotropic medications for 90 days or more and, if so, order the applicant to provide the child and the child's attorney blank copies of *Position on Release of Information to Medical Board of California* (form JV-228), *Background on Release of Information to Medical Board*

of California (form JV-228-INFO), and *Withdrawal of Release of Information to Medical Board of California* (form JV-229).

10. Revise *County Report on Psychotropic Medication* (form JV-224) to add an item for the social worker or probation officer to indicate whether the court order is for three or more concurrent psychotropic medications for 90 days or longer. If so, the item would ask whether form JV-228 has been filed with the court.

11. Revise *Confidential Information* (form JV-287) to amend the instructions to indicate the form can be used with form JV-228, that the form must be kept under seal in the court file, and that only the court, the agency, and the child's attorney can look at the information.

The text of the new and amended rules is attached at pages 11–17. The new and revised forms are attached at pages 18–32.

Relevant Previous Council Action

As mandated by Senate Bill 543 (Bowen; Stats. 1999, ch. 552), effective January 1, 2001, the Judicial Council adopted a California Rule of Court and two Judicial Council forms regarding administration of psychotropic medications to children under the jurisdiction of the juvenile court. This initial proposal included rule 1432.5, *Application for Order for Psychotropic Medication—Juvenile* (form JV-220), and *Opposition to Application for Order for Psychotropic Medication—Juvenile* (form JV-220A). Clarifying changes were made to the rule and forms effective January 1, 2003, January 1, 2005, and July 1, 2005.

Effective January 1, 2007, rule 1432.5 was renumbered as rule 5.640, as part a comprehensive reorganization and renumbering to improve the format and usability of the California Rules of Court. Effective January 1, 2008, the Judicial Council amended rule 5.640, revised form JV-220, revoked form JV-220A, and adopted forms JV-219-INFO, JV-220(A), JV-221, JV-222, and JV-223 to improve the statewide procedure used to seek authorization for administering psychotropic medication to children in out-of-home placements.

Effective January 1, 2014, the council amended rule 5.640 and revised three related forms: JV-219-INFO, *Information About Psychotropic Medication Forms*; JV-221, *Proof of Notice: Application for Psychotropic Medication*; and JV-222, *Opposition to Application Regarding Psychotropic Medication* to (1) clarify the time frame for filing an opposition to an application for the juvenile court to authorize the administration of psychotropic medication for a child, (2) clarify appropriate methods of service and notice protocols, and (3) add notice requirements for an Indian child's tribe if psychotropic medication is being sought for an Indian child.

Effective July 1, 2016, the council amended rule 5.640; approved two related forms, *Child's Opinion About the Medicine* (form JV-218) and *Statement About Medicine Prescribed* (form JV-219); adopted two related forms, *Physician's Request to Continue Medication—Attachment* (form JV-220(B)) and *County Report on Psychotropic Medication* (form JV-224); revised five

related forms, *Application for Psychotropic Medication* (form JV-220), *Physician's Statement—Attachment* (form JV-220(A)), *Proof of Notice of Application* (form JV-221), *Input on Application for Psychotropic Medication* (form JV-222), and *Order on Application for Psychotropic Medication* (form JV-223); and revised and renumbered one related form, *Guide to Psychotropic Medications Forms* (form JV-217-INFO) to implement the mandates of Senate Bill 238 (Mitchell; Stats. 2015, ch. 534) which required the Judicial Council to develop rules and forms to (1) ensure that the child and his or her caregiver and Court Appointed Special Advocate volunteer (CASA), if any, have an opportunity to provide input on the medications being prescribed; (2) ensure that information regarding an assessment of the child's overall mental health and treatment plan, as well as information regarding the rationale for the proposed medication are provided to the court; (3) address how to proceed if information, otherwise required to be included in a request for authorization, is not included in the request; (4) include a process for periodic oversight by the court of orders regarding the administration of psychotropic medication; and (5) mandate that the child welfare agency, probation department, or other person or entity who submitted the request for authorization of psychotropic medication provide a copy of the court order approving or denying the request to the child's caregiver.

Most recently, effective January 1, 2018, based on the suggestions received from stakeholders and others about how the forms were functioning, the Judicial Council made several clarifying changes to the rule and forms in a "clean-up" proposal. The council again amended rule 5.640; approved *Order Delegating Judicial Authority Over Psychotropic Medication* (form JV-216) as a new optional form to document the court's findings and order when the court orders that a parent is authorized to approve or deny the administration of psychotropic medication; and again revised forms JV-217-INFO, JV-219, JV-220, JV-220(A), JV-220(B), JV-221, JV-222, JV-223, and JV-224.

Analysis/Rationale

As indicated in the legislative history for SB 377, in 1999, the Legislature passed Senate Bill 543 (Bowen; Stats. 1999, ch. 552) to provide that only a juvenile court judicial officer has the authority to make orders regarding the administration of psychotropic medications for children in foster care and that the juvenile court may issue a specific order delegating this authority to a parent if the parent poses no danger to the child and has the capacity to authorize psychotropic medications. This legislation was passed in response to concerns that foster children were being subjected to excessive use of psychotropic medication, and that judicial oversight was needed to reduce the risk of unnecessary medication. The Judicial Council was required to adopt rules of court to implement the new requirement. Accordingly, rule 5.640 of the California Rules of Court was adopted and specified the process for juvenile courts to follow in authorizing the administration of psychotropic medications; it also permits courts to adopt local rules to further refine the approval process.

In 2004, the provisions of SB 543 were amended by Assembly Bill 2502 (Keene; Stats. 2004, ch. 329) to require a judicial officer to approve or deny, in writing, a request for authorization to administer psychotropic medication, or set the matter for hearing, within seven days. This

amendment was intended to ensure timely consideration of requests for authorization to administer psychotropic medication to dependent children.

In 2015, Senate Bill 238 (Monning; Stats. 2015, ch. 534) further amended these provisions to, among other things, require the rules of court and corresponding forms to address specified concerns. These concerns included ensuring that the dependent or ward and the dependent's or ward's caregiver (or court-appointed special advocate, if any) are allowed an opportunity to provide input on the medications being prescribed, and that guidance be provided to the court on how to evaluate the request for authorization. The bill also required the rules of court and forms to include a process for periodic oversight by the court of orders regarding the administration of psychotropic medications.

In 2017, Senate Bill 1174 (McGuire; Stats. 2017, ch. 840), required the Department of Health Care Services (DHCS) and the California Department of Social Services (CDSS) to provide data, pursuant to a specified data-sharing agreement, to the Medical Board of California regarding Medi-Cal physicians and their prescribing patterns of psychotropic medications and related services for dependents or wards of the court, and provided that personal identifiers were to be removed from the data before providing it. That bill also required the board to contract with a psychiatrist who has expertise and specializes in pediatric care for the purpose of reviewing the data provided to the board to ensure the appropriate standard of care was being met.

The board's expert reviewing the data provided by CDSS flagged 86 patients who fit the description of being on three or more psychotropic medications for 90 days or more.[1] In order to assess if the psychotropic medications were prescribed appropriately and consistent with the standard of care, the board must review the patient's medical record. Under existing law, the board is required to obtain authorization to contact the individual before it can even ask for authorization to review the patient's medical record. Through administrative efforts with CDSS, the board received authorization to contact five individuals and was only able to get three authorizations for release of a patient's medical record. This resulted in the board only being able to investigate 3 of the 86 cases originally identified.[2]

Senate Bill 377 is intended to allow the board to get the information it needs to investigate more cases of potential overprescription of psychotropic medication. The bill revises Welfare and Institutions Code sections 369.5 and 739.5 regarding psychotropic medication prescriptions, and requires the Judicial Council to develop a form to include a request for authorization by the child or child's attorney for CDSS to release the child's identification information to the board so it can ascertain whether there is excessive prescribing of psychotropic medication.

[1] Welfare and Institutions Code section 14028 requires CDSS to share with the board data for all foster children who are or have been on three or more psychotropic medications for 90 days or more.

[2] Sen. Com. on Judiciary, Analysis of Sen. Bill No. 377 (2019–2020 Reg. Sess.) Apr. 23, 2019, p. 5

Policy implications

The committee considered how to best implement SB 377, which required the development of a Judicial Council form with specified stakeholders.

The proposed forms and rules of court are intended to allow the board to get the information it needs to investigate more cases of potential overprescription of psychotropic medication. The proposal should result in the board reviewing more cases to determine whether there is excessive prescribing of psychotropic medication to foster youth.

Comments

This proposal circulated for comment as part of the winter 2020 invitation-to-comment cycle from December 11, 2019, to February 12, 2020, to the standard mailing list for family and juvenile law proposals. Included on the list were appellate presiding justices, appellate court administrators, trial court presiding judges, trial court executive officers, judges, court administrators and clerks, attorneys, family law facilitators and self-help center staff, legal services attorneys, social workers, probation officers, CASA programs, and other juvenile and family law professionals. Senate Bill 377 also required the Judicial Council to develop the form in consultation with CDSS, the Medical Board of California, the County Welfare Directors Association, the Chief Probation Officers of California, and groups representing foster children, dependency counsel, and children's advocates. Ten organizations provided comment: one agreed with the proposal, seven agreed with the proposal if modified, no commenters opposed the proposal, and two did not indicate a position. A chart with the full text of the comments received and the committee's responses is attached at pages 33–68.

The committee sought specific comment on whether the authorization to release information should last until it is withdrawn or whether there was an appropriate time for it to expire. The commenters did not overwhelmingly agree on any time frame. One thought it should last until withdrawn, several thought it should last one year, one thought it should be resigned every six months, since the orders are made that often, and one commentator, CDSS, agreed with the proposed three-year time frame that circulated for public comment.

The committee considered several time limits on the duration of the authorization. Since the board is looking at prescribing practices of physicians, the board may need to obtain information on children in past data sets. A short time limit, for example a one-year limit, on the authorization would only address data recently submitted to the board. One issue the board seeks to address, however, is its inability to obtain information on children that may have been in foster care several years ago. The board is looking at prescription patterns and as such, is not only requesting the identifying information for children in the most recent data set, but also for children prescribed medication by that same doctor for what could be years ago. Additionally, a short time frame would increase workload for the department, the child's attorney, the court clerk, and CDSS. The committee concluded that the authorization should remain valid until it is withdrawn. The committee has amended the rules and forms to indicate this. The rules have also been amended to require the social worker or probation officer to provide the youth a blank copy of *Withdrawal of Release of Information to Medical Board of California* (form JV-229) when it

is the last hearing before the child turns 18 years of age, or if the recommendation is to terminate juvenile court jurisdiction. This approach will decrease workload for both court clerks and CDSS since the authorization form will not need to be repeatedly filed and sent to CDSS.

CDSS, one of the stakeholders that SB 377 mandated the council to consult with, in response to the rule requiring the court clerk to send the JV-228 to CDSS at the address indicated on the form, commented:

> The CDSS has significant concerns that this proposed provision imposes a requirement that does not exist in statute for the CDSS to be the repository of these documents, without any analysis of the costs and burdens that would be triggered by the creation of a separate system at the state level to receive and maintain the JV-228 forms. The CDSS does not typically receive individual case documents from the JV-220 process or maintain individual case files or records for child welfare services or probation cases. Such recordkeeping is done at the local level by the appropriate county child welfare services agency or county probation department overseeing the child's case. The CDSS therefore recommends striking paragraph (2) of subdivision (c) of the proposed Rule of Court 5.642 to remove CDSS as the point of delivery and repository for the JV-228 forms. Instead, the CDSS recommends that Rule 5.642 require either the clerk of the court to mail a copy of the filed JV-228 form to the respective county child welfare services agency or probation department, so it may be included in the child's existing individual case file, or alternatively, that the proposed rule require the child's attorney to provide a copy of form JV-228 to the county child welfare services agency or probation attorney upon filing the form with the juvenile court. Should the Medical Board of California request a further review of a dependent's/ward's medical record, the CDSS can simply contact the necessary county agency to determine if there is a JV-228 form on file.

The suggestion of maintaining the JV-228 form in the social worker or probation officer's file, however, does not address one of the main problems the board is having, which is obtaining the identifying information of children whose cases have been closed.

CDSS further commented:

> The CDSS respectfully notes that this proposed Rule of Court creates a new responsibility and imposes a direct duty on an agency of the executive branch that is not prescribed by statute. The CDSS has significant concerns that this provision creating a new responsibility for an agency of the executive branch that is not a party to juvenile court proceedings may be beyond the constitutional authority of the Judicial Council to "adopt rules for court administration, practice, and procedure, and perform other functions prescribed by statute," as set forth in subdivision (d) of Section 6, Article VI of the California Constitution. Senate Bill 377, which added sections 369.5(a)(2)(D) and 739.5 (a)(2)(D) to the Welfare and

Institutions Code, does not specify an expansion of this authority nor authorize the direct imposition of a new duty upon CDSS via the Rules of Court.

Senate Bill 377 imposed the unique requirement on the Judicial Council that it create a form for use by the California Department of Social Services to authorize that agency to release the identifying information of youth or nonminor dependents whose prescriptions for psychotropc medications the board would like to investigate. As indicated in the legislative history, the current process has resulted in only 3 of 86 children reviewed by the board. The bill, and the mandated form, are intended to assist CDSS to perform its statutorily mandated information sharing with the board so that the board can perform its statutorily mandated review of the child's medical records to decide if there are any violations of the law or excessive prescribing of psychotropic medications. As the process is currently performed, the board is unable to meet its statutory obligations because it is not getting the necessary information releases from CDSS. This is a unique use of a Judicial Council form, but it is mandated by statute. Additionally, the fact that a rule goes beyond what is contained in a statute does not make it inconsistent with the statute.[3] Unless the circumstances show otherwise, it should be presumed that the Legislature simply chose not to establish specific procedures in that area and that the council is free to do so.[4] SB 377 requires the Judicial Council to develop a form to include a request for authorization by the child or child's attorney for CDSS to release the child's identification information to the Medical Board of California, so it can ascertain whether there is excessive prescribing of medication. Establishing basic procedures for how that form is provided to the child and maintained for a future request by the Medical Board of California is within the Judicial Council's rule-making authority.

One commentator, a large court, suggested amending rule 5.640 to add "Indian custodian" wherever there is a reference to "parent or legal guardian." The committee agrees with this suggestion and recommends amending rule 5.640. The Indian Child Welfare Act defines an "Indian custodian" as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child."[5] Federal and state law provide the Indian custodian with the same rights and protections as a parent.[6]

Three commentators thought the authorization form should expire when the child turns 18 years old. As discussed above, the committee concluded that the authorization should remain valid until it is withdrawn. The committee recommends, however, that the council amend three rules to require the social worker or probation officer to provide the child with a blank copy of

[3] *Butterfield v. Butterfield* (1934) 1 Cal.2d 227.

[4] See *People v. Mendez* (1999) 19 Cal.4th 1084; *In re Juan C.* (1993) 20 Cal.App.4th 748; compare *Simpson v. Smith* (1989) 214 Cal.App.3d Supp. 7 (statute that was amended to delete notice requirement inconsistent with rule requiring notice).

[5] 25 U.S.C. § 1903 (6).

[6] 25 U.S.C. §§ 1901 et seq.; §§ 224(d), 224.1(a).

Withdrawal of Release of Information to Medical Board of California (form JV-229) when it is the last hearing before the child turns 18 years of age, so the child and their attorney can determine whether they want the authorization to continue.

As circulated for public comment, the proposed rules allowed the child to withdraw authorization by a written letter to CDSS or the filing of form JV-229. CDSS commented it was concerned about permitting a letter to be sent to the CDSS. Permitting a letter, it wrote, especially without any requirements on how to communicate withdrawal of authority, will result in confusion and lack of uniformity. CDSS therefore requested removing the option of sending a letter to the CDSS. The committee agrees with the concerns of CDSS, has removed the option of sending the letter to CDSS, and is recommending that the council adopt JV-229 as a mandatory form.

One commentator proposed modifications to ensure the Welfare and Institutions Code section 827 process applied to the child's juvenile court case file.[7] The committee agrees that it could be possible that the board may seek information from the juvenile court case file, and if so, the protections and procedures in section 827 should apply. The committee recommends including in proposed rule 5.642 and on form JV-228 statements that the authorization is for the release of medical records only, not an authorization for the release of the juvenile court case file as described by section 827.

Alternatives considered

The committee considered requiring that the court provide a blank authorization form and Information Sheet to the child and the child's attorney when the court ordered three or more psychotropic medications for 90 days or longer. This process, however, would not result in the receipt of these forms immediately when the order was made. Since most orders for psychotropic medications are made ex parte without attorneys present, the forms would likely not be provided to the court until the next status review hearing, which could be months from when the order was made. There also would be no reminder to the court that the documents needed to be provided.

The committee concluded that having the applicant (typically the social worker or probation officer) provide the forms when providing notice of the application was a better approach. The applicant is already required under rule 5.640 to provide five documents to the child's attorney when notice is given. The committee concluded that it was most efficient to add three more potential documents to the notice at the beginning of the request for psychotropic medications. The committee also concluded that it was more efficient since the social workers and probation officers have a better understanding of the forms and when they are needed than a courtroom clerk.

The committee considered having CDSS notify the court when the board is requesting the identifying information of a child; however, this approach would not be helpful for prescriptions made several years ago, as the child's case would likely be closed. That approach would only

[7] Section 827 lists the people and entities that may inspect a juvenile court case file without filing a petition with the juvenile court requesting a court order authorizing the person to inspect the file.

address data recently submitted to the board, but one issue the board seeks to address is its inability to obtain information on children that may have been in foster care several years ago. The board is looking at prescription patterns and as such, is not only requesting the identifying information for children in the most recent data set, but also for children prescribed medication by that same doctor for what could be years ago.

The committee also considered creating a form that could be sent to CDSS without filing it with the court. However, the committee concluded that the form could easily be lost or misplaced if it was not kept in the child's court file. Filing the form also allows the court the ability to review the file to determine if the form has been filled out.

The committee considered several time limits on the duration of the authorization. See discussion above in the Comments section of this report.

Fiscal and Operational Impacts

The proposal includes an added requirement that notice to the child's attorney include blank copies of *Position on Release of Information to Medical Board of California* (form JV-228), *Background on Release of Information to Medical Board of California* (form JV-228-INFO), and *Withdrawal of Release of Information to Medical Board of California* (form JV-229). Providing notice with three additional documents will likely result in minimal implementation costs and a slight increase in workload for the person or persons providing notice to the parties and attorneys. The proposal also includes an added requirement that the court clerk send the filed copy of *Position on Release of Information to Medical Board of California* (form JV-228) to CDSS. This will likely result in minimal implementation costs and a slight increase in workload for the court clerk. In implementing the revised forms, courts will incur standard reproduction costs.

The proposal includes a requirement that CDSS receive and maintain any signed copies of form JV-228, in the event the board requests identifying information of a child, nonminor dependent, or former dependent or ward, for the purposes of further evaluating possible excessive prescribing of psychotropic medication. This will result in an unknown increase in workload for CDSS staff to maintain these forms and any signed withdrawals of authorization. However, this requirement is consistent with the legislative intent of increasing the number of cases the board reviews to ascertain whether there is excessive prescribing of psychotropic medication.

Attachments and Links

1. Cal. Rules of Court, rules 5.640, 5.642, 5.706, 5.708, and 5.810, at pages 11–17
2. Forms JV-221, JV-223, JV-224, JV-228, JV-228-INFO, JV-229, and JV-287, at pages 18–32
3. Chart of comments, at pages 33–67
4. SB 377, *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB377*

Rule 5.642 of the California Rules of Court would be adopted, and rules 5.640, 5.706, 5.708, and 5.810 would be amended, effective September 1, 2020, to read:

Rule 5.640. Psychotropic medications

(a) * * *

(b) Authorization to administer (§§ 369.5, 739.5)

(1) Once a child is declared a dependent child of the court and is removed from the custody of the parents, ~~or~~ guardian, or Indian custodian, only a juvenile court judicial officer is authorized to make orders regarding the administration of psychotropic medication to the child, unless, under (e), the court orders that the parent or legal guardian is authorized to approve or deny the medication.

(2) Once a child is declared a ward of the court, removed from the custody of the parents, ~~or~~ guardian, or Indian custodian, and placed into foster care, as defined in Welfare and Institutions Code section 727.4, only a juvenile court judicial officer is authorized to make orders regarding the administration of psychotropic medication to the child, unless, under (e), the court orders that the parent or legal guardian is authorized to approve or deny the medication.

(c) Procedure to obtain authorization

(1) To obtain authorization to administer psychotropic medication to a dependent child of the court who is removed from the custody of the parents, ~~or~~ legal guardian, or Indian custodian, or to a ward of the court who is removed from the custody of the parents, ~~or~~ legal guardian, or Indian custodian and placed into foster care, the following forms must be completed and filed with the court:

(A)–(C) * * *

(2) The child, caregiver, parents, ~~or~~ legal guardians, or Indian custodian, child's Indian tribe, and Court Appointed Special Advocate, if any, may provide input on the mediations being prescribed.

(A)–(C) * * *

(3) *Input on Application for Psychotropic Medication* (form JV-222) may be filed by a parent, ~~or~~ guardian, or Indian custodian, ~~his or her~~ their attorney of record, a child's attorney of record, a child's Child Abuse Prevention and Treatment Act guardian ad litem appointed under rule 5.662 of the California

Rules of Court, or the Indian child's tribe. If form JV-222 is filed, it must be filed within four court days of receipt of notice of the application.

(4)–(9) * * *

(10) Notice of the application must be provided to the parents, ~~or~~ legal guardians, or Indian custodian, their attorneys of record, the child's attorney of record, the child's Child Abuse Prevention and Treatment Act guardian ad litem, the child's current caregiver, the child's Court Appointed Special Advocate, if any, and where a child has been determined to be an Indian child, the Indian child's tribe (see also 25 U.S.C. § 1903(4)–(5); Welf. & Inst. Code, §§ 224.1(a) and (e) and 224.3).

(A)–(B) * * *

(C) Notice must be provided as follows:

(i)–(ii) * * *

(iii) Notice to the child's attorney of record and any Child Abuse Prevention and Treatment Act guardian ad litem for the child must include:

a.–c. * * *

d. A blank copy of *Input on Application for Psychotropic Medication* (form JV-222) or information on how to obtain a copy of the form.; ~~and~~

e. A blank copy of *Child's Opinion About the Medicine* (form JV-218) or information on how to obtain the form.; and

f. If the application could result in the authorization of three or more psychotropic medications for 90 days or longer, notice must also include a blank copy of *Position on Release of Information to Medical Board of California* (form JV-228), a copy of *Background on Release of Information to Medical Board of California* (form JV-228-INFO), a blank copy of *Withdrawal of Release of Information to Medical Board of California* (form JV-229), and the procedures in rule 5.642 must be followed.

(iv) * * *

(11) * * *

(12) The court may grant the application without a hearing or may set the matter for hearing at the court's discretion. If the court sets the matter for a hearing, the clerk of the court must provide notice of the date, time, and location of the hearing to the parents, ~~or~~ legal guardians, or Indian custodian, their attorneys of record, the dependent child if 12 years of age or older, a ward of the juvenile court of any age, the child's attorney of record, the child's current caregiver, the child's social worker or probation officer, the social worker's or probation officer's attorney of record, the child's Child Abuse Prevention and Treatment Act guardian ad litem, the child's Court Appointed Special Advocate, if any, and the Indian child's tribe at least two court days before the hearing. Notice must be provided to the child's probation officer and the district attorney, if the child is a ward of the juvenile court.

(d) * * *

(e) Delegation of authority (§ 369.5, 739.5)

If a child is removed from the custody of his or her parent, ~~or~~ legal guardian, or Indian custodian, the court may order that the parent, legal guardian, or Indian custodian is authorized to approve or deny the administration of psychotropic medication. The order must be based on the findings in section 369.5 or section 739.5, which must be included in the order. The court may use *Order Delegating Judicial Authority Over Psychotropic Medication* (form JV-216) to document the findings and order.

(f) * * *

(g) Progress review

(1)–(5) * * *

(6) The child, caregiver, parents, ~~or~~ legal guardians, or Indian custodian, and Court Appointed Special Advocate, if any, may provide input at the progress review as stated in (c)(2).

(7) * * *

(h)–(k) * * *

Rule 5.642. Authorization to release psychotropic medication prescription information to Medical Board of California

(a) Providing authorization forms

Whenever there is an *Application for Psychotropic Medication* (form JV-220) filed with the court under rule 5.640, the applicant must review the *Physician's Statement—Attachment* (form JV-220(A)) or *Physician's Request to Continue Medication—Attachment* (form JV-220(B)) to determine if the request would result in the child being prescribed three or more concurrent psychotropic medications for 90 days or more, as described in section 14028. If the request would result in the child being prescribed three or more psychotropic medications for 90 days or more, the applicant must provide blank copies of *Position on Release of Information to Medical Board of California* (form JV-228), *Background on Release of Information to Medical Board of California* (form JV-228-INFO), and *Withdrawal of Release of Information to Medical Board of California* (form JV-229) to the child and the child's attorney.

(b) Signing authorization form

(1) Form JV-228 may be signed by either the child, nonminor dependent, or the attorney, with the informed consent of the child if the child is found by the court to be of sufficient age and maturity to consent. Sufficient age and maturity to consent must be presumed, subject to rebuttal by clear and convincing evidence, if the child is 12 years of age or over. If the child does not want to sign form JV-228, the child's attorney may not sign it. The child's attorney may sign form JV-228 with the approval of a child 12 years of age or older, if the child is under 12 years of age, or if the court finds the child not to be of sufficient age and maturity to consent.

(2) The authorization is for the release of medical records only. It is not an authorization for the release of juvenile court case files as described in section 827.

(c) Filing and sending authorization form

(1) The child's attorney must review form JV-228 with the child and file it with the superior court.

(2) Within three court days of filing, the clerk of the superior court must send form JV-228 to the California Department of Social Services at the address indicated on the form.

(d) Withdrawal of authorization

At any time, the child, nonminor dependent, or attorney may withdraw the authorization to release information to the Medical Board of California.

(1) Withdrawal may be made by filing *Withdrawal of Release of Information to Medical Board of California* (form JV-229) or by written letter to the California Department of Social Services.

(2) The child, nonminor dependent, or attorney may sign (as specified in (b)) form JV-229.

(3) Within three court days of filing, the clerk of the superior court must send form JV-229 to the California Department of Social Services at the address indicated on the form.

(e) Notice of release of information to medical board

If the California Department of Social Services releases identifying information to the Medical Board of California, the California Department of Social Services must notify the child, nonminor dependent, or former dependent or ward, at the last known address. The California Department of Social Services must also notify the child's, nonminor dependent's, or former dependent's or ward's attorney, including in cases when jurisdiction has been terminated.

Rule 5.706. Family maintenance review hearings (§ 364)

(a) * * *

(b) Release of Information to the Medical Board of California

If the child has signed *Position on Release of Information to Medical Board of California* (form JV-228), the social worker must provide the child with a blank copy of *Withdrawal of Release of Information to Medical Board of California* (form JV-229) before the hearing if it is the last hearing before the child turns 18 years of age or if the social worker is recommending termination of juvenile court jurisdiction.

~~(b)~~(c) * * *

~~(c)~~(d) * * *

~~(d)~~**(e)** * * *

~~(e)~~**(f)** * * *

Rule 5.708. General review hearing requirements

(a)–(b) * * *

(c) Release of Information to the Medical Board of California

If the child has signed *Position on Release of Information to Medical Board of California* (form JV-228), the social worker must provide the child with a blank copy of *Withdrawal of Release of Information to Medical Board of California* (form JV-229) before the hearing if it is the last hearing before the child turns 18 years of age or if the social worker is recommending termination of juvenile court jurisdiction.

~~(e)~~**(d)** * * *

~~(d)~~**(e)** * * *

~~(e)~~**(f)** * * *

~~(f)~~**(g)** * * *

~~(g)~~**(h)** * * *

~~(h)~~**(i)** * * *

~~(i)~~**(j)** * * *

~~(j)~~**(k)** * * *

Rule 5.810. Reviews, hearings, and permanency planning

(a)–(e) * * *

(f) Release of Information to the Medical Board of California

If the child has signed *Position on Release of Information to Medical Board of California* (form JV-228), the probation officer must provide the child with a blank copy of *Withdrawal of Release of Information to Medical Board of California* (form JV-229) before the hearing if it is the last hearing before the child turns 18

years of age or if the social worker is recommending termination of juvenile court jurisdiction.

JV-221 Proof of Notice of Application

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

Read form JV-217-INFO, *Guide to Psychotropic Medication Forms,* for more information about the required forms and the application process.

Fill in court name and street address:

Superior Court of California, County of

Fill in child's name and date of birth:

Child's Name:

Date of Birth:

Court fills in case number when form is filed.

Case Number:

1 ☐ The following parents/legal guardians of the child were notified of the physician's request to begin and/or to continue administering psychotropic medication, of the name of each medication, and that an application is pending before the court. They were also provided with form JV-217-INFO, *Guide to Psychotropic Medication Forms,* a blank copy of form JV-219*, Statement About Medicine Prescribed* and a blank copy of form JV-222, *Input on Application for Psychotropic Medication*.

a. Name: _____ Date notified: _____
Relationship to child: _____
Manner: ☐ In person ☐ By phone at *(specify):* _____
☐ By depositing the required information in a sealed envelope in the United States mail, with first-class postage prepaid, to the last known address *(specify):*
_____

b. Name: _____ Date notified: _____
Relationship to child: _____
Manner: ☐ In person ☐ By phone at *(specify):* _____
☐ By depositing the required information in a sealed envelope in the United States mail, with first-class postage prepaid, to the last known address *(specify):* _____
_____

c. Name: _____ Date notified: _____ Relationship to child: _____
Manner: ☐ In person ☐ By phone at *(specify):* _____
☐ By depositing the required information in a sealed envelope in the United States mail, with first-class postage prepaid, to the last known address *(specify):* _____
_____

2 ☐ Parental rights were terminated, and the child has no legal parents who must be informed.

3 ☐ Parent/legal guardian *(name):* _____
was not informed because *(state reason):* _____

4 ☐ Parent/legal guardian *(name):* _____
was not informed because *(state reason):* _____

5 The child's current caregiver was notified that a physician is asking to treat the child with psychotropic medication and that an application is pending before the court. The caregiver was provided form JV-217-INFO, *Guide to Psychotropic Medication Forms* and a blank copy of form JV-219, *Statement About Medicine Prescribed,* or information on how to obtain a copy of the form as follows:

Child's name: _____ **Case Number:**

5 Caregiver's name: _____ Date notified: _____
Manner: ☐ In person ☐ By phone at *(specify):* _____
☐ By depositing the required information in a sealed envelope in the United States mail, with first-class postage prepaid, to the following address
(specify): _____
At the time of service I was at least 18 years of age and not a party to this matter. I am a resident of or employed in the county where the mailing occurred. My residence or business mailing address is: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

_____ ▶ _____
Type or print name *Sign your name* ☐ Signature follows on page 3.

6 ☐ The child's attorney and the child's CAPTA guardian ad litem, if that person is someone other than the child's attorney, were provided with completed form JV-220, *Application for Psychotropic Medication;* completed JV-220(A), *Physician's Statement—Attachment* or completed form JV-220(B), *Physician's Request to Continue Medication—Attachment;* a copy of form JV-217-INFO, *Guide to Psychotropic Medication Forms;* a blank form JV-218, *Child's Opinion About the Medication;* and a blank copy of form JV-222, *Input on Application for Psychotropic Medication*, as follows:

a. Attorney's name: _____ Date notified: _____
Manner: ☐ In person ☐ By fax at *(specify):* _____
☐ By depositing copies in a sealed envelope in the United States mail, with first-class postage prepaid, to the last known address *(specify):* _____

b. CAPTA guardian ad litem's name: _____ Date notified: _____
Manner: ☐ In person ☐ By fax at *(specify):* _____
☐ By depositing copies in a sealed envelope in the United States mail, with first-class postage prepaid, to the last known address *(specify):* _____

7 ☐ The application could result in the child being prescribed three or more concurrent psychotropic medications for 90 days or more. The child's attorney and the child's CAPTA guardian ad litem, if that person is someone other than the child's attorney, were provided with blank copies of *Position on Release of Information to Medical Board of California* (form JV-228), *Background on Release of Information to Medical Board of California* (form JV-228-INFO), and *Withdrawal of Release of Information to Medical Board of California* (form JV-229), as follows:

a. Attorney's name: _____ Date notified: _____
Manner: ☐ In person ☐ By fax at *(specify):* _____
☐ By depositing copies in a sealed envelope in the United States mail, with first-class postage prepaid, to the last known address *(specify):* _____

b. CAPTA guardian ad litem's name: _____ Date notified: _____
Manner: ☐ In person ☐ By fax at *(specify):* _____
☐ By depositing copies in a sealed envelope in the United States mail, with first-class postage prepaid, to the last known address *(specify):* _____

Child's name: _____ **Case Number:**

8 ☐ The following attorneys were notified of the physician's request to begin and/or continue administering psychotropic medication, of the name of each medication, and that an application is pending before the court. They were also provided with a copy of form JV-217-INFO, *Guide to Psychotropic Medication Forms,* a blank copy of form JV-219, *Statement About Medicine Prescribed*; and a blank copy of form JV-222, *Input on Application for Psychotropic Medication,* or with information on how to obtain a copy of each form as follows:

a. Attorney's name: _____ Date notified: _____
Attorney for *(name):* _____
Manner: ☐ In person ☐ By phone at *(specify):* _____ ☐ By fax at *(specify):* _____
☐ By depositing the required information and copies of forms JV-217-INFO and JV-222 in a sealed envelope in the United States mail, with first-class postage prepaid, to the last known address *(specify):*
_____

b. Attorney's name: _____ Date notified: _____
Attorney for *(name):* _____
Manner: ☐ In person ☐ By phone at *(specify):* _____ ☐ By fax at *(specify):* _____
☐ By depositing the required information and copies of forms JV-217-INFO and JV-222 in a sealed envelope in the United States mail, with first-class postage prepaid, to the last known address *(specify):*
_____

c. Attorney's name: _____ Date notified: _____
Attorney for *(name):* _____
Manner: ☐ In person ☐ By phone at *(specify):* _____ ☐ By fax at *(specify):* _____
☐ By depositing the required information and copies of forms JV-217-INFO and JV-222 in a sealed envelope in the United States mail, with first-class postage prepaid, to the last known address *(specify):*
_____

At the time of service I was at least 18 years of age and not a party to this matter. I am a resident of or employed in the county where the mailing occurred. My residence or business mailing address is: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

_____ ▶ _____

Type or print name *Sign your name* ☐ Signature follows on page 3.

9 ☐ The child's CASA volunteer was notified of the physician's request to begin and/or continue administering psychotropic medication, of the name of each medication, and that an application is pending before the court. The CASA volunteer was provided with form JV-217-INFO, *Guide to Psychotropic Medication Forms;* a blank copy of form JV-218, *Child's Opinion About the Medicine;* and a blank copy of form JV-219, *Statement About Medicine Prescribed,* as follows:

CASA volunteer *(name):* _____ Date notified: _____
Manner: ☐ In person ☐ By phone at *(specify):* _____
☐ By depositing the required information in a sealed envelope in the United States mail, with first-class postage prepaid, to the last known address *(specify):* _____
_____

Child's name: _____ **Case Number:**

10 ☐ The Indian child's tribe was notified of the physician's request to begin and/or continue administering psychotropic medication, of the name of each medication, and that an application is pending before the court. The tribe was also provided with form JV-217-INFO, *Guide to Psychotropic Medication Forms,* a blank copy of form JV-219, *Statement About Medicine Prescribed,* and a blank copy of form JV-222, *Input on Application for Psychotropic Medication*.

Indian Tribe *(name):* _____ Date notified: _____

Manner: ☐ In person ☐ By phone at *(specify):* _____ ☐ By fax at *(specify):* _____

☐ By depositing the required information in a sealed envelope in the United States mail, with first-class postage prepaid, to the last known address *(specify):* _____

_____

At the time of service I was at least 18 years of age and not a party to this matter. I am a resident of or employed in the county where the mailing occurred. My residence or business mailing address is: _____

_____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

_____ ▶ _____

Type or print name *Sign your name*

JV-223 Order on Application for Psychotropic Medication

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Fill in child's name and date of birth:

Child's Name:

Date of Birth:

Court fills in case number when form is filed.

Case Number:

The Court read and considered:

a. Form JV-220, *Application for Psychotropic Medication,* and form JV-220(A), *Physician's Statement—Attachment,* or JV-220(B), *Physician's Request to Continue Medication—Attachment* filed on *(date):* _____

b. ☐ Form JV-218, *Child's Opinion About the Medicine,* filed on *(date):* _____

c. ☐ Form JV-219, *Statement About Medicine Prescribed,* filed on *(date):* _____

d. ☐ Form JV-219, *Statement About Medicine Prescribed,* filed on *(date):* _____

e. ☐ Form JV-222, *Input on Application for Psychotropic Medication,* filed on *(date):* _____

f. ☐ Form JV-222, *Input on Application for Psychotropic Medication,* filed on *(date):* _____

g. ☐ CASA report

h. ☐ Other *(specify):* _____

The Court finds and orders:

(1) a. ☐ Notice requirements were met.

b. ☐ Notice requirements were *not* met. Proper notice was not given to:

(2) ☐ The matter is set for hearing on (*date*): _____ at *(time):* _____ in *(dept.):* _____

(3) ☐ Application was made for authorization to begin or to continue giving the child the psychotropic medication listed in (19) on page 5 of form JV-220(A) or (16) on page 4 of form JV-220(B).

Copies of pages 5 and 6 of form JV-220(A) or pages 3 and 4 of form JV-220(B) are attached to this order.

The application is *(check one):*

a. ☐ Granted as requested.

b. ☐ Granted with the following modifications or conditions to the request as made in (19) on page 5 of form JV-220(A) or (16) on page 4 of form JV-220(B) *(specify all modifications and conditions):*

c. ☐ Denied *(specify reason for denial):*

If the application was for medication the child is currently taking, the social worker or probation officer must consult with the prescribing physician to determine whether the physician is recommending that the medication should be stopped immediately or gradually reduced over time.

Child's name: _____ **Case Number:**

4 a. ☐ This authorization will not result in the child being prescribed three or more psychotropic medications at the same time for 90 days or more.

b. ☐ This authorization will result in the child being prescribed three or more psychotropic medications at the same time for 90 days or more, which meets the description in Welfare and Institutions Code section 14028 of the data the California Department of Health Care Services and the California Department of Social Services must share with the Medical Board of California in order to ascertain whether there is excessive prescribing of psychotropic medication. The applicant must provide the child and the child's attorney a blank copy of *Position on Release of Information to Medical Board of California* (form JV-228) and a copy of *Background on Release of Information to Medical Board of California* (form JV-228-INFO), and a blank copy of *Withdrawal of Release of Information to Medical Board of California* (form JV-229). The procedures in California Rules of Court, rule 5.642 must be followed.

5 ☐ The applicant must resubmit the application no later than *(date):* _____
with the missing information, which is: _____

The matter is set for hearing on (*date*): _____ at *(time):* _____
in *(dept.):* _____

6 The

a. ☐ social worker
b. ☐ probation officer
c. ☐ person who submitted application

is ordered to give a copy of this order, including pages 5 and 6 of form JV-220(A) or pages 3 and 4 of form JV-220(B) and the medication monograph attached to the form JV-220(A) to the child's caregiver either in person or by mail within two court days.

7 ☐ Other *(specify):* _____

8 The order is set for a progress review on (*date*): _____ at *(time):* _____
in *(dept.):* _____

This order is effective until terminated or modified by court order or until 180 days from the date of this order, whichever is earlier. If the prescribing physician is no longer treating the child, this order extends to subsequent treating physicians. A change in the child's placement does not require a new order regarding psychotropic medication. Except in an emergency situation, a new application must be submitted and consent granted by the court before giving the child medication not authorized in this order or increasing medication dosage beyond the maximum daily dosage authorized in this order.

Date: _____ _____
Signature of judge or judicial officer

JV-224 County Report on Psychotropic Medication

The social worker or probation officer must file this form for any hearing for which the court is providing oversight of psychotropic medications. This includes all scheduled progress reviews on orders authorizing psychotropic medication and every status review hearing. If you are filing this form for a status review hearing, file it with the status review hearing report. If you need more space for any of the items, write the item number and additional information on page 4 of this form. If you need more space than page 4, attach a sheet or sheets of paper. If you do not know the answer to a question, write "I do not know."

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Fill in child's name and date of birth:

Child's Name:

Date of Birth:

Court fills in case number when form is filed.

Case Number:

1 Your name: _____

2 Your relationship to the child:

☐ Social worker ☐ Probation officer

☐ Other county staff *(specify):* _____

_____

3 a. Caregiver's relationship to child: _____

b. Date of last communication with caregiver: _____

4 Child Information

a. Child's height: _____ b. Child's weight: _____

c. Prescribing physician's name: _____

d. Date last seen by prescribing physician: _____

e. Next appointment date: _____

f. Therapist's name: _____

g. Date last seen by therapist: _____

5 List current court-approved psychotropic medications. *(Verify that this is what child is taking.)*

Name of Medication	Dosage

Name of Medication	Dosage

6 ☐ The child is taking the medication in **5**. This was verified by ☐ child ☐ caregiver ☐ other *(specify):*

_____

7 ☐ The child is not taking the following medication in **5** *(specify):* _____

This was verified by ☐ child ☐ caregiver ☐ other *(specify):* _____

8 a. ☐ The court has not authorized three or more psychotropic medications at the same time for 90 days or more.

b. ☐ The court has authorized three or more psychotropic medications at the same time for 90 days or more.

Does the court case file contain a signed copy of *Position on Release of Information to Medical Board of California* (form JV-228)?

(1) ☐ Yes

(2) ☐ No

(3) ☐ I do not know.

9 Describe the caregiver's observations regarding how the child's behaviors and/or symptoms have changed since the medication was begun.

10 Describe the caregiver's observations regarding the side effects of the medication.

11 Describe any concerns the caregiver has regarding the medication.

12 Describe what the child says about whether his or her behaviors and/or symptoms have changed since the medication was begun.

13 Describe what the child says about the side effects of the medication.

14 Describe any concerns or complaints the child has regarding the medication.

15 List the dates of all medication management appointments since the last court hearing.

16 List the dates and reasons of other follow-up medical appointments since the last court hearing.

17 Describe other mental health treatments that are part of the child's overall treatment plan (for example, frequency and type of counseling, wraparound, etc.) or attach mental health treatment plan from treating clinician.

18 Provide any other information you think the judge should know.

19 ☐ Check here if you need more space for any of the items. Write the item number and additional information here. If you need more space, attach a sheet or sheets of paper.

Date:

_____
Type or print name of person completing this form

▶ _____
Signature

☐ Child welfare services staff *(sign above)*
☐ Probation department staff *(sign above)*
☐ Other *(specify):* _____ *(sign above)*

JV-228 Position on Release of Information to Medical Board of California

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

You have been prescribed three or more psychotropic medications at the same time for 90 days or longer. The Medical Board of California will look into the care your doctor provided you and may need additional information to decide if the doctor properly prescribed medication for you. You may use this form to authorize the California Department of Social Services and the California Department of Health Care Services to give your name and contact information to the Medical Board of California, if the board requests, so the board can look more closely at your care. You can also use this form to authorize the release of limited information to the board.

1 Your information:

a. I am the
- ☐ child or youth
- ☐ nonminor dependent
- ☐ child's or youth's attorney

b. My name: _____

c. My address, city, state, and zip code *(If confidential, see 2):*

_____

d. My telephone number: _____

e. My email address: _____

f. *If you are an attorney:*
My client's name: _____
My client's address, city, state, and zip code *(If confidential, see 2):*

_____

My client's telephone number: _____
My client's email address: _____
My state bar number: _____

2 *If the child or nonminor dependent's address should remain confidential in the juvenile court file, a* Confidential Information *(form JV-287) must be completed. The address should not be included on this form.*

☐ *Check here if form JV-287 is attached.*

3 I understand that I cannot be denied the receipt of government services or treatment, and care may not be denied due to not authorizing the release of information.

4 a. ☐ I authorize ☐ my name and contact information ☐ my client's name and contact information to be shared with the Medical Board of California and authorize board staff to contact ☐ me ☐ my client for further details about medical care.

b. ☐ I do not authorize ☐ my name and contact information ☐ my client's name and contact information to be shared with the Medical Board of California and do not authorize board staff to contact ☐ me ☐ my client for further details about medical care.

If you check item 4b, you can skip to the signature line at the end of this form.

Case Number:

5 a. ☐ I authorize the California Department of Health Care Services and the California Department of Social Services to connect ☐ my name ☐ my client's name to the prescribing data and other information about ☐ me ☐ my client that was previously provided under a unique number.

b. ☐ I do not authorize the California Department of Health Care Services and the California Department of Social Services to connect ☐ my name ☐ my client's name to the prescribing data and other information about ☐ me ☐ my client that was previously provided under a unique number.

6 a. ☐ I authorize the Medical Board of California to see ☐ my ☐ my client's medical records to decide if there are any potential violations of the law or excessive prescribing of psychotropic medications.

(1) The authorization is limited to medical information relevant to the investigation of the prescription of psychotropic medications only.

(2) The information may be used only for the purpose of the investigation.

(3) If the medical information is admitted as an exhibit in an administrative hearing, the medical board must request that it be sealed.

b. ☐ I do not authorize the Medical Board of California to obtain ☐ my ☐ my client's medical records to decide if there are any potential violations of the law or excessive prescribing of psychotropic medications.

7 This authorization will remain valid for three years unless I cancel it in writing by using *Withdrawal of Release of Information to Medical Board of California* (form JV-229).

8 This form does not authorize the release of juvenile court case file information as described by Welfare and Institutions Code section 827.

9 I understand that I may cancel this authorization by filing *Withdrawal of Release of Information to Medical Board of California* (form JV-229).

Date: _____

_____ ▶ _____

Type or print your name *Signature of* ☐ Child or youth
☐ Nonminor dependent
☐ Attorney for child, youth, or nonminor dependent

Whenever a child, nonminor dependent, or attorney signs this form, the child or nonminor dependent's attorney must file the form with the juvenile court. The clerk of the court must mail a copy of the form to the California Department of Social Services (CDSS). CDSS must maintain all forms received to review whether the child has given permission to release their information to the Medical Board of California.

California Department of Social Services
Attention: Information Release for California Medical Board
744 P Street, MS 8-13-66
Sacramento, CA 95814

JV-228-INFO Background on Release of Information to Medical Board of California

1 Why you are receiving forms JV-228 and JV-229

You have been prescribed three or more psychotropic medications at the same time for 90 days or longer. The Medical Board of California ("board") will look into the care your doctor provided to you and may need more information to determine if the doctor properly prescribed medication for you.

California law requires the board to review medical doctors prescribing psychotropic medication to youth in foster care. As part of this review, the California Department of Health Care Services (DHCS) and the California Department of Social Services (CDSS) provide prescribing and other data to the board under a unique number assigned to you, but with no personal identifying information. This means that the board does not know your name or other personal information about you, and does not know how to contact you.

After renewing the data provided by DHCS and CDSS, a medical expert may decide that prescribing practices by one or more doctors involved in your care should be examined more closely. To look into the quality of medical care you were provided, the board may ask you for your name and contact information, so board staff can contact you to get further details about your care and get your permission to review your medical records. You do not need to respond to contacts from the board, even if you agreed to the release of your information. The decision to respond to the board is up to you.

The board encourages you to authorize this review, because it is important to ensure doctors are appropriately prescribing medications to youth in foster care.

2 Information that may be made known

The medical board may also request that you give your permission to DHCS and CDSS to connect your name to the prescribing and other data that was provided to the board under a unique number. This means the medical board will know:

- Your name and that you are or were in foster care;
- Your contact information;
- What psychotropic medications you were prescribed;
- How much of each medication you were prescribed;
- The start and stop dates for each medication;
- Who prescribed them to you; and
- Your age and weight at the time you were prescribed these medications.

This information may help the board evaluate the quality of care you received from your doctors.

You may also allow the board to see your medical records if the board needs them to decide whether the doctor broke the law or prescribed too much psychotropic medication to you.

You do not have to release any information to the board, and you may choose not to share your information with the board. Further, if you do not release your information, there will be no impact on or changes to the services, treatment, or care you receive from the government.

3 Confidentiality of information

Please be aware that all of the state agencies involved are committed to protecting your privacy. The medical board is required by law to keep all information used in their investigations confidential.

4 Withdrawal of authorization

You can change your mind and withdraw your authorization to give information to the medical board at any time. You can do this by signing, or having your attorney sign, *Withdrawal of Release of Information to Medical Board of California* (form JV-229) and your attorney will file it with the court.

JV-229 Withdrawal of Release of Information to Medical Board of California

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

You may use this form to stop your authorization for the California Department of Social Services and the California Department of Health Care Services to give your name and contact information to the Medical Board of California, and to see your medical records.

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(1) Your information:

a. I am the
- ☐ child or youth
- ☐ nonminor dependent
- ☐ child's or youth's attorney

b. My name: _____

c. My address, city, state, and zip code *(If confidential, see (2)):*

_____

d. My telephone number: _____

e. My email address: _____

f. *If you are an attorney:*
My client's name: _____
My client's address, city, state, and zip code *(If confidential, see (2)):*

_____
My client's telephone number: _____

My client's email address: _____
My state bar number: _____

(2) *If you want to keep your address or your client's address confidential in the juvenile court file, fill out* Confidential Information *(form JV-287) and do not write the address on this form.*
☐ *Check here if form JV-287 is attached.*

(3) I DO NOT authorize ☐ my name and contact information ☐ my client's name and contact information to be shared with the Medical Board of California and DO NOT authorize board staff to contact me or my client for further details about medical care.

(4) I DO NOT authorize the California Department of Health Care Services and the California Department of Social Services to connect my name to the prescribing data and other information about ☐ me ☐ my client that was previously provided under a unique number.

(5) I DO NOT authorize the Medical Board of California to see ☐ my ☐ my client's medical records to decide if there are any potential violations of the law or excessive prescribing of psychotropic medications.

Date: _____

_____ ▶ _____

Type or print your name *Signature of*
- ☐ Child or youth
- ☐ Nonminor dependent
- ☐ Attorney for child, youth, or nonminor dependent

Whenever a child, nonminor dependent, or attorney signs this form, the child or nonminor dependent's attorney must file the form with the juvenile court. The clerk of the court must mail a copy of the form to CDSS. CDSS must maintain all forms received.

California Department of Social Services
Attention: Information Release for California Medical Board
744 P Street, MS 8-13-66, Sacramento, CA 95814

JV-287 Confidential Information

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

This form is used to keep contact information confidential. It may be used along with any Judicial Council juvenile form, including *Request to Change Court Order* (form JV-180), *Application and Affidavit for Restraining Order* (form JV-245), *Relative Information* (form JV-285), *Caregiver Information Form* (form JV-290), *De Facto Parent Request* (form JV-295), and *Position on Release of Information to Medical Board of California* (form JV-228).

You do not need to fill out this entire form. Write only the information that you know.

This information must be kept under seal in the court file. Only the court, the agency, and the child's attorney may look at this information.

Fill in court name and street address:

Superior Court of California, County of

Fill in child's name and date of birth:

Child's Name:

Date of Birth:

Court fills in case number when form is filed.

Case Number:

1 Your name: _____

Your telephone number: _____

Your address: _____

_____

_____

2 Child's name: _____

Child's telephone number, if known: _____

Child's address, if known: _____

_____

_____

3 If known:

Child's Indian custodian, if any *(name each):* _____

Custodian's telephone number: _____

Custodian's address: _____

_____

_____

4 If known:

Child's caregiver *(name each):* _____

Caregiver's telephone number: _____

Caregiver's address: _____

_____

_____

Winter 20-07

Juvenile Law: Psychotropic Medication Information Release (Adopt Cal. Rules of Court, rule 5.642; amend rule 5.640; approve forms JV-228, JV-228-INFO, and JV-229; amend forms JV-221, JV-223, JV-224, and JV-287)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committees Response
1.	California Academy of Child and Adolescent Psychiatry By: Priscilla Quiroz		On behalf of the nearly 1,000 members of the California Academy of Child and Adolescent Psychiatry (CALACAP), I write to you today to provide comments on the Family and Juvenile Law Advisory Committee proposal W20-07. First, we recommend replacing 'excessive prescribing' throughout the bill with 'prescribing without appropriate clinical indication'. In 2016, SB 1174 (McGuire) indicates excessive prescribing as 3 or more psychotropics for more than 90 days, which seems very concrete and does not consider that different patients have different clinical needs. In practice, there are few kids who need more than 3 medications for longer than 90 days for clinically appreciate indications. We hope that replacing 'excessive prescribing' may have more meaning when there are looking for clinically inappropriate prescribing and not just 3 or more medication for 90 days. CALACAP also recommends an online database for JV-220. Although this is not directly related to SB 377 (McGuire), we believe having this database would help the impact on the system by this legislation. We'd like to raise the concern that if a youth's 3 medications prescribed for over 90 days was approved by a Juvenile Court for Behavioral Health Services (JCBHS) child psychiatrist (or	This bill has been signed by the governor and codified. The Judicial Council cannot change the language used in the statute. The committee has tracked the language in the statute that CDSS must provide the information to the board as required by statute. The committee appreciates this comment, and while an online database for tracking the JV-220 forms may be a good idea, it is outside the scope of this proposal and the rule making authority of the council. The Medical Board of California would review the child or youth's medical records before making a determination regarding the prescribing doctor. It is not a review of the JV-220(A) or JV-

	Commenter	Position	Comment	Committees Response
			similar program) and the records reveal information that leads to finding the practice not acceptable to the MBC reviewer, this could potentially put the JCBHS reviewer at risk for the initial approval based on just a review of the JV-220(A) or (B). Another concern is if a youth (or their lawyer) requests information regarding the result of the MBC review which finds that the prescribing physician's practice did not meet the standard of care, the youth could sue the prescribing physician for negligence. CALACAP would like to let the committee know that we were strongly opposed to SB 1174 when it was introduced, and we have major concerns with SB 377. Strengthening the current arbitrary law may lead to reluctance among child psychiatrists to work with this population. There is already a significant shortage of child psychiatrist serving this population, and given the already complex nature of treating them, SB 1174 and SB 377 create further barriers to serving these children. Additionally, SB 1174 was meant to authorize investigation of the treatment only of dependents of the foster care system. SB 377, on the other hand, authorizes the investigation of both wards and dependents of the court. SB 377, therefore, attempts to expand the original scope of SB 1174 and	220(B). The committee recommends including in proposed rule 5.642 and on form JV-228 statements that the authorization is for the release of medical records only, not an authorization for the release of the juvenile court case file as described by section 827. The Medical Board of California is required to review the data and medical records to determine if the appropriate standard of care was met. The results of this determination are outside the scope of this proposal and the rule-making authority of the Judicial Council. See response above.

	Commenter	Position	Comment	Committees Response
			leaves ambiguous and unclear the scope of minors included under their collective umbrella. Thank you again for the opportunity to comment on the Committee's proposal. We look forward to discussing our comments with you in more detail.	
2.	California Department of Social Services By: Lori Fuller	AM	COMMENTS ON THE PROPOSED AMENDMENTS TO CALIFORNIA RULES OF COURT, RULE 5.640; ADOPTION OF CALIFORNIA RULES OF COURT, RULE 5.642; AMENDMENTS TO FORMS JV-223, JV-224, AND JV-287; AND APPROVAL OF FORMS JV-228, JV-228 INFO, AND JV-229 Dear Honorable Members of the Family and Juvenile Law Advisory Committee: This letter provides comments from the California Department of Social Services (CDSS) on the Judicial Council Family and Juvenile Law Advisory Committee's proposed amendments to rule 5.640 and addition of rule 5.642 of the California Rules of Court regarding the release of psychotropic medication information of children and youth in foster care to the Medical Board of California. Comments to Proposed Rules of Court, rule 5.642. Authorization to release psychotropic medication prescription information to the	

	Commenter	Position	Comment	Committees Response
			Medical Board of California: Rule of Court 5.642(a) Providing authorization forms… If there is a request to order three or more psychotropic medications for 90 days or more, the applicant must provide a blank copy of Position on Release of Information to Medical Board of California (form JV-228) and Background on Information Release to Medical Board of California (form JV-28 INFO) to the child and the child's attorney. Comment #1: The CDSS recommends including a requirement that the applicant must also provide to the child and the child's attorney a blank copy of Withdrawal of Information Release to Medical Board of California (form JV-229) so the child and their attorney will have this form immediately available should they wish to withdraw their consent to release their information to the Medical Board of California at any time in the future. Additionally, the CDSS recommends Rule 5.642(a) be revised to state that when an Application for Psychotropic Medication (form JV-220) is filed with the juvenile court, the applicant must review of the Physician's Statement (form JV-220(A)), or Physician's Request to Continue Medication (form JV-220(B)) to determine if the request would result in the child or youth being prescribed three or more concurrent psychotropic medications for	The committee appreciates this comment and has amended rule 5.642 to require the applicant to also serve a blank copy of *Withdrawal of Information Release to Medical Board of California* (form JV-229) so the child and their attorney will have this form immediately available should they wish to withdraw their consent to release their information to the Medical Board of California at any time in the future. The committee has amended this rule to clarify that the applicant must review *Physician's Statement—Attachment* (form JV-220(A)) or *Physician's Request to Continue Medication—Attachment* (form JV-220(B)) to determine if the request could result in the child being prescribed three or more concurrent psychotropic medications for 90 days or more.

	Commenter	Position	Comment	Committees Response
			90 days or longer. This would clarify that this review applies in cases where new psychotropic medication, in addition to continuing medication that was previously authorized, will result in the child being prescribed three or more concurrent psychotropic medications for 90 days or more. Rule of Court 5.642(c)(2) Within three days of filing, the clerk of the superior court must send form JV-228 to the California Department of Social Services at the address indicated on the form. Comment #2: The CDSS has significant concerns that this proposed provision imposes a requirement that does not exist in statute for the CDSS to be the repository of these documents, without any analysis of the costs and burdens that would be triggered by the creation of a separate system at the state level to receive and maintain the JV-228 forms. The CDSS does not typically receive individual case documents from the JV-220 process or maintain individual case files or records for child welfare services or probation cases. Such recordkeeping is done at the local level by the appropriate county child welfare services agency or county probation department overseeing the child's case. The CDSS therefore recommends striking paragraph (2) of subdivision (c) of the proposed Rule of	The committee appreciates this comment, however the suggestion of maintaining the JV-228 form in the social worker or probation officer's file does not address one of the main problems the board is having, which is obtaining the identifying information of children whose cases have been closed. The bill, and the mandated form, are intended to assist CDSS perform its statutorily mandated information sharing with the board so that the board can perform its statutorily mandated review of the child's medical records to decide if there are any violations of the law or excessive prescribing of psychotropic medications.[1] As the process is currently performed, the board is unable to meet its statutory obligations because it is not getting the necessary information releases from CDSS. This is a unique use of a Judicial Council

[1] Bus. & Prof. Code § 2245; Welf. & Inst. Code § 14028

	Commenter	Position	Comment	Committees Response
			Court 5.642 to remove CDSS as the point of delivery and repository for the JV-228 forms. Instead, the CDSS recommends that Rule 5.642 require either the clerk of the court to mail a copy of the filed JV-228 form to the respective county child welfare services agency or probation department, so it may be included in the child's existing individual case file, or alternatively, that the proposed rule require the child's attorney to provide a copy of form JV-228 to the county child welfare services agency or probation attorney upon filing the form with the juvenile court . Should the Medical Board of California request a further review of a dependent's/ward's medical record, the CDSS can simply contact the necessary county agency to determine if there is a JV-228 form on file. Additionally, CDSS recommends that the proposed language "within three days of filing" be clarified to read "within three court days of filing". Specifying "court days" is consistent with existing language in rule 5.640. Rule of Court 5.642(d)(1)(2) Withdrawal of authorization. At any time, the child, nonminor dependent, or attorney may withdraw the authorization to release information to the Medical Board of California. Withdrawal may	form, but it is mandated by statute. Additionally, the fact that a rule goes beyond what is contained in a statute does not make it inconsistent with the statute.[2] Unless the circumstances show otherwise, it should be presumed that the Legislature simply chose not to establish specific procedures in that area and that the council is free to do so.[3] SB 377 requires the Judicial Council to develop a form to include a request for authorization by the child or child's attorney for CDSS to release the child's identification information to the Medical Board of California, so it can ascertain whether there is excessive prescribing of medication. Establishing basic procedures for how that form is provided to the child and maintained for a future request by the Medical Board is within the Judicial Council's rule-making authority. The committee appreciates this comment and has amended the rule to indicate three court days of filing.

[2] *Butterfield v. Butterfield* (1934) 1 Cal.2d 227.
[3] See *People v. Mendez* (1999) 19 Cal.4th 1084; *In re Juan C.* (1993) 20 Cal.App.4th 748; compare *Simpson v. Smith* (1989) 214 Cal.App.3d Supp. 7 (statute that was amended to delete notice requirement inconsistent with rule requiring notice).

	Commenter	Position	Comment	Committees Response
			be made by filing Withdrawal of Information Release to Medical Board of California (form JV-229) or by written letter to the California Department of Social Services. The child or child's attorney may sign (as specified in (b)) form JV-229 or send a letter to the California Department of Social Services. Comment #3: Subdivision (d)(1)(2) does not contain a mechanism for the JV-229 form to be transmitted anywhere upon being filed with the court. The CDSS recommends that the proposed rule include a requirement that the JV-229 form be transmitted to the county child welfare services agency or probation department by either the clerk of the court or the child's attorney filing the form, in order for the document to be maintained in the child's individual case file. The CDSS is concerned about permitting a letter to be sent to the CDSS. Permitting a letter, especially without any requirements on how to communicate withdrawal of authority, will result in confusion and lack of uniformity. The CDSS therefore recommends removing the option of sending a letter to the CDSS. The CDSS suggests that the rule prescribe the same process for transmitting the JV-229 Withdrawal of Information Release to Medical Board of California form to the county agency as will be prescribed for the JV-228 Position on Release of	The committee has amended this rule to indicate that *Withdrawal of Information Release to Medical Board of California* (form JV- 229) be filed with the court and sent by the clerk to CDSS. Since the rule requires CDSS to maintain the JV-228, any withdrawal of that consent would need to be maintained with the original authorization. The committee has revised the rule and forms to remove the option of sending a letter to CDSS and recommends that *Withdrawal of Information Release to Medical Board of California* (form JV-229) be adopted as a mandatory form. The committee has amended this rule to indicate that *Withdrawal of Information Release to Medical Board of California* (form JV- 229) be filed with the court and sent by the clerk to CDSS. Since the rule requires CDSS to maintain the JV-228, any withdrawal of that consent would need to be maintained with the original authorization

	Commenter	Position	Comment	Committees Response
			Information to the Medical Board form. As such, the CDSS reiterates the recommendation that either the clerk of the superior court or the child's attorney be designated as the responsible party to send the forms to the respective county child welfare or probation agency for inclusion in the child's case file. Indicating a uniform process will minimize any unnecessary confusion by all respective parties. Rule of Court 5.642(e) Notice of release of information to medical board. If the California Department of Social Services releases identifying information to the Medical Board of California, the California Department of Social Services must notify the child, nonminor dependent, or former dependent or ward, at the last known address. The California Department of Social Services must also notify the child's, nonminor dependent's, or former dependent's or ward's attorney, including in cases when jurisdiction has been terminated. Comment #4: The CDSS respectfully notes that this proposed Rule of Court creates a new responsibility and imposes a direct duty on an agency of the executive branch that is not prescribed by statute. The CDSS has significant concerns that this provision creating a new responsibility for an agency of the executive branch that is not a party to juvenile court proceedings may be beyond the constitutional authority of the Judicial Council to "adopt rules	Senate Bill 377 imposed the unique requirement on the Judicial Council that it create a form for use by the California Department of Social Services to authorize that agency to release the identifying information of youth or nonminor dependents whom the Medical Board of California would like to investigate prescriptions of psychotropic medications. As indicated in the legislative history, the current process has resulted in only 3 of 86 children reviewed by the board.

	Commenter	Position	Comment	Committees Response
			for court administration, practice, and procedure, and perform other functions prescribed by statute," as set forth in subdivision (d) of Section 6, Article VI of the California Constitution. Senate Bill 377, which added sections 369.5(a)(2)(D) and 739.5 (a)(2)(D) to the Welfare and Institutions Code, does not specify an expansion of this authority nor authorize the direct imposition of a new duty upon CDSS via the Rules of Court.	The bill, and the mandated form, are intended to assist CDSS perform its statutorily mandated information sharing with the board so that the board can perform its statutorily mandated review of the child's medical records to decide if there are any violations of the law or excessive prescribing of psychotropic medications.[4] As the process is currently performed, the board is unable to meet its statutory obligations because it is not getting the necessary information releases from CDSS. This is a unique use of a Judicial Council form, but it is mandated by statute. Additionally, the fact that a rule goes beyond what is contained in a statute does not make it inconsistent with the statute.[5] Unless the circumstances show otherwise, it should be presumed that the Legislature simply chose not to establish specific procedures in that area and that the council is free to do so.[6] SB 377 requires the Judicial Council to develop a form to include a request for authorization by the child or child's attorney for CDSS to release the child's identification information to the Medical Board of California, so it can ascertain whether there is excessive prescribing of medication. Establishing basic procedures for how that form is provided to the child and maintained for a future request by the

[4] Bus. & Prof. Code § 2245; Welf. & Inst. Code § 14028
[5] *Butterfield v. Butterfield* (1934) 1 Cal.2d 227.
[6] See *People v. Mendez* (1999) 19 Cal.4th 1084; *In re Juan C.* (1993) 20 Cal.App.4th 748; compare *Simpson v. Smith* (1989) 214 Cal.App.3d Supp. 7 (statute that was amended to delete notice requirement inconsistent with rule requiring notice).

	Commenter	Position	Comment	Committees Response
				Medical Board is within the Judicial Council's rule-making authority.
			The CDSS respectfully requests the removal of subdivision (e) of the proposed Rule of Court 5.642 in its entirety, and recommends an alternative approach of including on page two of the proposed JV-228 form a ninth item allowing the child and/or their attorney to check a box that indicates: "As a condition of my authorization, I request notification at my last known address if the Medical Board of California seeks release of my identifying information or my medical records to determine if there are any potential violations of the law or excessive prescribing of psychotropic medications." The CDSS supports the idea that a child, youth, and/or their attorney should be notified if the Medical Board of California seeks release of their identity and psychotropic medication information. The CDSS is committed to continuing to partner with the Medical Board of California, local agencies, and other relevant stakeholders to develop the best process for notifying the child, including any former dependents/wards, in an appropriate, effective, and trauma-informed manner. Comments to Amended Rules of Court, rule 5.640. Psychotropic Medications	CDSS can continue to partner with the Medical Board of California, local agencies, and other relevant stakeholders to develop the best process for notifying the child including any former dependents/wards, of the board's request, in an appropriate, effective, and trauma-informed manner. Nothing in the rule prevents that. It simply requires CDSS to notify the child, nonminor dependent, or former dependent or ward at their last known address. It also requires CDSS to notify the attorney of record.

	Commenter	Position	Comment	Committees Response
			Rule of Court 5.640(f) If the application is a request for authorization of three or more psychotropic medications for 90 days or longer, notice must also include a blank copy of Position on Release of Information to Medical Board of California (form JV-228) and a copy of Background on Information Release to Medical Board of California (form JV-28 INFO), and the procedures in rule 5.642 must be followed. Comment #5: The CDSS recommends including in the noticing requirements that a blank copy of Withdrawal of Information Release to Medical Board of California (form JV-229) must also be included in the notice to the child's attorney of record. Additionally, the CDSS recommends Rule 5.640(f) be clarified to state that blank copies of these forms must be provided if the Application for Psychotropic Medication (form JV-220) will result in the child or youth being prescribed three or more concurrent psychotropic medications for 90 days or longer. This will clarify that this requirement applies in cases where new psychotropic medication, in addition to continuing medication that was previously authorized, will result in the child being prescribed three or more concurrent psychotropic medications for 90 days or more.	The committee appreciates this comment and has amended the rule to require that notice include service of a blank copy of *Withdrawal of Information Release to Medical Board of California* (form JV-229). The committee has amended this rule to clarify that the applicant must review *Physician's Statement—Attachment* (form JV-220(A)) or *Physician's Request to Continue Medication—Attachment* (form JV-220(B)) to determine if the request could result in the child being prescribed three or more concurrent psychotropic medications for 90 days or more.

	Commenter	Position	Comment	Committees Response
			Comments to Proposed Forms: JV-228 Position on Release of Information to Medical Board of California Comment #6: The CDSS recommends the following changes: • Page 2, Item #7, include clarifying language as follows: "This authorization will remain valid for three years unless: 1) I cancel it in writing; or 2) I exit foster care and the court terminates jurisdiction; or 3) If the authorization is signed only by my attorney, I reach the age of 18 years. "	The suggested approach of the authorization becoming invalid when the child exits foster care or reaches 18 years of age does not address one of the main problems the board is having, which is obtaining the identifying information of children whose cases have been closed. There is no reason for differentiating between current and former foster youth. The legislative intent is that all foster youth should be given an opportunity to authorize the board to access their medical information if there is alleged to have been inappropriate prescribing of psychotropic medication.[7] The committee concluded that the authorization should remain valid until it is withdrawn. The committee has amended the rules and forms to indicate this. The rules have also been amended to require the social worker or probation officer to provide the youth a blank copy of *Withdrawal of Information Release to Medical Board of California* (form JV-229) when it is the last hearing before the child turns 18 years of age, or if the recommendation is

[7] Assem. Com. on Judiciary, Analysis of Sen. Bill No. 377 (2019-2020 Reg. Sess.) July 2, 2019, pp.8-9

	Commenter	Position	Comment	Committees Response
				to terminate juvenile court jurisdiction. This approach will decrease workload for both court clerks and CDSS since the authorization form will not need to be repeatedly filed and sent to CDSS.
			The CDSS believes that the proposed three-year timeframe is generally appropriate for the authorization to remain valid. However, once a child exits care to reunification, adoption, or legal guardianship, the child will have a biological parent, adoptive parent, or legal guardian who may make medical decisions on behalf of the child, including whether to release the child's medical information. Additionally, once a child reaches the age of majority, they may also independently authorize the release of their own medical information. Therefore, the CDSS believes it is appropriate for the JV-228 authorization to expire in these instances.	See response above.
			• Page 2, include an item #9 allowing the child and/or their attorney to request notification at their last known address if the Medical Board seeks release of their information as a condition of their authorization.	CDSS can continue to partner with the Medical Board of California, local agencies, and other relevant stakeholders to develop the best process for notifying the child, including any former dependents/wards, in an appropriate, effective, and trauma-informed manner. Nothing in the rule prevents that. It simply requires CDSS to notify the child, nonminor dependent, or former dependent or ward at their last known address. It also requires CDSS to notify the attorney of record.

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Juvenile Law: Psychotropic Medication Information Release (Adopt Cal. Rules of Court, rule 5.642; amend rule 5.640; approve forms JV-228, JV-228-INFO, and JV-229; amend forms JV-221, JV-223, JV-224, and JV-287)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committees Response
			• Page 2, remove the language within the bottom box requiring the clerk of the court to mail a copy of the form to the CDSS, and instead provide instructions that the responsible party (e.g. clerk of the court or child's attorney) must provide a copy of the form to the child's respective county child welfare or probation agency for inclusion in the agency case file.	The committee appreciates this comment, however the suggestion of maintaining the JV-228 form in the social worker or probation officer's file does not address one of the main problems the board is having, which is obtaining the identifying information of children whose cases have been closed. The committee recommends maintaining the requirement in rule 5.642 and on this form that the clerk of the court mail a copy of the form to CDSS.
			• Should CDSS remain as a point of delivery, a CDSS mail station must be included after the street address, specifically "MS 8-13-66". JV-228 INFO Background on Information Release to the Medical Board of California Comment #7: The CDSS recommends that if it remains a point of delivery of receiving a copy of the forms, Item #4 Withdrawal of authorization should specify a complete CDSS address, including the designated mail station listed above. Comments to Amended Forms: JV-223 Order on Application for Psychotropic Medication	The committee has revised the form to include the specified CDSS mail station. The committee has revised the form to specify a complete CDSS address, including the designated mail station.

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	Commenter	Position	Comment	Committees Response
			Comment #8: The CDSS recommends on page 2, Item #4b, should include that the applicant must provide the child and the child's attorney with a blank copy of Withdrawal of Information Release to Medical Board of California (form JV-229).	The committee has revised the form to include that the applicant must provide the child and the child's attorney with a blank copy of *Withdrawal of Information Release to Medical Board of California* (form JV-229).
3.	California Lawyers Association, Executive Committee of the Family Law Section	A	*Should the authorization to release information last until it is withdrawn or is there an appropriate time limit when it should expire?* The authorization should last until it is withdrawn. However, it might bring clarity to note in the JV-228 INFO under item 4 that authorization, if not withdrawn, will end upon the child turning 18 (at that point new rights arise as an adult to control medication and information related thereto).	The suggested approach of the authorization becoming invalid when the child exits foster care or reaches 18 years of age does not address one of the main problems the board is having, which is obtaining the identifying information of children whose cases have been closed. The committee has concluded that the authorization should remain valid until it is withdrawn. The committee has amended the rules and forms to indicate this. The rules have also been amended to require the social worker or probation officer to provide the youth a blank copy of *Withdrawal of Information Release to Medical Board of California* (form JV-229) when it is the last hearing before the child turns 18 years of age, or if the recommendation is to terminate juvenile court jurisdiction. This approach will decrease workload for both court clerks and CDSS since the authorization form will not need to be repeatedly filed and sent to CDSS.
4.	County Behavioral Health Directors Association	NI	CBHDA recommends a three to six month limit on the duration of authorization which appears appropriate given the unique circumstances faced by children and youth who are in the foster care system and who may have been seen by various practitioners due to multiple placements in or out of county as determined by	The committee considered several time limits on the duration of the authorization. Since the Board, however, is looking at prescribing practices of physicians, the Board may need to obtain information on children in past data sets. A three to six month limit on the authorization would only address data recently submitted to the Board. One

	Commenter	Position	Comment	Committees Response
			the placing agency. This will offer the most current information on the child or youth's medical history.	issue the Board seeks to address, however, is its inability to obtain information on children that may have been in foster care several years ago. The Board is looking at prescription patterns and, as such, is not only requesting the identifying information for children in the most recent data set, but also for children prescribed medication by that same doctor for what could be years ago. Additionally, a short time frame would increase workload for the department, the child's attorney, the court clerk and CDSS. The committee concluded that the authorization should remain valid until it is withdrawn. The committee has amended the rules and forms to indicate this. The rules have also been amended to require the social worker or probation officer to provide the youth a blank copy of *Withdrawal of Information Release to Medical Board of California* (form JV-229) when it is the last hearing before the child turns 18 years of age, or if the recommendation is to terminate juvenile court jurisdiction. This approach will decrease workload for both court clerks and CDSS since the authorization form will not need to be repeatedly filed and sent to CDSS.
			In addition, it's unclear why the background document bases authorization on previous prescribing patterns since the request for authorization happens at the time the JV-223 is filed. The review after authorization to release medical records by the child or child's attorney should not exceed three to six months and it appears that the proposed timeframe is beyond	The Board is looking at prescribing practices of physicians and may need to obtain information on children in past data sets. The Board is looking at prescription patterns and, as such, is not only requesting the identifying information for children in the most recent data set, but also for children prescribed medication by that same doctor for what could be years ago.

	Commenter	Position	Comment	Committees Response
			the scope and intent of the legislation. The review process must be contemporaneous to determine the practitioners reasoning for prescription. It would be unreasonable to review medical records for three years to then request a practitioner to provide reasoning and to articulate their initial clinical judgment based on the child or youth's unique circumstances that occurred several years prior. Unintended consequences of this legislation could create a two-tiered system of treatment for foster youth versus those children and youth who have not been removed from their homes. The increased oversight could unintentionally cause practitioners to become less able to use their best clinical judgement if they believe it might lead to an unjust and unfair review. The appropriate forms and any potential investigation must account for unique situations that the child or youth may be subject to, such as presumptive transfer (AB 1299). Currently, the provisions related to presumptive transfer are still being developed and the processes related to timely notification which includes the appropriate transfer of medical history and records, is often inconsistent and/or incomplete. Circumstances such as this must be taken into consideration upon a review by the Medical Board of California and should be included in the appropriate form.	The Medical Board of California is required to review the data and medical records to determine if the appropriate standard of care was met. The results of this determination are outside the scope of this proposal and the rule-making authority of the Judicial Council. SB 377 requires the Judicial Council to develop a form to include a request for authorization by the child or child's attorney for CDSS to release the child's identification information to the Medical Board of California, so it can ascertain whether there is excessive prescribing of medication. The committee chose to make that form as straightforward as possible. Developing procedures for presumptive transfer cases is outside the scope of this proposal. The Judicial Council implemented policies and procedures for presumptive transfer through California Rules of

	Commenter	Position	Comment	Committees Response
				Court, rule 5.674, *Request for Hearing on Waiver of Presumptive Transfer* (form JV-214), *Notice of and Order on Request for Hearing on Waiver of Presumptive Transfer* (form JV-214(A)), *Instructions for Requesting a Hearing to Review Waiver of Presumptive Transfer* (form JV-214-INFO), and *Order After Hearing on Waiver of Presumptive Transfer.*
			Other unique circumstances and needs of the child must be taken into consideration for foster youth, especially those children and youth who may be placed in Short-Term Residential Therapeutic Programs (STRTPs), who have chaotic internal needs due to traumatic experiences, leading to the removal from home and do not have a sense of stability or appropriate behavioral support. Circumstances such as this, from a psychiatric perspective, could increase the child and youth's need for psychotropic medications in order to keep them safe. In the absence of decent and stable placement options, the expectation that a child or youth must deal with complex psychiatric symptoms on their own should be taken into consideration related to the review of medical records.	See response above. Developing a procedure for what the Medical Board of California must take into consideration is outside the scope of this proposal.
			Language should be developed which accounts for the limited number of child psychiatrists across the state to adequately shape internal policies that will need to be developed due to the provisions related to SB 377. The	See response above. Developing protocols or model policies which would help counties during a review that may take place to provide greater support for practitioners is outside the scope of this proposal.

	Commenter	Position	Comment	Committees Response
			development of internal policies could potentially become an issue, especially for small or rural counties. The state should consider protocols or model policies which would help counties during a review that may take place to provide greater support for practitioners. Will the Medical Board of California (MBC) expert reviewer keep a copy of the records until age of maturity? If the youth withdraws consent, what happens to the records?	See response above. Proscribing to the Medical Board of California what to do with the records is outside the scope of this proposal.
5.	Los Angeles Department of Children and Family Services By: Alyssa Skolnick	AM	Consider whether authorization should expire when youth reaches age of majority or is withdrawn, whichever comes first. NMD or adult former foster might have different opinion about their info being released and should be given a opportunity to reconsider their consent once they become "legal" adults.	The suggested approach of the authorization becoming invalid when the child exits foster care or reaches 18 years of age does not address one of the main problems the board is having, which is obtaining the identifying information of children whose cases have been closed. The committee has concluded that the authorization should remain valid until it is withdrawn. The committee has amended the rules and forms to indicate this. The rules have also been amended to require the social worker or probation officer to provide the youth a blank copy of *Withdrawal of Information Release to Medical Board of California* (form JV-229) when it is the last hearing before the child turns 18 years of age, or if the recommendation is to terminate juvenile court jurisdiction. This approach will decrease workload for both court

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				clerks and CDSS since the authorization form will not need to be repeatedly filed and sent to CDSS.
			Regarding item number W20-07, this change would create three (3) new psychotropic medication forms – the JV-228, JV-228-INFO, and JV-229 -- in order to allow CDSS to authorize the Medical Board of California to ascertain whether there is excessive prescribing of psychotropic medication. This would create a moderate workload impact for the PMA desk clerks, who would then have to send out these additional notice forms in addition to the JV-217, JV-217 INFO, JV-218, JV-219 forms they send out now to clients. In addition, this change would revise the existing JV-223 and JV-224 forms in order to add an item to indicate whether or not a youth is on 3 or more psych meds for 90 days or longer. Our PMA policy would need to be updated to reference these new forms.	The committee appreciates this comment and is aware that providing additional forms will create a small workload impact to those already providing notice.
			Although we're not necessarily opposed to these changes, we're aware that Judge Nash/Office of Child Protection would like for the Judicial Council to also update the JV-220(A) Physician's Statement in order to require prescribing physicians list the specific lab tests that were performed prior to the prescription. Currently, the form only has checkboxes (#14 a and b) for "All essential laboratory tests were performed" or "All essential laboratory tests were not performed (explain what laboratory	The committee appreciates this comment, however the JV-220(A) form was not a part of this proposal. Any changes to that form would be an important substantive change and public comment would need to be sought before the form could be revised. The committee will consider this comment the next time form JV-220(A) is revised.

	Commenter	Position	Comment	Committees Response
			tests were not done and why)." However, there are some limitations with this question as currently written. First, there is no definition of what "essential" means, so there is wide variety in practice among physicians. Also, about half of PMA requests do not have any lab tests done, which is a safety issue for youth. DMH has indicated that getting the lab results is often very difficult, so they are considering creating their own form to be faxed to prescribing physicians inquiring about the specific lab tests ordered for each youth, the date they were ordered, whether results have come back, and what those results were. The biggest challenge historically is that providers very often fail to respond to these requests absent a court order. PHNs will do what they can to get these results from physicians, but without a mandate or court order, they may not be too successful. As a result, the Office of Child Protection has requested that the Judicial Council update the JV-220(A) form for doctors to indicate which lab tests were performed rather than merely having a yes/no checkbox.	
6.	Orange County Bar Association By: Scott B. Garner	AM	**Proposed Modification:** To ensure that W.I.C. section 827 is not violated, add to: CRC 5.642(e)—The authorization is for release of medical records only, it is not an authorization for the release of juvenile court case files as described by Section 827.	The committee agrees that it could be possible that the Board may seek information from the juvenile court case file, and if so, the protections and procedures in section 827 should apply. The committee recommends including in proposed rule 5.642 and on form JV-228 statements that the authorization is for the release of medical records only, not an authorization for the release of the

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			JV-228—at the end of the introduction: "This form does not authorize the release of juvenile case file information as described by Section 827." JV-228-INFO—Item 2—at the end add: "This form does not authorize the release of juvenile case file information as described by Section 827." **Specific Comments:** *Does the proposal appropriately address the stated purpose?* See proposed modifications. *Should the authorization to release information last until it is withdrawn or is there an appropriate time limit when it should expire?* The medication authorization is reviewed regularly by the juvenile court and the authorization should have an equal lifespan.	juvenile court case file as described by section 827. The committee considered several time limits on the duration of the authorization. Since the Board, however, is looking at prescribing practices of physicians, the Board may need to obtain information on children in past data sets. A six month limit on the authorization would only address data recently submitted to the Board. One issue the Board seeks to address, however, is its inability to obtain information on children that may have been in foster care several years ago. The Board is looking at prescription patterns and, as such, is not only requesting the identifying information for children in the most recent data set, but also for children prescribed medication by that same doctor for what could be years ago. Additionally, a short time frame would increase workload for the department, the child's attorney, the court clerk and CDSS. The committee

	Commenter	Position	Comment	Committees Response
				concluded that the authorization should remain valid until it is withdrawn. The committee has amended the rules and forms to indicate this. The rules have also been amended to require the social worker or probation officer to provide the youth a blank copy of *Withdrawal of Information Release to Medical Board of California* (form JV-229) when it is the last hearing before the child turns 18 years of age, or if the recommendation is to terminate juvenile court jurisdiction. This approach will decrease workload for both court clerks and CDSS since the authorization form will not need to be repeatedly filed and sent to CDSS.
7.	Superior Court of California, County of Los Angeles By: Bryan Borys	AM	*Does the proposal appropriately address the stated purpose?* Yes • *Should the authorization to release information last until it is withdrawn or is there an appropriate time limit when it should expire?* Recommendation would be for an expiration date of one (1) year after the authorization is signed to ensure that the minor has an opportunity to provide consent if a request is submitted after the one-year expiration date. If further release is necessary, then the child or the attorney should have to sign another one.	No response required. The committee considered several time limits on the duration of the authorization. Since the Board, however, is looking at prescribing practices of physicians, the Board may need to obtain information on children in past data sets. A one-year limit on the authorization would only address data recently submitted to the Board. One issue the Board seeks to address, however, is its inability to obtain information on children that may have been in foster care several years ago. The Board is looking at prescription patterns and, as such, is not only requesting the identifying information for children in the most recent data

	Commenter	Position	Comment	Committees Response
				set, but also for children prescribed medication by that same doctor for what could be years ago. Additionally, a short time frame would increase workload for the department, the child's attorney, the court clerk and CDSS. The committee concluded that the authorization should remain valid until it is withdrawn. The committee has amended the rules and forms to indicate this. The rules have also been amended to require the social worker or probation officer to provide the youth a blank copy of *Withdrawal of Information Release to Medical Board of California* (form JV-229) when it is the last hearing before the child turns 18 years of age, or if the recommendation is to terminate juvenile court jurisdiction. This approach will decrease workload for both court clerks and CDSS since the authorization form will not need to be repeatedly filed and sent to CDSS.
			The advisory committee also seeks comments from courts on the following cost and implementation matters: • *Would the proposal provide cost savings? If so, please quantify.* No. • *What would the implementation requirements be for courts?*	No response required.

	Commenter	Position	Comment	Committees Response
			Implementation will require training of staff, revising and updating of the PMA protocol, PMA procedure and logs to include the new forms. Updates to forms in our CMS would need to be made. If the court decides it would like a copy of the release in the CMS, then we would need a new event code for that document. Training for courtroom staff, clerical support and supervisory staff will be required. • *Would 3 ½ months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?* Yes OTHER COMMENTS: Currently, the court gives notice to minor's attorney. This proposal says that the Applicant (which is DCFS) has to give notice of the Release to minors (over 12) and minor's counsel. There would be reduced workload for court staff if child protective services is required to notice to minor's attorney.	This will likely result in minimal implementation costs and a slight increase in workload for the court clerk. In implementing the revised forms, courts will incur standard reproduction costs. No response required. Current rule 5.640 requires the applicant to provide notice to the child's attorney.
8.	Superior Court of California, County of Orange, Juvenile Court and Family Law Divisions	AM	JV-228 – Position on Release of Information to Medical Board of California For section #2, it is recommended the sentence be updated to, "If the youth or nonminor dependent's address should remain confidential	The committee has revised the form to accommodate for the possibility of the child,

Winter 20-07

Juvenile Law: Psychotropic Medication Information Release (Adopt Cal. Rules of Court, rule 5.642; amend rule 5.640; approve forms JV-228, JV-228-INFO, and JV-229; amend forms JV-221, JV-223, JV-224, and JV-287)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committees Response
			in the juvenile court file, a Confidential Information (form JV-287) must be completed. The address should not be included when completing the form. This will help clarify that either the youth, dependent, or attorney may complete the JV-287. For section #3, update sentence to, "Government services, treatment, and care may not be denied due to not authorizing the release of information." Acknowledgement of this notice is general since multiple individuals may complete the form. For section #7, update sentence to, "Authorization will remain valid for three years unless it is cancelled in writing".	nonminor dependent, or attorney to complete the form. The committee has revised the form to accommodate for the possibility of the child, nonminor dependent, or attorney to complete the form. The committee has revised the form to accommodate for the possibility of the child, nonminor dependent, or attorney to complete the form.
			Does the proposal appropriately address the stated purpose? Yes, the proposal addresses the stated purpose. *Would the proposal provide cost savings?* The proposal would not provide a cost savings. Currently, our Juvenile Administration Department processes all psychotropic related requests. *What would the implementation requirements be for courts?* Communication would be needed to judicial officers and administration staff. Procedures	No response required. No response required. This will likely result in minimal implementation costs and a slight increase in workload for the

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Juvenile Law: Psychotropic Medication Information Release (Adopt Cal. Rules of Court, rule 5.642; amend rule 5.640; approve forms JV-228, JV-228-INFO, and JV-229; amend forms JV-221, JV-223, JV-224, and JV-287)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committees Response
			may require revisions and updates would be needed to the case management system. *Would 3 ½ months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?* Yes, 3 ½ months would be sufficient time to implement changes.	court clerk. In implementing the revised forms, courts will incur standard reproduction costs. No response required.
9.	Superior Court of California, County of San Diego By: Mike Roddy	AM	*Does the proposal adequately address the stated purpose?* Yes. *Should the authorization to release information last until it is withdrawn or is there an appropriate time limit when it should expire?* There are pros and cons for both options, i.e., valid until withdrawn or valid for three years unless cancelled. Our court would be interested to hear views on this issue from foster youth and their counsel. Specifically, would youth be more or less inclined to release their information if the authorization is time-limited? If a time limit would encourage youth to sign authorizations, then it should be imposed. N.B.: Item 7 on the proposed JV-228 form states, "This authorization will remain valid for three years unless I cancel it in writing." If, after the comment period, it is decided to allow authorizations to last until withdrawn, this item will need to be deleted or revised accordingly.	No response required. The committee considered several time limits on the duration of the authorization. Since the Board is looking at prescribing practices of physicians, the Board may need to obtain information on children in past data sets. A one-year limit on the authorization would only address data recently submitted to the Board. One issue the Board seeks to address, however, is its inability to obtain information on children that may have been in foster care several years ago. The Board is looking at prescription patterns and, as such, is not only requesting the identifying information for children in the most recent data set, but also for children prescribed medication by that same doctor for what could be years ago. Additionally, a short time frame would increase workload for the department, the child's attorney, the court clerk and CDSS. The committee concluded that the authorization should remain valid until it is withdrawn. The committee has amended the rules

	Commenter	Position	Comment	Committees Response
				and forms to indicate this. The rules have also been amended to require the social worker or probation officer to provide the youth a blank copy of *Withdrawal of Information Release to Medical Board of California* (form JV-229) when it is the last hearing before the child turns 18 years of age, or if the recommendation is to terminate juvenile court jurisdiction. This approach will decrease workload for both court clerks and CDSS since the authorization form will not need to be repeatedly filed and sent to CDSS.
			Would the proposal provide cost savings? Probably.	No response required.
			What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? Training of staff (courtroom clerks and clerks who handle the paperwork) and revision of procedures will vary depending on how a court is currently handling educational rights issues.	No response required. This appears to be a comment on another unrelated proposal.
			Would 3½ months from Judicial Council approval of this proposal until its effective	

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Juvenile Law: Psychotropic Medication Information Release (Adopt Cal. Rules of Court, rule 5.642; amend rule 5.640; approve forms JV-228, JV-228-INFO, and JV-229; amend forms JV-221, JV-223, JV-224, and JV-287)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committees Response
			date provide sufficient time for implementation? Three months probably is sufficient. *How well would this proposal work in courts of different sizes?* Unknown. Note: Due to the proposed rule revisions and new forms JV-228 and JV-228-INFO, **conforming changes will need to be made to JV-221** (Proof of Notice of Application), item 6. **Rule 5.640** Query: Should "Indian custodian" be added wherever there is a reference to "parent or legal guardian"? See, e.g., subd. (b)(1), (b)(2), (c)(1), (c)(2), (c)(3), (c)(10), (c)(12), (e), (g)(6). See Attachment A to this comment chart for comments regarding grammatical and stylistic changes to improve readability of the rules and forms.	No response required. No response required. The committee has revised *Proof of Notice of Application* (form JV-221), item 6, to include the additional forms that must be provided with notice of the application. The committee has amended rule 5.640 to include "Indian custodian" whenever there is a reference to "parent or legal guardian." The committee appreciates the level of detail in the comments provided and has made all the suggested comments to improve grammar and readability.
10.	Trial Court Presiding Judges Advisory Committee/Court Executive Advisory Committee, Joint Rules Subcommittee	AM	JV-228 - Position on Release of Information to Medical Board of California • For section #2, it is recommended the sentence be updated to, "If the youth or nonminor dependent's address should remain confidential in the juvenile court file, a Confidential	The committee has revised the form to accommodate for the possibility of the child, nonminor dependent, or attorney to complete the form.

Winter 20-07

Juvenile Law: Psychotropic Medication Information Release (Adopt Cal. Rules of Court, rule 5.642; amend rule 5.640; approve forms JV-228, JV-228-INFO, and JV-229; amend forms JV-221, JV-223, JV-224, and JV-287)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committees Response
			Information (form JV-287) must be completed. The address should not be included when completing the form. This will help clarify that either the youth, dependent, or attorney may complete the JV-287. • For section #3, update sentence to, "Government services, treatment, and care may not be denied due to not authorizing the release of information." Acknowledgement of this notice is general since multiple individuals may complete the form. *1. Does the proposal appropriately address the stated purpose?* • Yes *2. Should the authorization to release information last until it is withdrawn or is there an appropriate time limit when it should expire?* • Recommendation would be for an expiration date of one (1) year after the authorization is signed to ensure that the minor has an opportunity to provide consent if a request is submitted after the one-year expiration date. If further release is necessary, then the child or the attorney should have to sign another one.	The committee has revised the form to accommodate for the possibility of the child, nonminor dependent, or attorney to complete the form. No response required. The committee considered several time limits on the duration of the authorization. Since the Board, however, is looking at prescribing practices of physicians, the Board may need to obtain information on children in past data sets. A one-year limit on the authorization would only address data recently submitted to the Board. One issue the Board seeks to address, however, is its

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Juvenile Law: Psychotropic Medication Information Release (Adopt Cal. Rules of Court, rule 5.642; amend rule 5.640; approve forms JV-228, JV-228-INFO, and JV-229; amend forms JV-221, JV-223, JV-224, and JV-287)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committees Response
				inability to obtain information on children that may have been in foster care several years ago. The Board is looking at prescription patterns and as such, is not only requesting the identifying information for children in the most recent data set, but also for children prescribed medication by that same doctor for what could be years ago. Additionally, a short time frame would increase workload for the department, the child's attorney, the court clerk and CDSS. The committee concluded that the authorization should remain valid until it is withdrawn. The committee has amended the rules and forms to indicate this. The rules have also been amended to require the social worker or probation officer to provide the youth a blank copy of *Withdrawal of Information Release to Medical Board of California* (form JV-229) when it is the last hearing before the child turns 18 years of age, or if the recommendation is to terminate juvenile court jurisdiction. This approach will decrease workload for both court clerks and CDSS since the authorization form will not need to be repeatedly filed and sent to CDSS.

Attachment A
W 20-07 Comment Chart

Superior Court of California, County of San Diego
by: Mike Roddy, Executive Officer

Rule 5.642

Subd. (d)(2) – for consistency with subd. (d)

The child, nonminor dependent, or ~~the child's~~ attorney may sign (as specified in (b)) form JV-229 or send a letter to the California Department of Social Services.

JV-223

Item 4b:
Change to title of JV-228-INFO is suggested for consistency with title of JV-228.

… The applicant must provide the child and the child's attorney a blank copy of *Position on Release of Information to Medical Board of California* (form JV-228) and a copy of *Background on ~~Information~~ Release of Information to Medical Board of California* (form JV-228-INFO). The procedures in California Rules of Court, rule 5.642 must be followed.

JV-224

No comments.

JV-228

Note: Most of the following edits are suggested to make the text more plain-language and reader-friendly or to encourage the youth to authorize the release of information.

You have been prescribed three or more psychotropic medications at the same time for 90 days or longer. The ~~California~~ Medical Board of California will look into the care your doctor provided to you and may ~~want~~ need additional information to ~~determine~~ decide if the doctor ~~appropriately~~ properly prescribed medication for you. …

Item 5: Move check box before "about me" so that it is in between "about" and "me."

a. I authorize the California Department of Health Care Services and the California Department of Social Services to connect __ my name __ my client's name to the prescribing data and other information ~~=~~ about __ me __ my client that was previously provided under a unique number.

b. I do not authorize the California Department of Health Care Services and the California Department of Social Services to connect __ my name __ my client's name to the prescribing data and other information ~~==~~ about __ me __ my client that was previously provided under a unique number.

Item 6:

a. I authorize the Medical Board of California to ~~obtain~~ see ___ my ___ my client's medical records to ~~determine~~ decide if there are any ~~potential~~ violations of the law or excessive prescribing of psychotropic medications.

(1) …

(2) The information may ~~only~~ be used only for the purpose of the investigation.

(3) If the medical information is admitted as an exhibit in an administrative hearing, the medical board must request that it ~~the medical information obtained pursuant to this release~~ be sealed.

b. I do not authorize the Medical Board of California to obtain ___ my ___ my client's medical records to ~~determine~~ decide if there are any ~~potential~~ violations of the law or excessive prescribing of psychotropic medications.

Item 8:

I understand that I may cancel this authorization by filing *Withdrawal of ~~Authorization for Release of~~ Information Release to Medical Board of California* (form JV-229) or by sending a written letter to the California Department of Social Services at the address listed in the box below.

JV-228-INFO

For consistency with the title of JV-228:

Title (at top of page and in footer): **Background on ~~Authorization for~~ Release of Information to Medical Board of California**

Note: Most of the following edits are suggested to make the text more plain-language and reader-friendly.

Item 1 heading: ~~Reason~~ Why you are receiving ~~these~~ forms JV-228 and JV-229

Item 1:

You have been prescribed three or more psychotropic medications at the same time for 90 days or longer. The ~~California~~ Medical Board of California ("board") will look into the

care your doctor provided to you and may ~~want additional~~ need more information to ~~determine~~ decide if the doctor ~~appropriately~~ properly prescribed medication for you. California law requires the ~~The Medical B~~board ~~of California, as required by California law,~~ to review~~s~~ medical doctors prescribing psychotropic medication to youth in foster care. As part of this review, the California Department of Health Care Services (DHCS) and the California Department of Social Services (CDSS) provide prescribing and other data to the board under a unique number assigned to you, but with no personal identifying information. This means that the board does not know your name or other personal information about you, and does not know how to contact you.

~~The~~ After reviewing the data provided by DHCS and CDSS~~, will be reviewed by~~ a medical expert ~~who~~ may decide that prescribing practices by one or more doctors involved in your care ~~require further review~~ should be examined more closely. ~~In order t~~To look into the quality of medical care you were provided, the board may ~~request that~~ ask you ~~provide~~ for your name and contact information ~~to the board,~~ so board staff can contact you to get further details about your care and get your ~~authorization~~ permission to review your medical records. You do not need to respond to contacts from the board, even if you ~~authorized~~ agreed to the release of your information. The decision to respond to the board is up to you.

Item 2:

You may also ~~authorize~~ allow the board to ~~obtain~~ see your medical records if the board ~~decides that one or more of the doctors involved in your care require further review~~ needs them to ~~determine~~ decide ~~if the~~ whether a doctor broke the law or prescribed too much psychotropic medication to you.

You ~~are not required~~ do not have to release any information to the board, and you may choose not to share your information with the board. Further, if you do not ~~give authorization~~ release your information, there will be no impact on or changes to the ~~your receipt of government~~ services, treatment, or care you receive from the government.

Item 3:

… The medical board is required by law to keep all information ~~about~~ used in their investigations confidential.

Item 4:

You ~~are allowed to~~ can change your mind and ~~can~~ withdraw your authorization to give information to the medical board at any time. You can do this by signing, or having your attorney sign, *Withdrawal of Information Release to Medical Board of California* (form JV-229) or by sending a written letter to the ~~California Department of Social Services~~ CDSS, Attention: Information Release for California Medical Board, 744 P Street, Sacramento, CA 95814.

JV-229

For consistency with the titles of JV-228 and JV-228:

Title (at top of page and in footer): **Withdrawal of ~~Information~~ Release of Information to Medical Board of California**

You may use this form to stop your authorization for the California Department of Social Services and the California Department of Health Care Services to give your name and contact information to the Medical Board of California, and to stop your authorization for the Medical Board of California to ~~review limited~~ see your medical records.

You do not have to use this form. You may also stop your authorization by sending a written letter to the California Department of Social Services, Attention: Information Release for California Medical Board, 744 P Street, Sacramento, CA 95814.

Item 4:

I DO NOT authorize the California Department of Health Care Services and the California Department of Social Services to connect ___ my name ___ my client's name to the prescribing data and other information ___ about ___ me ___ my client that was previously provided under a unique number.

Item 5:

I DO NOT authorize the Medical Board of California to ~~obtain~~ see ___ my ___ my client's medical records to ~~determine~~ decide if there are any ~~potential~~ violations of the law or excessive prescribing of psychotropic medications.

JV-287

You do not need to fill out this entire form~~,~~. Write only the information that you know.

Item number: 32

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (September 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Juvenile Law: Educational Rights Holders

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Chris Cleary, (415) 865-8792, christine.cleary@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 10/28/19
Project description from annual agenda: Juvenile Law: Revise Form JV-535
Project Summary: In response to multiple concerns about the accuracy and usability of this form, the Committee will revise form JV-535 to ensure it is legally accurate and user-friendly.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
The Family and Juvenile Law Advisory Committee recommends amending California Rules of Court, rule 5.649 (Right to make educational or developmental-services decisions); revising Order Designating Educational Rights Holder (form JV-535) and its attachment (form JV 535(A)); and adopting Information on Educational Rights Holders (form JV 535-INFO) to clarify requirements, alleviate confusion, and provide more guidance on service of process.

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on: May 14–15, 2020

Title
Juvenile Law: Educational Rights Holders

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rule 5.649; revise forms JV-535 and JV-535(A); approve form JV-535-INFO

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Agenda Item Type
Action Required

Effective Date
September 1, 2020

Date of Report
April 1, 2020

Contact
Chris Cleary, 415-865-8792
christine.cleary@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee recommends amending California Rules of Court, rule 5.649 (Right to make educational or developmental-services decisions); revising *Order Designating Educational Rights Holder* (form JV-535) and its attachment (form JV-535(A)); and approving *Information on Educational Rights Holders* (form JV-535-INFO) to clarify requirements, alleviate confusion, and provide more guidance on service of process.

Recommendation

The committee recommends that the Judicial Council, effective September 1, 2020:

1. Amend rule 5.649 of the California Rules of Court to clarify the filing requirements following a hearing designating an educational rights holder; specify requirements for service of process after the hearing; and update references to "parent and guardian" to include the educational rights of an Indian custodian, in compliance with Welfare and Institutions Code section 361.

2. Revise *Order Designating Educational Rights Holder* (form JV-535) to bring key information to the front page, to include more information about the various parties, to better identify confidential names and addresses, and to provide space for the appointment of more than one educational rights holder.

3. Revise *Attachment to Order Designating Educational Rights Holder* (form JV-535(A)) to include room for the names of all parties and others who need to be served if applicable; include an educational rights holder service of process check box that designates the required parties and others that need service if applicable and appropriate; add the Child's Statewide Student Identifier (SSID) to better track the child or youth through any school changes; and make the form mandatory rather than optional.

4. Approve *Information on Educational Rights Holders* (form JV-535-INFO) to provide key information about educational rights holders, including what an educational rights holder is; what is required of an educational rights holder; what happens at each hearing when there is an educational rights holder; who needs to be served with forms JV-535 and JV-535(A); and how a parent, guardian, or Indian custodian can appeal a court's limiting or modifying of educational rights.

The text of the amended rule is attached at pages 5–7. The new and revised forms are attached at pages 8–14.

Relevant Previous Council Action

Forms JV-535 and JV-535(A) were last revised effective January 1, 2014, to conform to legislation that amended many sections of the Welfare and Institutions Code, the Education Code, and the Government Code to promote access to education and developmental and other legally mandated services for children and nonminors who are the subject of juvenile court proceedings and to ensure that all children and nonminors in foster care are able to maintain connections to relatives and other adults important to them. The Judicial Council also adopted rule 5.649, effective January 1, 2014.

Analysis/Rationale

Education is an issue at every juvenile court hearing and must be addressed in agency reports. Courts need complete information to address educational needs. Child welfare and probation agencies are required to provide a comprehensive report on a child's or youth's educational progress and recommendations on how to meet any educational or developmental-services needs at each hearing. The initial report is recorded on *Your Child's Health and Education* (form JV-225) and is updated at every hearing in the social worker's or probation officer's report.

The default educational and/or developmental-services rights holder is the parent(s), guardian(s), or Indian custodian(s) of the child or youth. But if the court limits or modifies the decisionmaking rights of a parent, guardian, or Indian custodian, it must appoint an educational rights holder (ERH) for the child or youth. That order is recorded on form JV-535, as are any

subsequent orders that limit, restore, or modify education rights, or where there is a need to update contact or other information, in any juvenile proceeding. Other information about the child's school, social worker or probation officer, foster youth educational liaison, and general findings and orders regarding educational decisions can be recorded on form JV-535(A). Rule 5.649 applies to these juvenile hearings and to the use of the two forms.

There have been multiple requests by rule and form users to clarify the rule and improve the forms. The committee received several comments about and requests for improvements to rule 5.649 and forms JV-535 and JV-535(A) during the comment period from court clerks, attorneys, judges, and others, primarily expressing confusion about what the rule requires, claiming inadequate guidance on service requirements, and complaining of a lack of clarity and insufficient information on the forms. This proposal includes amendments to rule 5.649; revisions to forms JV-535 and JV-535(A); and the adoption of a new form JV-535-INFO.

These recommendations are responsive to identified concerns or problems, and are otherwise helpful in advancing Judicial Council goals and objectives. They will provide more clarity and ease of use for the forms and will clarify that the rule does not require a new JV-535 to be filed at every hearing unless the court has limited, modified, or restored educational rights, or there have been changes to contact or other information. It will clarify a confusing rule and will make the forms more user friendly so that key information about the child and other interested parties will be more readily accessible to assist the court, the parties, and their attorneys.

Policy implications

The recommended amended rule of court, revised forms, and new INFO form should result in a more uniform practice across the state regarding the process involved in the appointment of educational rights holders.

Comments

This proposal circulated for comment as part of the winter 2020 invitation-to-comment cycle from December 11, 2019, to February 12, 2020, to the standard mailing list for family and juvenile law proposals. Included on the list were appellate presiding justices, appellate court administrators, trial court presiding judges, trial court executive officers, judges, court administrators and clerks, attorneys, family law facilitators and self-help center staff, legal services attorneys, social workers, probation officers, CASA programs, and other juvenile and family law professionals. Thirteen organizations and individuals provided comment: six agreed with the proposal, six agreed with the proposal if modified, and one commenter did not specify a position, but offered suggested modifications. No commenters opposed the proposal. The committee found some of the comments very helpful and incorporated them into the recommendations. Specifically, the following suggestions from commenters were incorporated into the recommendations:

- The inclusion in JV-535-INFO of e-service in compliance with rule 5.523 as an option for service of process when both the court and county authorize e-service in a jurisdiction;

- Amending rule 5.649 to include a section on service of process;
- Making form JV-535(A) a mandatory form;
- Including the Statewide Student Identifier (SSID) on form JV-535(A) to be able to better track the child or youth through school changes;
- Adding "Indian Custodian" to "parent or guardian" to bring the form into compliance with Welfare and Institutions Code § 361;
- The replacement of "juvenile justice" for "delinquency" wherever it occurs;
- The inclusion on form JV-535-INFO of information on who would benefit/should be given the JV-535-INFO form.

A chart with the full text of the comments received and the committee's responses is attached at pages 15–48.

The committee sought specific comment on whether the proposed new form JV-535-INFO would be helpful in clarifying the educational rights holder process. Those who responded were uniformly enthusiastic about the desire for such a form. In addition, the committee sought specific comment on whether the check box for service of process would be helpful, and again those who responded to the question were enthusiastic.

Alternatives considered

The committee considered waiting for legislative or other changes to propel this proposal, but the comments from the field were compelling and the committee felt that it was a matter of some urgency to clarify the rule, make the forms more user friendly, and develop form JV-535-INFO to address confusion in the field about the educational rights holder process.

The proposal that circulated for comment did not differ significantly, other than is noted above in the Comments section, from the recommendation presented in this report.

Fiscal and Operational Impacts

The committee does not anticipate any significant costs associated with implementation of this recommendation. The commenters who addressed the committee's question about cost savings indicated that there would be some minor savings because of the committee's clarification that form JV-535 does not have to be filed and served at each hearing unless there has been a change in the status of the educational rights holder or there has been a change in contact or other information in either form JV-535 or JV-535(A).

Attachments and Links

1. Cal. Rules of Court, rule 5.649, at pages 5–7
2. Forms JV-535, JV-535(A), and JV-535-INFO, at pages 8–14
3. Chart of comments, at pages 15–48

Rule 5.649 of the California Rules of Court is amended, effective September 1, 2020, to read:

Rule 5.649. Right to make educational or developmental-services decisions

The court must identify the educational rights holder for the child ~~on form JV-535~~ at each hearing in a juvenile dependency or ~~delinquency~~ juvenile justice proceeding. At any hearing, where the court limits, restores, or modifies educational rights, or where there are updates to any contact or other information, in any juvenile proceeding, the findings and orders must be documented on form JV-535. Unless ~~his or her~~ the rights of the parent, guardian, or Indian custodian ~~rights~~ have been limited by the court under this rule, the parent, ~~or~~ guardian, or Indian custodian holds the educational and developmental-services decisionmaking rights for the ~~his or her~~ child. In addition, a nonminor or nonminor dependent youth holds the rights to make educational and developmental-services decisions for ~~himself or herself~~ the youth and should be identified on form JV-535, unless rule 5.650(b) applies.

(a) Order (§§ 361, 366, 366.27, 366.3, 726, 727.2; 20 U.S.C. § 1415; 34 C.F.R. § 300.300)

At the dispositional hearing and each subsequent review or permanency hearing, the court must determine whether the rights of a parent, ~~or~~ guardian, or Indian custodian to make educational or developmental-services decisions for the child should be limited.

If necessary to protect a child who is adjudged a dependent or ward of the court under section 300, 601, or 602, the court may limit the rights of a parent~~'s,~~ ~~or~~ guardian~~'s~~, or Indian custodian ~~rights~~ to make educational or developmental-services decisions for the child by making appropriate, specific orders on *Order Designating Educational Rights Holder* (form JV-535).

(b) Temporary order (§ 319)

At the initial hearing on a petition filed under section 325 or at any time before a child is adjudged a dependent or the petition is dismissed, the court may, on making the findings required by section 319(g)(1), use form JV-535 to temporarily limit the rights of a parent~~'s,~~ ~~or~~ guardian~~'s~~, or Indian custodian ~~rights~~ to make educational or developmental-services decisions for the child. An order made under section 319(g) expires on dismissal of the petition, but in no circumstances later than the conclusion of the hearing held under section 361.

If the court does temporarily limit the rights of a parent~~'s,~~ ~~or~~ guardian~~'s~~, or Indian custodian ~~rights~~ to make educational or developmental-services decisions, the court must, at the dispositional hearing, reconsider the need to limit those rights and must identify the authorized educational rights holder on form JV-535.

(c) No delay of initial assessment

The child's initial assessment to determine any need for special education or developmental services need not be delayed to obtain parental or guardian consent or for the appointment of an educational rights holder if one or more of the following circumstances is met:

(1) The court has limited, even temporarily, the educational or developmental-services decisionmaking rights of the parent, ~~or~~ guardian, or Indian custodian, and consent for an initial assessment has been given by an individual appointed by the court to represent the child;

(2) The local educational agency or regional center, after reasonable efforts, cannot locate the parent, ~~or~~ guardian, or Indian custodian; or

(3) Parental rights have been terminated or the guardianship has been set aside.

(d) Judicial determination

If the court determines that the child is in need of any assessments, evaluations, or services—including special education, mental health, developmental, and other related services—the court must direct an appropriate person to take the necessary steps to request those assessments, evaluations, or services.

(e) Filing of order

Following the dispositional hearing and each statutory review hearing, the party that has requested a modification, limitation, or restoration of educational or developmental-services decisionmaking rights must complete form JV-535 and any required attachments to reflect the court's orders and submit the completed form within five court days for the court's review and signature. ~~If no request is made, the child's or youth's attorney must complete and file the form.~~ If there has been no request for modification, limitation, or restoration of educational or developmental-services decisionmaking rights, or there are no required updates to contact or other information, there is no need to file a new form JV-535. If a new form JV-535 is filed, the most recent *Attachment to Order Designating Educational Rights Holder* (form JV-535(A)) must be attached. The court may instead direct the appropriate party to attach a new ~~*Attachment to Order Designating Educational Rights Holder* (~~form JV-535(A)~~)~~ to document the court's findings and orders.

(f) Service of Process

After each hearing where a party has requested a modification, limitation, or restoration of educational or developmental-services decisionmaking rights, the court clerk must serve the most current forms JV-535 and JV-535(A) on each applicable party.

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*Name*):	**DRAFT** **Not approved by** **the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CHILD'S NAME: **CHILD'S DATE OF BIRTH:**	
ORDER DESIGNATING EDUCATIONAL RIGHTS HOLDER	CASE NUMBER:

Educational Rights Holder for Child or Youth

1. ☐ The rights of

a. *Name 1:*

☐ parent 1
☐ parent 2
☐ guardian
☐ Indian custodian

to make ☐ educational ☐ developmental-services decisions for the child or youth

Check one for each named educational right holder.

(1) ☐ are retained.
(2) ☐ are fully restored.
(3) ☐ are temporarily limited under section 319(g).
(4) ☐ are limited under section 361(a) or 726(b).
(5) ☐ have been terminated under section 366.26 or 727.31.
(6) ☐ transferred to the youth on their 18th birthday.

☐ Other Educational Rights Holders—see attached.

b. *Name 2:*

☐ parent 1
☐ parent 2
☐ guardian
☐ Indian custodian

(1) ☐ are retained.
(2) ☐ are fully restored.
(3) ☐ are temporarily limited under section 319(g).
(4) ☐ are limited under section 361(a) or 726(b).
(5) ☐ have been terminated under section 366.26 or 727.31.
(6) ☐ transferred to the youth on their 18th birthday.

2. ☐ The following adult(s) is/are designated as the educational rights holders, as defined in rule 5.502.

a. Name 1:
Address:

Telephone:
Email:
Relationship to child or youth:

☐ Confidential Name ☐ Confidential Address

b. Name 2:
Address:

Telephone:
Email:
Relationship to child or youth:

☐ Confidential Name ☐ Confidential Address

☐ Other Educational Rights Holders—see attached.

3. The adult(s) identified in item 2 ☐ Name 1 ☐ Name 2 is/are *(check all that apply)*:

a. ☐ The *first* educational rights holder(s) identified by the court for this child or youth.
b. ☐ The *same* educational rights holder(s) as last identified by the court, with new contact information in item 2, above.
c. ☐ A *different* educational rights holder from the one last identified by the court.

NOTICE

☐ Provision of the information on this form—as well as on forms JV-535(A), JV-536, JV-537, JV-538, JV-539, JV-540, or any equivalent form—to the parent(s), guardian(s), or Indian custodian(s) named in 1 ***will*** create a safety risk (for example, because of the placement's confidentiality). The information ***may not*** be disclosed to the parent, guardian, or Indian custodian.

Form Adopted for Mandatory Use
Judicial Council of California
JV-535 [Rev. September 1, 2020]

ORDER DESIGNATING EDUCATIONAL RIGHTS HOLDER

Welfare and Institutions Code, §§ 361, 726
Cal. Rules of Court, rules 5.502, 5.649, 5.650,5.651
www.courts.ca.gov

CHILD'S NAME:	CASE NUMBER:

3. d. ☐ The successor guardian or conservator and, as such, holds decisionmaking rights.

e. ☐ The caregiver in a planned permanent living arrangement and holds ☐ educational ☐ developmental-services decisionmaking rights under section 361(a)(1)(E). See item 6 for limitation of parental decisionmaking rights.

Having considered the evidence and made the findings required by law, THE COURT ORDERS that

4. ☐ The responsible adults identified in 2 are appointed the educational rights holders for the child or youth and are authorized to make ☐ educational ☐ developmental-services decisions for the child or youth to the extent permitted by law.

5. ☐ *(Check only if 2, 3, and 4 do not apply.)* The court cannot identify a parent, guardian, Indian custodian, or other responsible adult to act as the educational rights holder.

a. ☐ The court hereby refers the child to the local educational agency for appointment of a surrogate parent under section 7579.5 of the Government Code.

b. ☐ The court, with input from any interested person, will make ☐ educational ☐ developmental-services decisions.

☐ The appointment of a surrogate parent is not warranted.

☐ *(Before the dispositional hearing)* The child's attorney and the social worker or probation officer must make every effort to identify a responsible adult to make future educational or developmental-services decisions for the child.

6. ☐ The appointment of any previous educational rights holder or developmental-services decision maker is terminated.

Appointed Educational Rights Holder—Rights and Duties

7. The appointed educational rights holder is authorized to have access to the child's or youth's ☐ educational ☐ developmental-services records and information to the extent permitted by law.

8. The appointed educational rights holder may authorize the release of ☐ educational ☐ developmental-services records to the child's attorney or CASA volunteer to the extent permitted by law.

9. The appointed educational rights holder must comply with all applicable state and federal confidentiality laws, including sections 362.5, 827, 4514, and 5328 and Government Code section 7579.5(f), and may share information only to the extent necessary to further the interests of the child or youth.

10. The appointed educational rights holder must meet with the child or youth; investigate the child's or youth's educational and developmental-services needs and whether those needs are being met; and, before each scheduled review hearing, provide information and recommendations to the social worker or probation officer **OR** make written recommendations to the court **OR** attend the review hearing and participate in any part of the hearing that concerns the child's education or development **OR** do all of these. The rights holder may submit written recommendations on *Educational Rights Holder Statement* (form JV-537) or in any other suitable format. To the greatest extent possible, the educational rights holder must consult and collaborate with the educational liaison or regional center service coordinator, as applicable, to gather information needed to meet the needs and protect the rights of the child or youth.

Service of Order

11. If this is the first form JV-535 completed in this case or it includes any information different from information on the previous JV-535, the clerk will provide a copy of this form, form JV-535(A), and any other attachments to: the child (if 10 years old or older) or youth; the attorney for the child or youth; the social worker or probation officer; the Indian child's tribe, if applicable; the local foster youth educational liaison; the county office of education foster youth services coordinator; the regional center service coordinator, if applicable; and the educational rights holder or surrogate parent in person or by first-class mail no later than five court days after the order is signed. The clerk may also make the form available to the parent or guardian (unless otherwise indicated on this form, or parental rights have been terminated, or the child has reached 18 years of age and reunification services have been terminated), to the CASA volunteer, and if requested, to any other person entitled to notice under section 293.

12. The assigned social worker or probation officer must notify the educational rights holder of the date, time, and location of each court hearing.

This order applies to any local educational agency, school, school district, or regional center serving the child or youth in the State of California.

☐ Related findings and orders are attached on form JV-535(A) or its equivalent.

Date:

JUDICIAL OFFICER

CHILD'S NAME:	CASE NUMBER:

General Information

1. Child's or youth's date of birth: Child's Statewide Student Identifier (SSID):
   Indian child's tribe (if applicable):
   Address: City: Zip Code:
   Email: Phone No.:
2. School information
   a. School district (local educational agency or LEA):
   b. School *(name and address):*
   c. Foster youth educational liaison (Ed. Code, § 48853.5) *(name and contact information):*
   d. ☐ The child is currently expelled from school and may be eligible for readmission on or after *(date):*
3. County office of education *(name and address):*
   Foster youth service coordinator *(name and contact information):*
4. Regional center *(name and address):*
   Service coordinator *(name and contact information):*
5. County placing agency *(specify):*
   a. Assigned social worker or probation officer *(name and contact information):*
   b. Supervising social worker or probation officer *(name, address, and contact information):*
6. CASA organization *(name and address):*
   Court Appointed Special Advocate (CASA) *(name and contact information):*
7. Child's or youth's attorney *(name, address, and contact information):*

THE COURT FINDS AND ORDERS

8. ☐ The child or youth is the subject of a petition filed under section 325. The child's parent, guardian, or Indian custodian is unavailable, unable, or unwilling to exercise educational or developmental services rights; the agency has made diligent efforts to locate and secure the participation of the parent, guardian, or Indian custodian in educational and developmental-services decisionmaking; and the child's or youth's educational and developmental-services needs cannot be met without the temporary appointment of a responsible adult as educational rights holder.
9. ☐ Limitation of the rights of the parent(s), guardian(s), or Indian custodian(s) to make decisions is necessary to protect the child or youth. ☐ educational ☐ developmental services
10. ☐ The youth is at least 18 years old and
    a. ☐ has chosen not to make ☐ educational ☐ developmental-services decisions for the youth.
    b. ☐ is deemed incompetent to make educational or developmental-services decisions for the youth.
11. ☐ *(If 10a or 10b is checked):* The appointment of an educational rights holder to make developmental-service decisions for the youth is in the youth's best interests.

Form Approved for Mandatory Use
Judicial Council of California
JV-535(A) [Rev. September 1, 2020]

ATTACHMENT TO ORDER
DESIGNATING EDUCATIONAL RIGHTS HOLDER

Welfare and Institutions Code, §§ 361, 726
Cal.Rules of Court, rules 5.502, 5.649, 5.650, 5.651
www.courts.ca.gov

CHILD'S NAME:	CASE NUMBER:

12. ☐ The court has denied or terminated reunification services for the parent, guardian, or Indian custodian, and the child or youth is placed in a planned permanent living arrangement under section 366.21(g)(5), 366.22, 366.26, 366.3(i), or 727.3(b)(5)–(6).

13. There ☐ is ☐ is not a responsible adult relative, nonrelative extended family member, or other adult known to the child who is available and willing to serve as the educational rights holder.

14. The child or youth is receiving special education, general education accommodations and modifications, early intervention services, or developmental services. ☐ Yes ☐ No

15. ☐ The child or youth is receiving services under the following plan *(check all that apply):*

a. ☐ Individualized education program (IEP)
b. ☐ Section 504 plan
c. ☐ Individualized family service plan (IFSP)
d. ☐ Individual program plan (IPP)
e. ☐ Special education local plan area (SELPA)
f. ☐ Other *(explain):*

The LEA, SELPA, or regional center must provide a copy of any plan to the designated educational rights holder.

16. ☐ The child or youth needs the following educational or developmental assessments or services *(check all that apply):*

a. ☐ The child is 0–3 years old, is at risk for a disability or has a developmental delay, and needs assessment for services.
b. ☐ The child is 0–3 years old, has a disability, and needs the development of an IFSP.
c. ☐ The child or youth is 3 years old or older, may have a disability, and needs intake and assessment for services.
d. ☐ The child or youth is 3 years old or older, has a disability, and needs the development or revision of an IEP, IPP, or Section 504 plan.

17. The appointed educational rights holder must *(check all that apply):*

a. ☐ Submit to the LEA a written referral for assessment for special education and related services or for services under section 504 of the Rehabilitation Act of 1973.
b. ☐ Submit to the regional center a written referral for an initial intake and eligibility assessment or evaluation.
c. ☐ Submit to the LEA a written referral for assessment or services, or a written request to convene the IEP team to develop, review, or revise the pupil's IEP.
d. ☐ Submit a written request to the regional center to convene the IFSP team to develop, review, or revise the IFSP.
e. ☐ Submit a written request to the regional center to convene the IPP team to develop, review, or revise the IPP.
f. ☐ Other:

18. ☐ The following person is directed under rule 5.649(c)–(d) to take whatever steps are necessary to request any assessments or services identified in item 14 or 15 *(name and address unless confidential):*

19. ☐ The current educational program and school placement are in the best interests of the child or youth.

20. ☐ The current IFSP, IPP, or other developmental services plan is in the best interests of the child or youth.

21. ☐ The child or youth ☐ is ☐ is *not* attending the child's or youth's school of origin. If not,

a. The educational rights holder ☐ has ☐ has *not* waived the child's or youth's right to attend the school of origin.
b. The child or youth ☐ has ☐ has *not* waived the child's or youth's right to attend the school of origin.

22. ☐ The county placing agency has considered educational stability and the opportunity to be educated in the least restrictive educational program when making placement decisions for the child or youth.

CHILD'S NAME:	CASE NUMBER:

Educational Rights Holder Service of Process Check Box

Mandatory:

1. ☐ Social worker ☐ Probation officer
   a. Name:
   b. Mailing or electronic service address:
   c. Date of service:
   d. Method of service:
2. ☐ Child *(if 10 years of age or older)*
   a. Name:
   b. Mailing or electronic service address:
   c. Date of service:
   d. Method of service:
3. ☐ Local Foster Youth Educational Liaison
   a. Name:
   b. Mailing or electronic service address:
   c. Date of service:
   d. Method of service:
4. ☐ Attorney for child or youth
   a. Name:
   b. Mailing or electronic service address:
   c. Date of service:
   d. Method of service:
5. ☐ County Office of Education Foster Youth Services Coordinator
   a. Name:
   b. Mailing or electronic service address:
   c. Date of service:
   d. Method of service:
6. ☐ Educational Rights Holder
   a. Name:
   b. Mailing or electronic service address:
   c. Date of service:
   d. Method of service:

Mandatory, if applicable:

1. ☐ Regional Center Service Coordinator
   a. Name:
   b. Mailing or electronic service address:
   c. Date of service:
   d. Method of service:
2. ☐ CASA Volunteer
   a. Name:
   b. Mailing or electronic service address:
   c. Date of service:
   d. Method of service:
3. ☐ Tribe/Bureau of Indian Affairs
   a. Name:
   b. Mailing or electronic service address:
   c. Date of service:
   d. Method of service:

If appropriate:

1. ☐ Mother ☐ Father ☐ Legal guardian
   a. Name:
   b. Mailing or electronic service address:
   c. Date of service:
   d. Method of service:
2. ☐ Indian custodian
   a. Name:
   b. Mailing or electronic service address:
   c. Date of service:
   d. Method of service:

If requested and entitled to notice under § 293:

1. ☐ Other *(specify):*
   a. Name:
   b. Mailing or electronic service address:
   c. Date of service:
   d. Method of service:
2. ☐ Other *(specify):*
   a. Name:
   b. Mailing or electronic service address:
   c. Date of service:
   d. Method of service:
3. ☐ Other *(specify):*
   a. Name:
   b. Mailing or electronic service address:
   c. Date of service:
   d. Method of service:

JV-535-INFO Information on Educational Rights Holders

1 What Is an Educational Rights Holder?

An educational rights holder is the adult identified or appointed by the court to make educational or developmental-services decisions for a child or youth who has a case in the juvenile court. It can be a parent, guardian, or Indian custodian of the child or youth. But if the court limits decisionmaking rights and appoints an educational rights holder other than the parent, guardian, or Indian custodian, that person acts as the child's or youth's parent, spokesperson, decision maker, and "authorized representative" for all matters related to education and/or developmental-services needs. That person has the right to access the child's or youth's educational and developmental-services records and information to the same extent permitted by the law for a parent.

2 What Is Required of an Educational Rights Holder?

The person who is appointed as the educational rights holder for a child or youth has rights and duties that are imposed by the court. The appointed educational rights holder:

- Will be authorized to have access to the child's or youth's educational and/or developmental-services records and information to the extent permitted by the law.
- May authorize the release of educational and/or developmental-services records to the child's attorney or CASA volunteer to the extent permitted by the law.
- Must comply with all applicable state and federal confidentiality laws and may share information only to the extent necessary to further the interests of the child or youth.
- Must meet with the child or youth; investigate the child's or youth's educational and/or developmental-services needs and whether those needs are being met; and, before each scheduled review hearing, provide information and recommendations to the social worker or probation officer or make written recommendations to the court or attend the review hearing, and participate in any part of the hearing that concerns the child's education or development, or do all of these. The educational and/or developmental-services rights holder may submit written recommendations on *Educational Rights Holder Statement* (form JV-537) or in any other suitable format. To the greatest extent possible, the educational rights and/or developmental-services holder must consult and collaborate with the school district's educational liaison or regional center service coordinator, or other educators and case managers as applicable, to gather information needed to meet the needs and protect the rights of the child or youth.

3 At Each Hearing...

At each hearing in a dependency or juvenile justice proceeding, the court is required to identify the educational rights holders for the child or youth. At the dispositional hearing, the social worker or probation officer will have interviewed the parent, guardian, or Indian custodian and have had them fill out and return *Your Child's Health and Education* (form JV-225) and have filed it with the court. At that hearing the court, using the information available, will appoint an educational rights holder if necessary in an order that will be made on *Order Designating Educational Rights Holder* (form JV-535). That order will be signed by the judge and filed with the court along with form JV-535 (A), which contains general information and the court's other findings and orders related to the child's or youth's health and education. At each subsequent hearing those original JV-535 and JV-535(A) forms will remain in effect until there is a need to limit, restore, or modify educational or developmental-services rights, or where there is a need to update any contact or other information on form JV-535; or when there are changes in the general information or subsequent findings and orders on form JV-535(A). The most recently updated forms JV-535 and JV-535(A) should be combined and presented at each subsequent hearing.

4 Who Needs to Be Served the Original and Updated Forms JV-535 and JV-535(A)?

The first form JV-535 or any subsequent form JV-535 with new information, along with the most recently updated JV-535(A), must be served by the clerk of the court on the following:

- The child (if 10 years old or older);
- The attorney for the child or youth;
- The social worker or probation officer;
- The Indian child's tribe (if applicable);

- The local foster youth educational liaison;
- The county office of education foster youth services coordinator;
- The regional center service coordinator (if applicable); and
- The educational rights holder or surrogate parent.

The clerk may also serve the form on:

- The parent or guardian (unless the information is deemed confidential, parental rights have been terminated, or the child has reached 18 years of age and reunification services have been terminated);
- To the CASA volunteer (if applicable); and, if requested,
- To any other person entitled to notice under Welfare and Institutions Code section 293.

Service must be in person or by first-class mail no later than five court days after the order is signed. If both the county and the court authorize electronic service in a jurisdiction, then electronic service may also be used in compliance with California Rules of Court, rule 5.523.

5 If You Want to Appeal a Decision by the Court to Limit or Modify Educational Rights

If you are a parent, guardian, or Indian custodian, and the juvenile court limited or modified your educational or developmental-services rights at a hearing, you have the right to appeal that decision. To appeal, your attorney must fill out and file *Notice of Appeal—Juvenile* (form JV-800) within 60 days of the date of the decision. ***Before filing the Notice of Appeal, the order that the judge signed limiting or modifying your educational rights (form JV-535) must be attached to it, along with the most recently updated form JV-535(A).*** The appeal should be filed in the clerk's office at the court where the decision was made.

This form JV-535-INFO should be made available to court staff, attorneys of record, social workers, probation officers, parents, guardians, Indian custodians, and other educational rights holders, and to anyone with questions about educational rights holders.

W20-08

Juvenile Law: Educational Rights Holders (Amend California Rules of Court rule 5.649; revise forms JV-535 and JV-535(A); adopt form JV-535-INFO)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	Rosanna Anderson, Education Liaison San Mateo County Office of Education	AM	Regarding the need to update the JV-535 at each hearing. I was a child welfare social worker and now work at the County Office of Education - Foster Youth Services Coordinating Program (FYSCP). It has been my experience that when JV535s are not completed at each hearing, they are forgotten. Due to frequent changes in social workers or because social workers have so much on their plates, Educational Rights Holders (ERH) fall by the wayside. We had many foster youth whose parents, who were not involved in the case at all, holding educational rights, or previous foster parents (some from more than two placements ago) still holding educational rights. If not prompted to think about it at each hearing, the issue is forgotten. There are also cases of a school district having a JV535 from a couple of years ago and not knowing a new ERH had been appointed as a new JV535 had not been provided. Due to these circumstances, when I jointed the FYSCP, we began to urge social workers to complete a JV535 at each hearing in order to ensure: 1) the ERH was continuously evaluated for appropriateness AND 2) if the school/district was using a JV535 from a year ago, they would know there was a more current one. It would be helpful to understand for which peoples notice is mandatory vs. optional. The JV-535-INFO would be helpful.	The committee acknowledges this concern and has addressed it in the proposed amended California Rules of Court rule 5.649, which requires: "At any hearing where the court limits, restores, or modifies educational rights, or where there are updates to any contact or other information, in any juvenile proceeding, the findings and orders must be documented on form JV-535." It also clarifies that any new JV-535 must be attached to the most recent form JV-535(A). The committee also acknowledges that service of the most current JV-535 and JV-535(A) on all applicable parties is critical. For that reason, the committee has further amended Rule 5.649 to add subsection (f) Service of Process, which requires the court clerk to serve the most current JV-535 and JV-535(A) on each applicable party after each hearing where a party has requested a modification, limitation or restoration of educational or developmental-services decision making rights. The committee will be providing a service checkbox on form JV-535(A) No response required.

W20-08

Juvenile Law: Educational Rights Holders (Amend California Rules of Court rule 5.649; revise forms JV-535 and JV-535(A); adopt form JV-535-INFO)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
2.	Renzo Bernales, Education Programs Consultant, California Department of Education	A	Consider adding the youth's statewide student identifier (SSID) to the form. These are provided once a youth enrolls as a student in California public schools. It makes it easier to follow the youth and determine which schools were attended and the districts in which the student has been enrolled. In addition, consider adding information as to the educational responsibilities, such as attending IEP meetings, the education rights holder will need to meet.	The committee agrees with this suggestion and is recommending that the statewide student identifier (SSID) be added to section 1 (General information about the child) on the JV-535(A) form, as altered in response to comments, for adoption. The proposed JV-535-INFO form that the committee is recommending for approval includes a section on "What is Required of an Educational Rights Holder?"
3.	Del Norte County Office of Education by Patti Rommel, Foster Youth Services Coordinator	A	As the Del Norte County Office of Education Foster Youth Services Coordinator, I have requested that I be served with copies of the JV-535, per Rules of the Court. The Court's response was that I needed to request these from the child's attorney. I believe have a checkbox with the list of mandatory service versus optional service would be very useful and would clarify for the courts who are to be served with the form. Thank you	The committee agrees with this suggestion and has incorporated it, with minor alterations, into the amended form JV-535(A) that it is recommending for adoption.
4.	Executive Committee of the Family Law Section of the California Lawyers Association (FLEXCOM)	A	Juvenile Law: Educational Rights Holders FLEXCOM agrees with this proposal. Although FLEXCOM believes the proposal accomplishes the stated purpose, we suggest the modifications below. Our proposed modifications are indicated in bold font, with	

W20-08

Juvenile Law: Educational Rights Holders (Amend California Rules of Court rule 5.649; revise forms JV-535 and JV-535(A); adopt form JV-535-INFO)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			underlines for proposed additions and **strikeouts** for proposed deletions. Rule 5.649: FLEXCOM proposes the following modifications: Rule 5.649. Right to make educational or developmental-services decisions The court must identify the educational rights holder for the child on form JV-535 at each hearing in a dependency or delinquency proceeding. At **the first hearing, and at any subsequent any** hearing where the court limits, restores, or modifies educational rights, or where there are updates to any contact or other information, in any juvenile proceeding, the findings and orders must be documented on form JV-535. Unless his or her rights have been limited by the court under this rule, the parent or guardian holds the educational and developmental-services decisionmaking rights for his or her child. In addition, a nonminor or nonminor dependent youth holds the rights to make educational and developmental-services decisions for himself or herself unless rule 5.650(b) applies. * * * Rule 5.649(e). Filing of order	The committee does not see a suggestion that differs from the proposal in this section. The committee does not recommend this suggested reorganization of Rule 5.649 because it may cause confusion. If a modification, limitation,

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			If there is no modification, limitation, or restoration of educational or developmental-services decisionmaking rights, and there are no required updates to contact or other information, there is no need to file a new or updated form JV-535. **Following the dispositional At any** hearing **and each statutory review hearing,** the party that has requested a modification, limitation, or restoration of educational or developmental-services decisionmaking rights **that was granted** must complete form JV-535 and any required attachments to reflect the court's orders and submit the completed form within five court days for the court's review and signature **unless ordered otherwise**. If no request is made, the child's or youth's attorney must complete and file the form. **If there has been no request for modification, limitation, or restoration of educational or developmental-services decisionmaking rights, or there are no required updates to contact or other information, there is no need to file a new form JV-535.** If a new **or updated** form JV-535 is filed, the most recent *Attachment to Order Designating Educational Rights Holder* (form JV-535(A)) must be attached. The court may instead direct the appropriate party to attach a new **or updated** *Attachment to Order Designating Educational Rights Holder* (form	or restoration of educational rights has been requested and the court denies it; that is a new order and would require the filing and service of a new JV-535, along with the most recent JV-535(A)

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			JV-535(A)) to document the court's findings and orders. Basis of proposed modifications: In the second sentence of rule 5.649, the comma after "first hearing" may suggest that the modifier ("where the court limits, restores, or modifies educational rights") applies only to a "subsequent" hearing. More importantly, for purposes of the rule there is no distinction between a first hearing and subsequent hearing. We believe this sentence could be stated more clearly by simply referring to "any" hearing.	The committee agrees with this suggestion and will modify the language using "any" hearing.
			In rule 5.649(e), we suggest moving the proposed new language (with some modifications) to the first sentence of the subdivision. We recommend changing "request for modification" to "modification" as the need for a new or updated form is dependent on requisite changes, not whether a request was made (e.g. contact information changes happen independent of requests or orders).	The committee does not recommend this suggested reorganization of Rule 5.649 because it may cause confusion. If a modification, limitation, or restoration of educational rights has been requested and the court denies it; that is a new order and would require the filing and service of a new JV-535, along with the most recent JV-535(A)
			We recommend changing "or" to "and" before "there are no required updates to contact or other information" to avoid potential grammatical ambiguity about the use of "or" in the sentence and clarify that if contact or other information is changed	The committee does not recommend this proposed change because it believes that the use of "or" does clarify that the new form JV-535 must be filed for either contingency.

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			without any other change, an updated JV-535 must be filed. With respect to the second sentence of our proposed modification, while it is true that the question of the need to file the JV-535 initially presents itself at the dispositional hearing, there is no difference in the treatment of the question before the court between the dispositional or subsequent hearings, aside from when a "new" as opposed to "updated" JV-535 is filed. We therefore suggest streamlining the language to simply refer to "any" hearing. We also suggest clarifying the language to state explicitly that a new or updated JV-535 is only required when a request has been *granted*. We believe "unless ordered otherwise" should be added to preserve the judge's general discretion in such matters, and is especially appropriate for a situation where "contact or other information" has changed. Notably in the latter situation where no request was made, the petitioner would typically be the default party to file the new or updated form(s). **JV-535-INFO**: Question (1) We suggest modifying the second sentence to read as follows: It **can be is usually** a parent or guardian of the child or youth.	The committee agrees with the suggestion to modify the rule to reference any hearing, but does not agree with a new JV-535 only being needed when a request is granted. If the request has not been granted, that would requires a new JV-535 to be filed to record the most current decision by the court, even if that decision is to leave things as they were. The committee does not recommend this suggestion, but has modified the language for clarity.

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			Question (2) Since the parent or guardian may be the default educational rights holder, and no "appointment" is required, to increase clarity FLEXCOM suggests that the first sentence be modified to read as follows: **Whether a parent or guardian or another person is appointed as the educational rights holder Whoever holds the educational rights** for a child or youth**, that person** has rights and duties that are imposed by the court. The final phrase of the 4th bullet point refers to the hearing that concerns the child's education or development "or all of these." FLEXCOM was not clear on the intent and thought this might be intended to refer to education or development "services."	The committee does not recommend this suggestion, but has modified the language for clarity.
			Question (4) The introduction to the last series of bullet points should be modified to read: The clerk may also serve the form **to on**.	The committee agrees with this suggestion and has made the change.
			Question (5) (inadvertently numbered Question (4)) Non-parent and non-guardian educational rights holders, not being parties, do not have a right to appeal a court's decision to terminate their educational rights. Non-parent or non-guardian educational rights holders serve at	The committee agrees with your suggested modification and has incorporated it as suggested.

	Commenter	Position	Comment	Committee Response
			the pleasure of the court and in the best interests of the minor. Therefore, we suggest modifying the first sentence to read: If **you are a parent or guardian and** the court limited or modified educational rights at a juvenile court hearing, you have the right to appeal that decision. **JV-535** We recommend eliminating (and renumbering accordingly) (1) of both 1. a. and 1. b. because it implies that a form must be filed even if the court does not disturb the educational rights held by a parent.	The committee agrees with the suggested modification and has incorporated it into the proposal. The committee does not recommend this suggestion.
5.	Jason Gutierrez, Coordinator II, Los Angeles County Office of Education	A	My one comment or change I would like to bring up is in regards to our LGBTQ+ youth who do not identify as "his or her" I am not sure what the legalities are with this, but for the sake of changing forms again, maybe this can be explored. Also, is there a way that a box can be checked off by the child welfare agency representative, that states all information provided to the court is current and true to the best of my knowledge, on this day...I ask this because many times what is written in CWS/CMS is not always accurate and when it comes to data sharing with our Educational Passport System (EPS) by ensuring a caseworker has entered current information,	The committee appreciates that the commenter brought this to its attention as it is currently working on removing gendered language from forms and rules and replacing it with gender neutral terms. It will remove all references to “his or her” and replace the references with “child or youth”. The committee does not recommend this suggestion because it is not always filled out by the social worker.

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			would assist with identification and clean data. I know this may not be able to be a mandate due to the differing agencies, but even if a comment/reminder is on the form to submit current information and entered into your county agencies data information system. I think this form will be more effective if approved. So many times over the most important information is not listed, thus creating issues for staff.	No response required.
6.	Los Angeles Department of Children and Family Services by Alyssa Skolnick, Deputy County Counsel	A	It would be extremely helpful to the CSW and Dependency court to add check boxes and include date and manner of service (in-person or 1st class mail).	The committee agrees with this suggestion and has incorporated it, with minor alterations, into the amended form JV-535(A) that it is recommending for adoption.
7.	Wendy Lowinger, Attorney	A	A really important addition would be for the clerk/ or whomever sends out the signed filed copies, to EMAIL all the parties who need to be notified. For instance, in San Francisco, where I usually end up doing the 535 and 535a's as minor's counsel, I email the "received" orders out as soon as I get them, most people use email now!	The committee agrees with this suggestion, to the extent that both the particular court and county have agreed to e-service, and the committee has incorporated it as a service option, where applicable, into the JV-535-INFO form that it is recommending for adoption.
8.	San Francisco Education Rights Working Group by Alicia Parks	AM	In general, the JV-535 should be one comprehensive form and there should not be a separate JV-535(A) form. One form should exist and provide all information. Perhaps it would make sense to have a separate service section or attachment with boxes similar to the JV-510 Proof of Service form. Ideally, the JV-	The committee discussed the idea of combining forms JV-535 and JV-535(A) into one form and does not recommend that approach based on the fact that information in each of the different forms is for different purposes: the JV-535 is an Order Designating the Educational Rights Holder, while the JV-535(A) is for General Information about

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			535 would include additional information for schools and other providers to let them know the purpose of the form, ie. this JV-535 form is used for children who are the subjects of juvenile petitions. The parent(s)/legal guardian(s) may retain rights to make decisions; their rights may be limited and/or another individual may be named together with the parent/legal guardian to make educational decisions. The schools and school districts should know that the ERH is entitled to all information re: the child's education and should be making decisions. The schools should know when the ERH makes decisions and when the caregiver does (this is complicated but important). Rule 5.649: This rule should require a JV-535 in all cases, even if the child's parent/legal guardian retains rights to make educational decisions. This will make clear to schools and school districts who has the right to make educational decisions for each child. Neither the current Rule nor the proposed Rule makes clear whether the JV-535 is required when parents retain their rights. Ideally, there would be an age for which an ERH is required (ie. children age 3 and older) while Developmental Rights Holders are needed beginning at birth.	the various parties and institutions involved in the case and the court's ongoing findings and orders regarding the case. Both forms are to be served together on the parties and institutions involved in the case, including the school district foster youth educational liaison. Because requiring that a JV-535 be used in every case, even if the educational rights holder is the parent, guardian, or Indian custodian, would impose important substantive changes to the proposal, the committee believes public comment should be sought before it could be considered for adoption. The committee will consider this suggestion during another rules cycle. Because setting an age of the child when an ERH is required would impose important substantive changes to the proposal, the committee believes public comment should be sought before it could be considered for adoption. The committee will

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				consider this suggestion during another rules cycle.
			The proposal modifies the existing Rule's requirement that a JV-535 be prepared and filed at each hearing to require the form only when there is a change. The San Francisco Education Rights Working Group recommends that the current Rule be maintained. We acknowledge that preparing a form for each hearing is cumbersome however, it is in fact best practice. If the proposed Rule is put into effect, schools and Districts will not know whether a form is up to date or is stale. By requiring a JV-535 at each hearing, schools, districts and all involved will know that the JV-535 should be dated within the past 6-8 months.	The committee prefers, based on the number of supportive comments submitted, to limit the need for new JV-535 forms to be filed to hearings where there is a change in ERH or there is new contact or other information. At all other hearings the most current JV-535 and JV535(A) will be in effect.
			JV-535 Info §2: The second bullet point states that the Education Rights Holder may authorize the release of records to the child's attorney and/or CASA. However, these individuals have independent statutory rights and court authorization to receive these records. The Education Rights Holder should not have within his/her power the authority to grant or withhold the release of these records.	The committee does not recommend a change to this language, which does not address the rights of the child's attorney or CASA volunteer to access the records, but just addresses the ERH's authority to authorize the access in the same way that a parent could authorize access.
			The top of the second column: The Education Rights Holder is directed to consult and collaborate with the educational liaison. The	The committee agrees to make this section more inclusive and expansive by adding "or other educators and case managers as applicable."

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			ERH should consult with education and developmental providers, eg. educators and case managers and not exclusively with the liaison.	
			§3: This section discusses the JV-535(A): As discussed within the JV-535 and 535(A) sections, only one comprehensive form should exist. Having both forms is confusing and duplicative if they are both used. The JV-535(A) includes essential information that will be missing if the JV-535(A) is not mandatory in a particular jurisdiction or is not used.	As noted above, the committee discussed the idea of combining forms JV-535 and JV-535(A) into one form and does not recommend that approach based on the fact that information in each of the different forms is for different purposes: the JV-535 is an Order Designating the Educational Rights Holder, while the JV-535(A) is for General Information about the various parties and institutions involved in the case and the court's ongoing findings and orders regarding the case. Both forms are to be served together on the parties and institutions involved in the case, including the school district foster youth educational liaison.
			JV-535 ¶¶1 and 2: This form would make more sense if paragraphs 1 and 2 were reversed so that the Educational Rights Holder were listed in ¶1. Re: ¶1 as presented: a and b:	The committee specifically chose this order of placement because of requests from judicial officers who wanted to know first at the hearing whether the child's parent, guardian, or Indian custodian was the educational rights holder or had been limited in any way.
			Why list parents #1 and #2? Who is the first vs. second parent of a child? Is there a way to have a third ERH?	The revised JV-535 form has check boxes to add an attachment with additional Educational Rights Holders.

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			¶3c. This would make more sense if it read, "A different educational rights holder from the one identified by the court in the most recently filed JV-535".	The committee prefers the wording in the proposal, and does not recommend this suggestion.
			¶8. The Education Rights Holder may authorize the release of records to the child's attorney and/or CASA. However, these individuals have independent statutory rights and court authorization to receive these records. The Education Rights Holder should not have within his/her power the authority to grant or withhold the release of these records.	As noted above, the committee does not recommend a change to this language, which does not address the rights of the child's attorney or CASA volunteer to access the records, but just addresses the ERH's authority to authorize the access in the same way that a parent could authorize access.
			¶10. The ERH should consult with education and developmental providers, eg. educators and case managers and not exclusively with the liaison.	As noted above, the committee expanded the language in the JV-535-INFO
			¶11. The child's school should be included in the list of entities to be served with the Order.	There is not a statutory requirement to serve the child's school and thus the committee declines to add this requirement.
			JV-535(A)	
			This should not be an independent Optional form. See above. There should be one JV-535 form so that all of the needed information is provided and there is not duplicative information on the JV-535 and JV-535(A).	As noted above, the committee declines to make this a combined form, but is proposing to make JV-535(A) a mandatory form.
			1. Including the child's date of birth is duplicative of the newly proposed JV-535;	Because they are different forms, the committee is not concerned that this is duplicative.

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			Why include the child's Indian tribe on this portion of the form? Why is this relevant here? The Tribe should be included in the list of entities to be served. If this is to be included and both the JV-535(A) and the birthdate are kept then, the tribe should be listed separately from the child's birthdate.	The child's tribe is identifying information about the child and the committee is retaining it in this portion of the form on a separate line from the birthdate.
			¶¶2 and 3. It's very confusing to separate out the county office of education from the school district and liaisons vs. FYS coordinators. The school districts for both the residence (county from which the child is a dependent) and the school district where the child attends should both be included.	The committee has determined that all of the information on the proposed form is useful, but that adding a school district that is not serving the child currently might be confusing, thus the committee does not recommend this suggestion.
			¶8. This does not appear to be an appropriate order. This is not the standard for limiting a parent or guardian's rights to make educational decisions. The recipient of the JV-535 is not entitled to know why the court has named the ERH that it has. The purpose of this form should be to inform the school, district, etc. of who makes decisions.	The committee has determined that these findings are legally accurate and appropriate to support the appointment of the ERH. .
			¶¶10-11. If an 18 year old is not conserved, what is the authority for limiting that young adult's rights to make decisions regarding his or her own education? I don't think that there is and therefore, this section should be that the young adult and/or court has authorized	The committee has determined that a nonminor who has not been conserved may consent to the continuing assistance of an ERH when the court finds it is in the nonminor's best interest. The committee does not recommend this suggestion.

	Commenter	Position	Comment	Committee Response
			_____ to make decisions in place of or together with the young adult. ¶¶14-15. These should be combined. If the answer to 14 is yes then, check the appropriate boxes listed in 15. ¶¶19 and 21. It would make more sense for these two paragraphs to be reversed. ¶22. If the rule is changed so that a new JV-535 is not required at each hearing, this paragraph does not seem appropriate. This question should be answered at each hearing and not only once to sit on a form that is not modified. Again, the Working Group recommends that a comprehensive JV-535 be prepared for each hearing.	The committee does not recommend this suggestion. The committee does not recommend this suggestion. As explained above, the committee does not recommend this change in procedure.
9.	San Francisco Unified School District Foster Youth Services, by Shira Andron, Foster Youth Services Coordinating Program Coordinator	AM	As a Local Education Agency and County Office of Education, I would recommend making the JV 535A mandatory or at least includes Section 1-7 in the JV 535. Schools and districts will not receive the order from the court clerk if not listed there, so it is important there be a way that the clerk know who to serve the order to.	The committee's proposed form JV 535-INFO already clarifies in §4 that the most current forms JV 535 and JV 535(A) must always be filed and served together. In addition, the revised Rule 5.649 also requires that they be filed together. The committee agrees that the form JV-535(A) should be mandatory.
10.	Superior Court of California, County of Los Angeles by Bryan Borys, Senior Advisor	AM	Updates on forms are necessary. Having the Proof of Service or Certificate of Mailing as part of the form would be helpful for the judicial assistant to fill out and send notice.	The committee agrees with this suggestion for edits to the JV-535(A) form and is recommending JV-535(A), as altered in part by this comment and others, for adoption.

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			If notice to parents or guardians is not a MUST how can you hold them to the 60 day appeal deadline from the time the orders were made? If the parental rights are terminated then not an issue. But if there is not TPR then parents and legal guardians should be noticed. Appeal rights should be included. JV 535 has a notice option that says due to confidentiality of the placement of the child, the information should not be sent to parents or guardians. How does this adequately allow parents or guardians the right to file an appeal? Notice requirements should be clarified as it affects the parent/guardians and youth 18 years old rights to file an appeal.	The committee notes that whenever a court limits or modifies a parent's educational rights, the parent will receive a copy of the order and will have an opportunity to appeal. The Notice box in JV-535 is for use when disclosure of information in the form would create a safety risk. See response to comment directly above.
11.	Superior Court of California, County of Orange Juvenile Court and Family Law Division by Fen-Ru Chen		**Rules 5.649** It is recommended to amended sentence to read, "*At the first hearing, and any subsequent hearing where the court limits, restores, or modifies educational rights; or where there are updates to any contact or other information for an educational rights holder in a juvenile proceeding, the findings and orders must be documented on form JV-535.* Revision will clarify when a JV-535 must be filed.	The committee does not recommend this proposed change because limiting it to information about the educational rights holder would not be as inclusive of all the updates to any contacts or other information that is intended to trigger the use of a new form JV-535.

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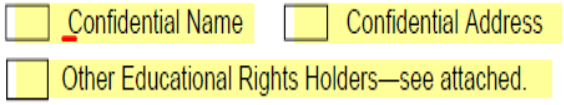
			In the same paragraph, it is recommended "decisionmaking" be updated to "decision-making". ***JV-535 – Order Designating Educational Rights Holder*** In section #2, the *Confidential Name* checkbox has an extra space at the beginning.  In the *Notice* section of the first page, it references the parent(s) or guardian(s) named in 6; however, section #6 on the form relates to the appointment of previous educational rights holders, not parents or guardians. Notice Box: Provision of the information on this form—as well as on forms JV-535(A), JV-536, JV-537, JV-538, JV-539, JV-540, or any equivalent form—to the parent(s) or guardian(s) named in 6 *will* create a safety risk (for example, because of the placement's confidentiality). The	The committee does not recommend this suggestion. The committee does not recommend this suggestion because the spacing is in part built into the program that is used to generate the form and cannot always be modified. The committee will correct this typographical error.

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			information ***may not*** be disclosed to the parent or guardian. In section #11, it is recommended that the verbiage be converted to checkboxes to better indicate mandatory or optional services and to provide clarity for clerks who need to mail or serve the form. ***Does the proposal appropriately address the stated purpose?*** Yes, the proposal addresses the stated purpose. ***Would the proposal provide cost savings?*** Costs savings would be minimal as the process is not changing, with the exception of the clarification that a new JV-535 is not always mandatory. Some courts do not file a new JV-535 unless modifications to the order have been made. ***What would the implementation requirements be for courts?*** Communication would be needed to judicial officers and staff. Procedures may require revisions and updates would be needed to the case management system.	The committee does not recommend this suggestion, but will include a checkbox for service on form JV-535(A). No response required. No response required. No response required.

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			Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes, three months would be sufficient time to implement.	No response required.
12.	Superior Court of California, County of San Diego by Mike Roddy, Executive Office	AM	Does the proposal adequately address the stated purpose? "Yes." Please comment on whether the proposed form JV-535-INFO would be helpful. "It will be very helpful, but courts probably could benefit from some guidance about using the form -- specifically, when and to whom the form should be provided, and who is responsible for distributing the form (e.g., court staff, attorney of record, social worker or probation officer). It seems obvious it should be given to the educational rights holder, but should it also be given to a parent, guardian, or Indian custodian regardless of whether their educational rights are limited? Also, please see suggested changes below."	No response required. The committee agrees with this suggestion and will add information about who should be provided with the form to the JV-535-INFO form, as altered in response to comments, for adoption.

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			Would the proposal provide cost savings? "Yes, to the extent courts were unnecessarily requiring new JV-535 forms to be filed at each hearing regardless of whether the court limited, modified, or restored educational rights or whether there were changes to other information on the forms." 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 of staff (courtroom clerks and clerks who handle the paperwork) and revision of procedures will vary depending on how a court is currently handling educational rights issues." Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? "Three months probably is sufficient." How well would this proposal work in courts of different sizes? "Unknown."	No response required. No response required. No response required. No response required.

	Commenter	Position	Comment	Committee Response
			"Note: WIC § 361 was amended in 2018 to include the educational rights of an Indian custodian (in addition to parents and guardians). Accordingly, Rule 5.649 should be amended to include Indian custodians (see below)."	The committee has responded below to the specific amendments suggested.
			Rule 5.649 The court must identify the educational rights holder for the child at each hearing in a dependency or ~~delinquency~~ juvenile justice proceeding. At the first hearing, and at any subsequent hearing where the court limits, restores, or modifies educational rights, or where there are updates to any contact or other information, in any juvenile proceeding, the findings and orders must be documented on form JV-535. Unless his or her rights have been limited by the court under this rule, the parent, ~~or~~ guardian, or Indian custodian holds the educational and developmental-services decisionmaking rights for his or her child. In addition, a nonminor or nonminor dependent youth holds the rights to make educational and developmental-services decisions for himself or herself unless rule 5.650(b) applies. **(a) Order (§§ 361, 366, 366.27, 366.3, 726, 727.2; 20 U.S.C. § 1415; 34 C.F.R. § 300.300)**	The committee agrees with these suggestions and is recommending that Rule 5.649, as revised by this comment and others, be adopted.

	Commenter	Position	Comment	Committee Response
			At the dispositional hearing and each subsequent review or permanency hearing, the court must determine whether the rights of a parent, ~~or~~ guardian, or Indian custodian to make educational or developmental-services decisions for the child should be limited. If necessary to protect a child who is adjudged a dependent or ward of the court under section 300, 601, or 602, the court may limit a parent's, ~~or~~ guardian's, or Indian custodian's rights to make educational or developmental-services decisions for the child by making appropriate, specific orders on *Order Designating Educational Rights Holder* (form JV-535). **(b) Temporary order (§ 319)** At the initial hearing on a petition filed under section 325 or at any time before a child is adjudged a dependent or the petition is dismissed, the court may, on making the findings required by section 319(g)(1), use form JV-535 to temporarily limit a parent's, ~~or~~ guardian's, or Indian custodian's rights to make educational or developmental-services decisions for the child. An order made under section 319(g) expires on dismissal of the petition, but in no circumstances later than the conclusion of the hearing held under section 361.	

	Commenter	Position	Comment	Committee Response
			If the court does temporarily limit the parent's, or guardian's, or Indian custodian's rights to make educational or developmental-services decisions, the court must, at the dispositional hearing, reconsider the need to limit those rights and must identify the authorized educational rights holder on form JV-535. **(c) No delay of initial assessment** The child's initial assessment to determine any need for special education or developmental services need not be delayed to obtain ~~parental or guardian~~ consent from the parent, guardian, or Indian custodian or for the appointment of an educational rights holder if one or more of the following circumstances is met: (1) The court has limited, even temporarily, the educational or developmental-services decisionmaking rights of the parent, ~~or~~ guardian, or Indian custodian, and consent for an initial assessment has been given by an individual appointed by the court to represent the child; (2) The local educational agency or regional center, after reasonable efforts, cannot locate the parent, ~~or~~ guardian, or Indian custodian; or	

	Commenter	Position	Comment	Committee Response
			(3) Parental rights have been terminated or the guardianship has been set aside. **(d) – (e) * * *** **JV-535-INFO, item 1** An educational rights holder is the adult identified or appointed by the court to make educational or developmental-services decisions for a child or youth who has a case in the juvenile court. It can be a parent, or guardian, or Indian custodian of the child or youth. But if the court limits ~~a parent's or guardian's~~ decisionmaking rights and appoints an educational rights holder other than the parent, ~~or~~ guardian, or Indian custodian, that person acts as the child's or youth's parent, spokesperson, decision maker, and "authorized representative" for all matters related to education and/or developmental-services needs. That person has the right to access the child's or youth's educational and developmental-services records and information to the same extent permitted by the law for a parent, guardian, or Indian custodian. **JV-535-INFO, item 2** ~~Whether a parent or guardian or another~~ The person who is appointed as the educational rights holder for a child or youth~~, that person~~	The committee agrees with most of these suggestions for clarifying edits and is recommending JV-535-INFO, as altered in part by this comment and others, for adoption.

	Commenter	Position	Comment	Committee Response
			has rights and duties that are imposed by the court. The appointed educational rights holder: Must meet with the child or youth; investigate the child's or youth's educational and/or developmental-services needs and whether those needs are being met; and, before each scheduled review hearing, provide information and recommendations to the social worker or probation officer or make written recommendations to the court or attend the review hearing, and participate in any part of the hearing that concerns the child's or youth's education or development, or do all of these. The educational rights holder may submit written recommendations on *Educational Rights Holder Statement* (form JV-537) or in any other suitable format. To the greatest extent possible, the educational rights holder must consult and collaborate with the school district's educational liaison or regional center service coordinator, as applicable, to gather information needed to meet the needs and protect the rights of the child or youth. **JV-535-INFO, item 3** At each hearing in a dependency or ~~delinquency~~ juvenile justice proceeding~~,~~ the	

	Commenter	Position	Comment	Committee Response
			court is required to identify the educational rights holder(s) for the child or youth. At the dispositional hearing, the social worker or probation officer will have interviewed the parent, ~~or~~ guardian, or Indian custodian, and have had them ~~parent or guardian~~ fill out and return *Your Child's Health and Education* (form JV-225), ~~and~~ have filed it with the court. At that hearing the court, using the information available, will appoint an educational rights holder ~~and that~~ in an order that will be made on *Order Designating Educational Rights Holder* (form JV-535). That order will be signed by the judge and filed with the court along with form JV-535(A), which contains general information and the court's other findings and orders related to the child's or youth's health and education. At each subsequent hearing, those original JV-535 and JV-535(A) forms will remain in effect until there is a need to limit, restore, or modify educational or developmental-services rights, or where there is a need to update any contact or other information on form JV-535; … **JV-535-INFO, page 1, item 4** The first form JV-535 and any following form JV-535 with new information, along with the most recently updated form JV-535(A), must	

	Commenter	Position	Comment	Committee Response
			be served by the clerk of the court on the following: … The clerk may also serve the form ~~to~~ on: **JV-535-INFO,** right footer at bottom of **page 1** "Insert underneath WIC § citations:" Cal. Rules of Court, rules 5.502, 5.649, 5.650, 5.651 **JV-535-INFO, page 2, item 4 5** –"Renumber item 4 to item 5." If the juvenile court limited or modified your educational or developmental-services decisionmaking rights at a ~~juvenile court~~ hearing, you have the right to appeal that decision. To appeal ~~a decision to limit your educational rights~~, your attorney must fill out and file *Notice of Appeal —Juvenile* (form JV-800) within 60 days of the date of the decision. ***Before filing the Notice of Appeal, the order that the judge signed limiting or modifying your educational rights (form JV-535) must be attached to it, along with the most recently updated form JV-535(A).*** The appeal ~~can~~ should be filed in the clerk's office at the court where the decision was made.	

W20-08

Juvenile Law: Educational Rights Holders (Amend California Rules of Court rule 5.649; revise forms JV-535 and JV-535(A); adopt form JV-535-INFO)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			JV-535, item 1a & 1b Add checkboxes for "Indian custodian" under the checkboxes for "guardian." **JV-535, item 2** "The following adult(s) is/are designated as the educational rights holder(s), …" **JV-535, item 3** **"**The adult(s) identified in item 2 ___ Name 1 ___ Name 2 is/are *(check all that apply)*:" a. ___ The *first* educational rights holder(s) identified by the court for this child or youth. b. ___ The *same* educational rights holder(s) as last identified by the court, with new contact information in item 2, above. … **JV-535,** boxed NOTICE at bottom of **page 1** Provision of the information on this form—as well as on forms JV-535(A), JV-536, JV-537, JV-538, JV-539, JV-540, or any equivalent form—to the parent(s), ~~or~~ guardian(s), or Indian custodian(s) named in item 6 will create a safety risk (for example, because of the placement's confidentiality). The information may not be disclosed to the parent, ~~or~~ guardian, or Indian custodian. **JV-535,** right footer at bottom of **page 1**	The committee agrees with most of these suggestions for edits to the JV-535 form and is recommending JV-535, as altered in part by this comment and others, for adoption.

W20-08

Juvenile Law: Educational Rights Holders (Amend California Rules of Court rule 5.649; revise forms JV-535 and JV-535(A); adopt form JV-535-INFO)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			"Insert underneath WIC § citations: Cal. Rules of Court, rules 5.502, 5.649, 5.650, 5.651" **JV-535, item 4** The responsible adults identified in item 2 are appointed the educational rights holders … **JV-535, item 5** (*Check only if items 2, 3, and 4 do not apply.*) The court cannot identify a parent, guardian, Indian custodian, or other responsible adult to act as the educational rights holder. **JV-535, item 5b** … The child's attorney and the social worker or probation officer must make every effort to identify a responsible adult to make future educational or developmental-services decisions for the child. **JV-535, item 10** The appointed educational rights holder must meet with the child or youth; investigate the child's or youth's educational and developmental-services needs and whether those needs are being met; and, before each scheduled review hearing, provide information and recommendations to the social worker or probation officer OR make written recommendations to the court OR	

	Commenter	Position	Comment	Committee Response
			attend the review hearing and participate in any part of the hearing that concerns the child's education or development OR do all of these. … **JV-535(A), item 2** a. School district (local educational agency or LEA): "Note: "LEA" is used, without explanation, in items 15 and 17." **JV-535(A), item 3** (see CRC 5.650(h)(6)) County office of education (name and *address*): Foster youth services coordinator … **JV-535(A), item 8** The child's parent, ~~or~~ guardian, or Indian custodian is unavailable, unable, or unwilling to exercise educational or developmental-services rights; the agency has made diligent efforts to locate and secure the participation of the parent, ~~or~~ guardian, or Indian custodian in educational and developmental-services decisionmaking; … **JV-535(A), item 9** Limitation of the rights of the parent(s), ~~or~~ guardian(s), or Indian custodian(s) to make … **JV-535(A),** right footer at bottom of **page 1**	The committee agrees with most of these suggestions for edits to the JV-535(A) form and is recommending JV-535(A), as altered in part by this comment and others, for adoption.

W20-08

Juvenile Law: Educational Rights Holders (Amend California Rules of Court rule 5.649; revise forms JV-535 and JV-535(A); adopt form JV-535-INFO)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			"Insert underneath WIC § citations: Cal. Rules of Court, rules 5.502, 5.649, 5.650, 5.651" **JV-535(A), item 12** The court has ~~not ordered~~ denied or ~~has~~ terminated reunification services for the parent, ~~or~~ guardian, or Indian custodian, and the child or youth is placed in a planned permanent living arrangement under section 366.21(g)(5), 366.22, 366.26, 366.3(i), or 727.3(b)(5)–(6). **JV-535(A), item 15 (last line)** "Query: Should "SELPA" be added?" "The LEA, SELPA, or regional center must ~~ensure that~~ provide a copy of any plan ~~is provided~~ to the designated educational rights holder." **JV-535(A), item 17 (first line)** "Query: Should any timeline be added?" The appointed educational rights holder must, as quickly as possible, (*check all that apply*):" …, within a reasonable time, … …, no later than five days after appointment, …	The committee agrees with this suggestion for edits to the JV-535(A) form and is recommending JV-535(A), as altered in part by this comment and others, for adoption.
13.	Stanislaus County Office of Education by Elisa Beltran, Foster Youth Liaison	AM	In an educational rights holder case, there are mandatory and optional people who may be served with process. Would it be helpful to	The committee agrees with this suggestion and has incorporated it, with minor alterations, into

	Commenter	Position	Comment	Committee Response
			create a service section on form JV-535(A) that has check boxes for the mandatory and optional persons to be served for a specific case? Response: Yes! Our office has encountered difficulties in obtaining educational rights holder information, accurate and updated information, and actual JV535 forms for foster youth from the court and social services. Confidential ERH information: Although we understand the need to indicate whether the names or addresses of the educational rights holders (ERHs) are confidential, education agencies are required by law to contact the person holding educational rights for foster youth for education decisions making purposes. For this reason, I want to make certain that the proposed changes allow educational agencies to obtain education right holder information when deemed confidential for the purpose of fulfilling other state laws and regulations? If not, I believe it is vital to address this issue by identifying who can and cannot receive such information. Please comment on whether the proposed form JV-535-INFO would be helpful. Response: Absolutely! This is a long-awaited shift in foster care information sharing practices between agencies and the court that are	the amended form JV-535(A) that it is recommending for adoption. The committee's recommendations do not change any existing legal access to information about Educational Rights Holders that is held by education agencies. The committee agrees with this suggestion and is recommending the JV-535-INFO form, as altered in response to comments, for adoption.

	Commenter	Position	Comment	Committee Response
			necessary and in the best interest of children in foster care. Would the proposal provide cost savings? If so, please quantify? Response: Yes, this would provide cost saving as it would limit the time spent requesting the information provided in these forms by COEs and other educational agencies through the development of other forms, emails, phone calls, etc. on a regular bases to ensure that educational agencies have the most current information and are not contacting individuals who are no longer involved in the student's case. What would the implementation requirements be for courts? Response: Appropriate court staff (including) judges should be required to attend training courses at least as part of the court's hiring, 6-month, and/or annual clerk re-certification process, and judge's annual refresher course. The course should allow for in-person and/or online one-hour training to include testing as part of the course to ensure competency. If the employee cannot pass the test, then they should be provided an opportunity to retake the test. It may also be beneficial to ensure that social workers completing these forms are also trained in the same manner.	No response required. This question was directed to the courts to determine what the impacts on them would be. The training suggestions made here are beyond the scope of this proposal and outside the purview of the committee. No response required.

W20-08

Juvenile Law: Educational Rights Holders (Amend California Rules of Court rule 5.649; revise forms JV-535 and JV-535(A); adopt form JV-535-INFO)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Response: Yes.	

Item number: 33

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9-10, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Juvenile Law: Information, Documents, and Services for Youth 16 Years of Age and Older
Amend Cal. Rules of Court, rules 5.502, 5.740, and 5.810; adopt forms JV-361, JV-362, and JV-363; revise form JV-365

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Kerry Doyle, 415-865-8791, kerry.doyle@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Family and Juvenile Law Advisory Committee Annual Agenda: Item 1: As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration.
Item 1k. AB 718 (Eggman) Dependent children: documents (Ch. 438, Statutes of 2019) Requires child welfare agencies to begin process of providing key documents to foster youth beginning at age 16, rather than at the end of juvenile court jurisdiction.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue . San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-21

Title
Juvenile Law: Information, Documents, and Services for Youth 16 Years of Age and Older

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 5.502, 5.740, and 5.810; adopt forms JV-361, JV-362, and JV-363; revise form JV-365

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair
Kerry Doyle, Attorney
Center for Families, Children & the Courts

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Kerry Doyle, 415-865-8791
kerry.doyle@jud.ca.gov

Executive Summary and Origin

The Family and Juvenile Law Advisory Committee recommends amending three California Rules of Court, adopting three forms, and revising one form to conform to Assembly Bill 718's statutory mandate that child welfare agencies begin the process of providing key information, documents, and services to youth in foster care beginning at age 16, rather than at the end of juvenile court jurisdiction. (Eggman; Stats. 2019, ch. 438).

Background

Before the passage of Assembly Bill 718, the law only required the provision of certain information, documents, and services to a youth in foster care 18 years of age or older prior to termination of juvenile court jurisdiction over that youth.[1] A county welfare department is also required, at the hearing before a dependent turns 18 years old, and at every review hearing thereafter until the court terminates jurisdiction, to submit a report describing efforts toward

[1] Welf. & Inst. Code, § 391. All further statutory references will be to the Welfare and Institutions Code unless otherwise indicated.

providing certain documents and information to the youth.[2] Assembly Bill 718 seeks to increase the access that youth in foster care have to various information, documents, and services—and to broaden those items to include financial literacy resources—as they transition to adulthood and greater levels of independence, acknowledging the need that some youth may have for such materials and supports before they turn 18 years old, and between turning 18 and exiting foster care.

According to the bill's author, "While many positives have come from the extension of benefits for youth involved in the foster care system, one result of the implementation of AB 12 (2010) has been that many youth do not receive important documents, such as their social security card, driver's license, and birth certificate, until well past the period when they need these documents to navigate employment, housing, higher education or financial aid applications. [This bill] would provide youth with important documentation and support when it is needed, which will give them a better opportunity to achieve their goals and be independent."[3]

The Proposal

Rule 5.502

Rule 5.502 would be amended to define the term "youth" as a person who is at least 14 years of age and not yet 21 years of age.

Rules 5.740 and 5.810

Rules 5.740 and 5.810 would be amended to add a requirement that the social worker or probation officer provide the youth with the documents required by section 391 and would indicate which form (discussed below) must be used to record the information, documents, and services that were provided to the youth.

Forms

The three new forms discussed below would all have the same instructions on the form directing the youth to review the boxes checked by the social worker or probation officer and sign their initials on the lines after the item if they have indeed received the information, document, or service described in that item. This mirrors the current JV-365 form and process for provision of information, documents, and services when the court is terminating jurisdiction over a nonminor.[4]

First Review Hearing After Youth Turns 16 Years of Age—Information, Documents, and Services *(form JV-361)*

This would be a new mandatory form for the social worker or probation officer to complete to specify which information, documents, and services have been provided to the youth at the first review hearing after the youth turns 16 years old.

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[2] § 366.31(a)(3).
[3] Assem. Com. on Judiciary, Analysis of Assem. Bill No. 718 (2019–2020 Reg. Sess.) Apr. 2, 2019, pp. 4–5.
[4] See *Termination of Juvenile Court Jurisdiction—Nonminor* (form JV-365), included in this Invitation to Comment.

Review Hearing for Youth Approaching 18 Years of Age—Information, Documents, and Services *(form JV-362)*
This would be a new mandatory form for the social worker or probation officer to complete to indicate which information, documents, and services have been provided to the youth at the last review hearing before the youth turns 18 years old.

Review Hearing for Youth 18 Years of Age or Older—Information, Documents, and Services *(form JV-363)*
This would be a new mandatory form for the social worker or probation officer to complete to indicate which information, documents, and services have been provided to the youth at each review hearing after the youth turns 18 years old.

Termination of Juvenile Court Jurisdiction—Nonminor *(form JV-365)*
This is an existing mandatory form for the social worker or probation officer to complete to indicate which information, documents, and services have been provided to the youth as the juvenile court terminates its jurisdiction. As indicated above, the instructions on the form direct the youth to review the boxes checked by the social worker or probation officer and sign their initials on the lines after the item if they have indeed received the information, document, or service described in that item.

This form would be revised to add the new requirement in AB 718 that the youth be provided with written information notifying the youth of any financial literacy programs or other available resources to help the youth obtain financial literacy skills.[5] It would also be revised to clarify the new requirement that information be in writing notifying a youth who was formerly in foster care and is granted a preference for student assistant or internship programs with state agencies. Further, several revisions would be made to the form removing the phrase "his or her" so that the form is gender neutral.

Alternatives Considered

The committee considered not defining "youth" in rule 5.502. However, the committee has had repeated and lengthy discussions over whether to use the term "child" or "minor." The current rules all use "child," but the statutes use "minor." The committees note that throughout the juvenile court rules and forms there is a consistent practice of using "child," and this term is clearly defined in rule 5.502.[6] Use of the term "child" is a reminder to all in the system that juvenile offenders are developmentally distinct from adults; "minor" is not defined in rule 5.502. In a proposal circulated for public comment in spring 2019 that addressed the needs of older children as this proposal does, the committee sought specific comment on whether the rules should use the term "child" or "minor." While many commentators suggested that the term "youth" is preferred by older children who do not like to be referred to as a child, the committee concluded that since "youth" is not defined in the rules of court and any definition of the term

[5] As indicated in AB 718, financial literacy programs include, but is not limited to, banking, credit card debt, student loan debt, credit scores, credit history, and personal savings. § 391(a)(1)(G) & (c)(5)
[6] Rule 5.502 defines child as "a person under the age of 18 years."

would be an important substantive change to the proposal, public comment should be sought before the council defines the term. The committee is now circulating a definition of "youth" for public comment. In addition to creating a respectful term for older children, this term is important in juvenile justice court since many 18–21-year olds are before that court and do not meet the definition of child.

The committee considered using 15 as the beginning age of the definition of youth, since that is the age the United Nations, for statistical purposes, uses as the beginning age of its definition.[7] However, under the California statutory scheme, the case plan must include a written description of the programs and services that will help the child to prepare for the transition from care to successful adulthood beginning at age 14.[8] For that reason, and because the dependency court needs to make a finding regarding the services needed to assist the child or nonminor dependent to make the transition from foster care to successful adulthood beginning at age 14,[9] the committee concluded that the term should be defined as " a person who is at least 14 years of age and not yet 21 years of age." Fourteen is also the minimum age when a minor can obtain a permit to work.[10] If a definition of youth is ultimately adopted by the Judicial Council, rules and forms can be updated in future proposals, as appropriate, when those rules and forms need to be updated due to new statutory mandates.

Assembly Bill 718 governs review hearings in the dependency court, but not in the delinquency court. The committee considered limiting this proposal to youth in foster care under the dependency jurisdiction of the court, and not including those youth who are in foster care under the delinquency jurisdiction of the court. This, however, would result in youth in foster care in the delinquency system receiving different treatment than youth in foster care in the dependency system. Rule 5.555(c)(1)(J) requires that the probation officer's report for a hearing where the court is considering terminating jurisdiction include verification that the nonminor was provided with the information, documents, and services as required under section 391(e). Probation officers throughout the state are providing the required information, documents, and services to nonminors when the court terminates jurisdiction, and are using and filing *Termination of Juvenile Court Jurisdiction—Nonminor* (form JV-365). While AB 718 governs review hearings in the dependency court and not in the delinquency court, the legislative history is very clear that the bill is intended to help youth who exit foster care successfully prepare for their transition to independence.[11] It is both fair and logical that this proposal help all youth in foster care successfully prepare for their transition to independence.

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[7] United Nations, "Global Issues—Youth," *https://www.un.org/en/sections/issues-depth/youth-0/index.html* (as of Feb. 21, 2020).
[8] § 16501.1(g)(16)(A).
[9] § 366.3(e)(10).
[10] Educ. Code, § 49112.
[11] Assem. Com. on Human Services, Analysis of Assem. Bill No. 718 (2019–2020 Reg. Sess.) Mar. 26, 2019. pp. 5–7.

Fiscal and Operational Impacts

The proposal includes an added requirement that social workers and probation officers provide certain information, documents, and services to youth in foster care earlier in the case than is the current practice. This will increase workload but is required for social workers by recent statutory amendments. As discussed above, the committee concluded that this benefit should also be provided to youth in foster care under the delinquency jurisdiction of the court and thus the proposal includes a slight increase in workload for probation officers. In implementing the new and revised forms, courts will incur standard reproduction costs.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Should the rules of court define "youth" and, if so, is the proposed definition of "a person who is at least 14 years of age and not yet 21 years of age" an appropriate definition?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rules 5.502, 5.740, and 5.810, at pages 6–8
2. Forms JV-361, JV-362, JV-363, and JV-365, at pages 9–14

Link A: Assem. Bill 718,
http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB718

Rules 5.502, 5.740, and 5.810 of the California Rules of Court would be amended, effective January 1, 2021, to read:

Rule 5.502. Definitions and use of terms

Definitions (§§ 202(e), 303, 319, 361, 361.5(a)(3), 450, 628.1, 636, 726, 727.3(c)(2), 727.4(d), 4512(j), 4701.6(b), 11400(v), 11400(y), 16501(f)(16); 20 U.S.C. § 1415; 25 U.S.C. § 1903(2))

As used in these rules, unless the context or subject matter otherwise requires:

(1)–(4) * * *

(5) "Child" means a person under the age of 18 years.

(6)–(24) * * *

(25) "Nonminor" means a youth at least 18 years of age and not yet 21 years of age who remains subject to the court's dependency, delinquency, or general jurisdiction under section 303 but is not a "nonminor dependent."

(26) "Nonminor dependent" means a youth who is a dependent or ward of the court, or a nonminor under the transition jurisdiction of the court, is at least 18 years of age and not yet 21 years of age, and:

(A) Was under an order of foster care placement on the youth's 18th birthday;

(B) Is currently in foster care under the placement and care authority of the county welfare department, the county probation department, or an Indian tribe that entered into an agreement under section 10553.1; and

(C) Is participating in a current Transitional Independent Living Case Plan as defined in this rule.

(27)–(45) * * *

(46) "Youth" means a person who is at least 14 years of age and not yet 21 years of age.

Rule 5.740. Hearings subsequent to a permanent plan (§§ 366.26, 366.3, 16501.1)

(a)–(b) * * *

(c) Review hearings—youth 16 years of age and older

If the youth is 16 years of age or older, the procedures in section 391 must be followed.

(1) If it is the first review hearing after the youth turns 16 years of age, the social worker must provide the information, documents, and services required by section 391(a) and must use *First Review Hearing after Youth Turns 16 years of Age—Information, Documents, and Services* (form JV-361).

(2) If it is the last review hearing before the youth turns 18 years of age, the social worker must provide the information, documents, and services required by section 391(b)–(c) and must use *Review Hearing for Youth Approaching 18 Years of Age—Information, Documents, and Services* (form JV-362).

(3) If it is a review hearing after the youth turns 18 years of age, the social worker must provide the information, documents, and services required by section 391(c) and must use *Review Hearing for Youth 18 Years of Age or Older—Information, Documents, and Services* (form JV-363). If the court is terminating jurisdiction at this review hearing, the social worker must also provide the information, documents, and services required by section 391(h), must follow the procedures in rule 5.555, and must use *Termination of Juvenile Court Jurisdiction—Nonminor* (form JV-365).

~~(c)~~**(d)** * * *

Rule 5.810. Reviews, hearings, and permanency planning

(a)–(b) * * *

(c) Postpermanency status review hearings (§ 727.2)

A postpermanency status review hearing must be conducted for wards in placement no less frequently than once every six months.

(1)–(2) * * *

(3) If the youth is 16 years of age or older, the procedures in section 391 must be followed.

(A) If it is the first review hearing after the youth turns 16 years of age, the probation officer must provide the information, documents, and services required by section 391(a) and must use *First Review Hearing after Youth Turns 16 years of Age—Information, Documents, and Services* (form JV-361).

(B) If it is the last review hearing before the youth turns 18 years of age, the probation officer must provide the information, documents, and services required by section 391(b)–(c) and must use *Review Hearing for Youth Approaching 18 Years of Age—Information, Documents, and Services* (form JV-362).

(C) If it is a review hearing after the youth turns 18 years of age, the probation officer must provide the information, documents, and services required by section 391(c) and must use *Review Hearing for Youth 18 Years of Age or Older—Information, Documents, and Services* (form JV-363). If the court is terminating jurisdiction at this review hearing, the probation officer must also provide the information, documents, and services required by section 391(h), must follow the procedures in rule 5.555, and must use *Termination of Juvenile Court Jurisdiction—Nonminor* (form JV-365).

(d)–(e) * * *

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	**DRAFT** **Not approved by** **the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
YOUTH'S NAME: DATE OF BIRTH:	
FIRST REVIEW HEARING AFTER YOUTH TURNS 16 YEARS OF AGE—INFORMATION, DOCUMENTS, AND SERVICES	CASE NUMBER:

Directions for the social worker or probation officer: Check the appropriate boxes in items 1 through 8, complete item 9, attach documents as required, and sign and date the form.

Directions for the youth *(if youth is available)*: Review the boxes checked by the social worker or probation officer in items 1 through 8. Sign your initials on the lines after items 1–8 ***only if*** you received the information, document, or service described in that item. Then sign and date the form. You should give the form to the judge on the day of the hearing if you didn't give it to your social worker, probation officer, or attorney before the hearing.

That attached report verifies that the youth has received the following information, documents, and services (*check all that apply*):

1. ☐ Social security card _____
2. ☐ A copy of the birth certificate _____
3. ☐ A certified copy of the birth certificate, if requested by the youth _____
4. ☐ California identification card or driver's license _____
5. ☐ Assistance in obtaining employment _____
6. ☐ Assistance in applying for, or preparing to apply for, admission to college or to a vocational training program or other educational institution, and in obtaining financial aid _____
7. ☐ Written notice informing the youth that current or former dependent children who are or have been in foster care are granted a preference for student assistant or internship positions with state agencies, or with participating county agencies, until the youth turns 26 years of age _____
8. ☐ Written information notifying the youth of any financial literacy programs or other available resources provided through the county or other community organizations to help the youth obtain financial literacy skills, including, but not limited to, banking, credit card debt, student loan debt, credit scores, credit history, and personal savings _____
9. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing and all attachments are true and correct.

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF SOCIAL WORKER OR PROBATION OFFICER)

I certify that I have received the information and services that I initialed above.

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF YOUTH)

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	***FOR COURT USE ONLY*** **DRAFT** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
YOUTH'S NAME: DATE OF BIRTH:	
REVIEW HEARING FOR YOUTH APPROACHING 18 YEARS OF AGE—INFORMATION, DOCUMENTS, AND SERVICES	CASE NUMBER:

Directions for the social worker or probation officer: Check the appropriate boxes in items 1 through 17, complete item 18, attach documents as required, and sign and date the form.

Directions for the youth *(if youth is available)*: Review the boxes checked by the social worker or probation officer in items 1 through 7. Sign your initials on the lines after items 1–17 ***only if*** you received the information, document, or service described in that item. Then sign and date the form. You may give the form to the judge on the day of the hearing if you didn't give it to your social worker, probation officer, or attorney before the hearing.

An attached report verifies that the youth has received the following information, documents, and services (*check all that apply*):

1. ☐ Social security card _____
2. ☐ Certified copy of birth certificate _____
3. ☐ California identification card or driver's license _____
4. ☐ Medi-Cal Benefits Identification card _____
5. ☐ A letter prepared by the county welfare department that includes the child's name and date of birth, the dates during which the minor was within the jurisdiction of the juvenile court, and a statement that the minor or nonminor was a foster youth in compliance with state and federal financial aid documentation requirements _____
6. ☐ The death certificate of the parent or parents, if applicable _____
7. ☐ Proof of citizenship or legal residence, if applicable _____
8. ☐ An advance health care directive form _____
9. ☐ A copy of each of the following: *How to Ask to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-464-INFO), a blank *Request to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-466), and a blank *Confidential Information—Request to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-468) _____
10. ☐ Assistance in obtaining employment _____
11. ☐ Assistance in applying for, or preparing to apply for, admission to college or to a vocational training program or other educational institution, and in obtaining financial aid _____
12. ☐ Written notice informing the youth that a current or former dependent child who is or has been in foster care is granted a preference for student assistant or internship positions with state agencies, or with participating county agencies, until the child turns 26 years of age _____
13. ☐ Written notice informing the youth that youth exiting foster care at 18 years of age or older are eligible for Medi-Cal until they reach 26 years of age, regardless of income, and are not required to apply _____

YOUTH'S NAME:	CASE NUMBER:

14. ☐ Written notice informing the youth of any financial literacy programs or other available resources provided through the county or other community organizations to help the youth obtain financial literacy skills, including, but not limited to, banking, credit card debt, student loan debt, credit scores, credit history, and personal savings _____

15. ☐ Referrals to transitional housing, if available, or assistance in securing other housing _____

16. ☐ Assistance in maintaining relationships with individuals who are important to a youth who has been in out-of-home placement for six months or longer from the date the child entered foster care, based on the minor's best interests _____

17. ☐ The whereabouts of any siblings under the jurisdiction of the juvenile court, unless the court determines that sibling contact would jeopardize the safety or welfare of either sibling _____

18. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing and all attachments are true and correct.

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF SOCIAL WORKER OR PROBATION OFFICER)

I certify that I have received the information and services that I initialed above.

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF YOUTH)

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
YOUTH'S NAME: DATE OF BIRTH:	
REVIEW HEARING FOR YOUTH 18 YEARS OF AGE OR OLDER—INFORMATION, DOCUMENTS, AND SERVICES	CASE NUMBER:

Directions for the social worker or probation officer: Check the appropriate boxes in items 1 through 8, complete item 9, attach documents as required, and sign and date the form.

Directions for the youth *(if youth is available)*: Review the boxes checked by the social worker or probation officer in items 1 through 8. Sign your initials on the lines after items 1–8 ***only if*** you received the information, document, or service described in that item. Then sign and date the form. You may give the form to the judge on the day of the hearing if you didn't give it to your social worker, probation officer, or attorney before the hearing.

An attached report verifies that the youth has received the following information, documents, and services (*check all that apply*):

1. ☐ Assistance in obtaining employment _____
2. ☐ Assistance in applying for, or preparing to apply for, admission to college or to a vocational training program or other educational institution, and in obtaining financial aid _____
3. ☐ Written information notifying the youth that a current or former dependent child who is or has been in foster care is granted a preference for student assistant or internship positions with state agencies, or with participating county agencies, until the child turns 26 years of age _____
4. ☐ Written information notifying the youth that youth exiting foster care at 18 years of age or older are eligible for Medi-Cal until they reach 26 years of age, regardless of income, and are not required to apply _____
5. ☐ Written notice informing the youth of any financial literacy programs or other available resources provided through the county or other community organizations to help the youth obtain financial literacy skills, including, but not limited to, banking, credit card debt, student loan debt, credit scores, credit history, and personal savings _____
6. ☐ Referrals to transitional housing, if available, or assistance in securing other housing _____
7. ☐ Assistance in maintaining relationships with individuals who are important to a youth who has been in out-of-home placement for six months or longer from the date the minor child entered foster care, based on the minor's or nonminor's best interests _____
8. ☐ The whereabouts of any siblings under the jurisdiction of the juvenile court, unless the court determines that sibling contact would jeopardize the safety or welfare of either sibling _____
9. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing and all attachments are true and correct.

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF SOCIAL WORKER OR PROBATION OFFICER)

I certify that I have received the information and services that I initialed above.

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF YOUTH)

Form Adopted for Mandatory Use
Judicial Council of California
JV-363 [New January 1, 2021]

Welfare & Institutions Code, §§ 391, 607.2, 607.3;
Cal. Rules of Court, rule 5.555
www.courts.ca.gov

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **Not approved by** **the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
NONMINOR'S NAME: NONMINOR'S DATE OF BIRTH: HEARING DATE AND TIME:	
TERMINATION OF JUVENILE COURT JURISDICTION—NONMINOR	CASE NUMBER:

Directions for the social worker or probation officer: Check the appropriate boxes in items 1 through 6, complete item 7, attach documents as required, and sign and date item 7.

Directions for the nonminor *(if nonminor is available)*: Review the boxes checked by the social worker or probation officer in items 1 through 6. If the box checked in item 1 is wrong, check the correct box and sign your initials next to the box. Sign your initials on the lines after items 2a–h, 3a–l, 4, 5a–b, and 6a–h ***only if*** you received the information, document, or service described in that item. Then sign and date item 7. You may give the form to the judge on the day of the hearing if you didn't give it to your social worker, probation officer, or attorney before the hearing.

1. a. ☐ The nonminor wants to attend the termination hearing ☐ in person ☐ by telephone.
   b. ☐ The nonminor does not want to attend the termination hearing. The petitioner has attached verification that the nonminor has been informed of the potential consequences of failure to attend the termination hearing.
   c. ☐ The nonminor is unavailable or has refused to sign this form. Documentation of reasonable efforts to locate the nonminor and to obtain the nonminor's signature is attached.

2. An attached report verifies that the nonminor has received written information about the minor's juvenile court case, including *(check all that apply):*
   a. ☐ The nonminor's Indian heritage or tribal connections _____
   b. ☐ The nonminor's family history _____
   c. ☐ The nonminor's placement history _____
   d. ☐ The nonminor's educational history and medical history _____
   e. ☐ Any photographs of the nonminor or the family in the possession of the county welfare department or probation department, other than forensic photographs _____
   f. ☐ Contact information for all siblings under juvenile court jurisdiction, except for any siblings whose safety or welfare would be jeopardized by contact with the nonminor, as determined by the court _____
   g. ☐ Instructions on how the nonminor may exercise the right to inspect, receive, and copy their juvenile case file, including how to access sealed records (see Welf. & Inst. Code, §§ 389(a), 781(a)(4), 786(f)(1)(F), 826.6 & 827; Cal. Rules of Court, rule 5.552) _____
   h. ☐ The date on which the jurisdiction of the court would be terminated _____

3. The nonminor has been provided with the following documents *(check all that apply):*
   a. ☐ A certified copy of the birth certificate _____
   b. ☐ Social security card _____
   c. ☐ California identification card or driver's license _____
   d. ☐ Proof of citizenship or lawful permanent resident status _____
   e. ☐ A copy of the death certificate of the parent or parents _____
   f. ☐ Health and Education Passport _____

Form Adopted for Mandatory Use
Judicial Council of California
JV-365 [Rev. January 1, 2021]

Welfare & Institutions Code, §§ 391, 607.2, 607.3;
Cal. Rules of Court, rule 5.555
www.courts.ca.gov

NONMINOR'S NAME:	CASE NUMBER:

3. g. ☐ A blank advance health care directive form _____

h. ☐ A letter prepared by the county welfare department that includes the nonminor's name and date of birth, the dates during which the nonminor was within the jurisdiction of the juvenile court, and a statement that the nonminor was a foster child in compliance with state and federal financial aid documentation requirements _____

i. ☐ Written information notifying the nonminor of any financial literacy programs or other available resources provided through the county or other community organizations to help the nonminor obtain financial literacy skills, including, but not limited to, banking, credit card debt, student loan debt, credit scores, credit history, and personal savings _____

j. ☐ Written information notifying the nonminor that state agencies, when hiring for internships and student assistant positions, must give preference to qualified applicants up to 26 years of age who are or have been dependent children in foster care _____

k. ☐ The nonminor's 90-day Transition Plan _____

l. ☐ A copy of each of the following: *How to Ask to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-464-INFO), a blank *Request to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-466), and a blank *Confidential Information—Request to Return to Juvenile Court Jurisdiction and Foster Care* (form JV-468) _____

4. ☐ The nonminor continues to be eligible for services or accommodations under the Individuals with Disabilities Education Act, the Americans with Disabilities Act, or section 504 of the Rehabilitation Act of 1973, and the nonminor has been provided with the most recent service or accommodation plan. _____

5. ☐ The nonminor has been receiving services as provided in the Individuals with Disabilities Education Act (see 34 C.F.R. §§ 300.320(b)–(c) & 300.321(b)), and

a. ☐ has received a copy of their transition service plan. _____

b. ☐ has been informed of the rights that will transfer to them under this Act. _____

6. The nonminor received the following assistance or services *(check all that apply):*

a. ☐ Written verification of continued enrollment in Medi-Cal with no interruption in coverage, and provision of _____

i. ☐ Medi-Cal Benefits Identification Card (BIC) _____

ii. ☐ Information about eligibility for extended Medi-Cal benefits until age 26 _____

b. ☐ Help applying to college, a vocational training program, or another educational or employment program _____

c. ☐ Help obtaining financial aid for college, a vocational training program, or another educational or employment program _____

d. ☐ A referral to transitional housing, if available, or assistance in securing other housing _____

e. ☐ Help obtaining employment or other financial support _____
☐ including completing enrollment in CalFresh _____

f. ☐ Help maintaining relationships with individuals important to the nonminor, consistent with their best interests *(required only if the nonminor has been in an out-of-home placement for six months or longer)* _____

g. ☐ Help accessing the Independent Living Aftercare Program in the nonminor's county of residence _____

h. ☐ Other services ordered by the court *(specify):*

_____

7. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing and all attachments are true and correct.

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF SOCIAL WORKER OR PROBATION OFFICER)

I certify that I have received the information and services that I initialed above.

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF NONMINOR)

Item number:34

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Juvenile Law: Nonminor Disposition Hearing–Dependency

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Daniel Richardson, 415-865-7619, daniel.richardson@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28. 2019
Project description from annual agenda: As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration:
AB 748 (Gipson) Nonminor dependents (Ch. 682, Statutes of 2019) Provides that youth who were subject to an order for foster care before they reached 18 years of age but were not yet adjudged dependents of the juvenile court before reaching their 18th birthday, are eligible for extended foster care benefits.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-22

Title
Juvenile Law: Nonminor Disposition Hearing–Dependency

Proposed Rules, Forms, Standards, or Statutes
Adopts Cal. Rules of Court, rule 5.697; amend rules 5.682 and 5.684; adopt forms JV-461, JV-461(A) and JV-463

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Daniel Richardson, 415-865-7619
daniel.richardson@jud.ca.gov

Executive Summary and Origin

To implement recent legislation creating a new disposition hearing for nonminors, the Family and Juvenile Law Advisory Committee proposes the Judicial Council adopt a new rule to the California Rules of Court, amend two rules, and adopt three new Judicial Council forms. The statutory amendments created a process to address a class of youth who were found to be within the jurisdiction of the juvenile court due to abuse or neglect as a child but reached the age of majority before a disposition hearing could be held, and thus ensure their eligibility for extended foster care. This proposal would create a uniform procedure for these nonminor disposition hearings through a new rule of court, two forms for the court's findings and orders, and a form for the youth to provide the required informed consent to proceed with the nonminor disposition hearing.

Background

Assembly Bill 748 (Gibson; Stats. 2019, ch. 682)[1] addresses those situations in which a juvenile court takes jurisdiction of a child who is fast approaching the age of majority. It ensures that these youth will not be excluded from extended foster care because a disposition hearing could not be held prior to their 18th birthday. The legislation seeks to eliminate administrative barriers

[1] The full text of this statute is available at *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB748*.

to ensure that a limited number of youth in certain narrow situations are able to enter or reenter extended foster care.[2] The legislation was partially in response to *In re David B.* (2017) 12 Cal.App.5th 633, in which an appellate court "reluctantly" agreed that the trial court's denial of dependency jurisdiction for a wheelchair-bound diabetic youth just before he turned 18 prevented the appellate court from reversing the decision.[3]

The legislation creates a procedure for a new version of a disposition proceeding, specifically tailored for young adults. Under section 358(d), to hold a disposition hearing for a nonminor, the nonminor must have been found to be a minor described by section 300 at a hearing pursuant to section 355 prior to turning 18 and must have remained continuously detained pursuant to section 319(c).[4] In addition, the nonminor must provide "informed consent" for the disposition proceeding. If these conditions are met, the court is required to hold a disposition hearing and determine by clear and convincing evidence if one of the conditions of section 361(c) existed *immediately prior to the youth turning 18*. If the court makes this finding, the youth meets the legal definition of a nonminor dependent (NMD) under section 11400(v) and is eligible for extended foster care. If the court does not make this finding, or the youth does not give informed consent, section 358(d)(5)(A) requires that dependency or general jurisdiction not be retained.

The Proposal

The legislation requires the Judicial Council to adopt implementing rules and forms as necessary on or before July 1, 2020.[5] This proposal will seek to provide a unified approach to these nonminor disposition hearings. It blends together many important concepts related to extended foster care and calls for a hybrid type of hearing, one which must respect the nonminor's status as an adult and their legal decision-making authority while also fulfilling the functions of a dependency disposition hearing which typically involve a child.

The committee proposes adoption of a new rule of court to implement the requirements of section 358(d), and minor amendments to two rules related to jurisdictional hearings and the setting of the disposition hearing. The committee also proposes adoption of three mandatory forms.

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[2] Assem. Bill 748 analysis (Sen. Floor Analysis, Sept. 1, 2019, p. 4) available at: *https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB748*.

[3] Assem. Bill 748 analysis (Assem. Com. on Judiciary, Mar. 29, 2019, p. 5) available at: *https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB748*.

[4] All unspecified statutory references are to the Welfare and Institutions Code, and all rule references are to the California Rules of Court.

[5] § 358(d)(8).

The following actions are proposed:

- Adopt rule 5.697, entitled "Disposition Hearing for a Nonminor";
- Amend rules 5.682 and 5.684 on uncontested and contested jurisdiction hearings to clarify that the setting of a nonminor disposition hearing is required when the child will turn 18 prior to the holding of the disposition hearing; and
- Adopt three Judicial Council forms, *Findings and Orders after Nonminor Disposition Hearing* (form JV-461), *Dispositional Attachment: Nonminor Dependent* (JV-461(A)) and *Nonminor's Informed Consent to Hold Disposition Hearing* (form JV-463);

New rule and rule amendments

Rule 5.697. Disposition Hearing for a Nonminor

The rule addresses several issues that the court would address at a disposition hearing for a child and combines these with the required reporting and findings and orders for a nonminor dependent status review hearing. It creates a procedure for providing informed consent to the nonminor disposition hearing, by requiring the completion and filing of the proposed mandatory form JV-463 10 days prior to the scheduled hearing, which sets out the information that nonminor must be aware of before giving consent. It also states the findings a court is required to make if a nonminor does not consent, before dismissing jurisdiction. In addition, the rule lists required contents for a social worker report or social study to be considered if the disposition hearing is held.

There were three prominent issues that the committee considered in drafting the rule:

Title IV-E Case Review

Disposition hearings in California are treated as case reviews for title IV-E[6] purposes to ensure that California law meets the title IV-E timeline requirements that a review hearing be held within six months of the date of entry into foster care. A similar approach may be needed for the nonminor disposition hearing. If the nonminor disposition hearing did not address the title IV-E case review requirements, a case review six months after the date of the nonminor disposition hearing would not be timely for title IV-E because it would not be held six months from the date of entry into foster.[7]

To ensure that title IV-E timelines are maintained, the committee has elected to develop rules that treat the nonminor disposition hearing as a title IV-E case review as well. The committee is mindful, however, of the fact that more time may be needed to meet the requirements of section 358(d) and the requirements of section 366.31, which include the findings required by title IV-E. The committee therefore elected to give the court the option to make the findings and orders

[6] See 42 U.S.C. § 675.

[7] 42 U.S.C. § 675(5)(B).

required for an NMD status review as part of the disposition order or hold a separate NMD status review within 60 days of the disposition hearing. The committee is seeking specific comment on this issue from commenters.

Parent Participation

The committee also considered whether the nonminor's parent or guardian should be allowed to participate in the hearing. Section 358(d) is silent as to what right a parent or guardian has to participate in the nonminor disposition hearing. For NMD status review hearings, section 295(b) and rule 5.903 require notice to parents only if the parent is receiving family reunification services pursuant to section 361.6, otherwise, they may only participate in the hearing if they are invited by the NMD.[8]

When their child becomes an adult, parents no longer have a liberty interest in the custody of their adult offspring, as no one has legal custody of an adult. Parents therefore do not have the same liberty interest at stake in a nonminor disposition hearing as in a disposition hearing for a child, where the court can consider removing a child from parental custody. However, the finding under section 361(c) at a nonminor disposition hearing may have implications for parents in collateral proceedings by, for example, being disclosed by a social worker in a future petition or disclosed in a future application for a foster license. There is then some deprivation for the parent, triggering a possible due process right.

The committee proposes that the rule clarify that a parent or guardian may participate in the hearing for the limited purpose of the court's consideration of a finding of detriment under section 361(c). The committee is seeking specific comment on this issue from commenters.

Informed Consent

The committee also addressed how "informed consent" from the nonminor must be provided. The rule requires that informed consent be provided at least 10 days before the hearing date. To ensure that the nonminor is "informed," the proposed rule requires that the youth be informed by their social worker about extended foster care in the same way that a minor approaching the age of majority is informed about extended foster care under section 366.31(a).[9] In addition, the rule proposes that the court ensure the nonminor has had an opportunity to confer with his or her attorney on providing consent for the disposition hearing. The proposed form JV-463 has the nonminor sign confirming that they have been informed of each of these points and provides additional information on the second page about the nonminor disposition hearing and extended foster care.

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[8] Section 317(d) also specifies that "in the case of a nonminor dependent, as described in subdivision (v) of Section 11400, no representation by counsel shall by provided for a parent, unless the parent is receiving court-ordered family reunification services."

[9] That is, that the nonminor understands the potential benefits of continued dependency, has been informed of his or her right to seek termination of dependency jurisdiction pursuant to section 391 if the court establishes dependency, and has been informed of his or her right to have dependency reinstated pursuant to subdivision (e) of section 388 if the court establishes dependency.

If the court finds that the nonminor is not competent to give informed consent, the rule requires that the court appoint a guardian ad litem to decide whether to consent on behalf of the nonminor. Under section 317(e), a guardian ad litem is required to be appointed for a nonminor dependent when the nonminor dependent is not competent to direct counsel. The committee believes a similar approach is needed for a determination on informed consent for a youth approaching a nonminor disposition hearing who does not have the capacity to give informed consent. The committee is seeking specific comment from commenters on how to approach these situations.

Rules 5.682 and 5.684, jurisdiction

Rules 5.682 and 5.684, related to uncontested and contested jurisdiction hearings respectively, are updated to address the setting of the nonminor disposition hearing by adding the following language: "the court must proceed to a disposition hearing under rule 5.690, or rule 5.697 if the child will turn 18 years old prior to the holding of the disposition hearing."

New and revised forms

The committee proposes that three new Judicial Council forms be adopted to (1) provide for the court's findings and orders after the nonminor disposition hearing, and (2) provide a form for the youth to provide his or her informed consent.

Findings and Orders After Nonminor Disposition Hearing (form JV-461)

A new mandatory form is proposed to provide for the court's findings and orders after a nonminor disposition hearing. The form includes the findings and orders discussed above. It also can be used by the court to dismiss jurisdiction if either the nonminor does not provide informed consent or if the court does not find one of the conditions of section 361(c) existed immediately prior to the nonminor turning 18.

Dispositional Attachment: Nonminor Dependent (form JV-461(A))

This form will be used to complete the findings and orders if the court does declare dependency. It includes the findings and orders required at nonminor dependent status review hearing and required title IV-E findings and orders. This form would only be used if the nonminor provides informed consent and the court found one of the conditions of section 361(c) existed immediately prior to the nonminor turning 18.

Nonminor's Informed Consent to Hold Disposition Hearing (form JV-463)

This mandatory form would be used to verify the youth's informed consent or lack thereof. The form requires the youth verify that the requirements mentioned above to be informed about extended foster care have been met and gives the youth (or guardian ad litem) the option to consent to the hearing or not. The youth's attorney is also required to sign the form, declaring they have discussed the implications of setting a nonminor disposition hearing with their client. The form also provides information intended for the youth explaining the nonminor dependent hearing and extended foster care on the second page.

Alternatives Considered

The committee never considered not proposing rules and forms changes because the legislation requires the Judicial Council to adopt implementing rules and forms.

The committee did consider various options in the construction of rule 5.697 as described above. The committee considered whether a parent or guardian had a due process right to participate in the nonminor disposition hearing when they no longer have a liberty interest in the right to custody of the child. Some committee members believed there was no due process right, but the committee as a whole elected to proceed with a rule that gives a parent the right to participate in the hearing on the issue of whether a condition in section 361(c) existed immediately before the nonminor turned 18. The committee also considered whether the nonminor disposition hearing should include a title IV-E case review, or whether more time should be given to complete the requirements of the case review and require the setting of a case review hearing under section 366.31 within sixty days of the hearing. The committee elected to give the court the option to proceed with the case review at the nonminor disposition hearing or hold a case review within 60 days.

Fiscal and Operational Impacts

The committee anticipates that there will be additional costs to courts when a hearing under the rule is held, but this is the result of the implementation of Assembly Bill 748 rather than the proposal. A uniform procedure for these hearings as proposed can benefit judicial economy and provide cost saving for courts and litigants. Courts will be able to save time using the procedure created in this proposal as opposed to having to create their own procedures for these hearings.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal adequately address the stated purpose?
- Should rule 5.697 permit a parent or guardian to participate in the nonminor disposition hearing as a party with standing limited to the court's determination of whether clear and convincing evidence of the conditions described in section 361(c) existed immediately prior to the nonminor turning 18 years of age?
- Does the rule appropriately address nonminors who do not have capacity to give informed consent by requiring that the court appoint a guardian ad litem to make a decision on behalf of the nonminor whether or not to give informed consent?
- Should the rule provide that the nonminor disposition hearing must meet the requirements for a title IV-E case review, or should the rule instead require that a nonminor dependent status review hearing be held within 60 days? Or should courts be giving the option to choose between conducting the title IV-E case review at the nonminor disposition hearing or holding a nonminor dependent status review hearing within 60 days, as set out in the proposed rule?

The advisory committees also seek comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?

Attachments and Links

1. Cal. Rules of Court, rules 5.682, 5.684, and 5.697, at pages 8–15
2. Forms JV-461, JV-461(A) and JV-463 at pages 16–22

Rule 5.697 of the California Rules of Court would be adopted, and rules 5.682 and 5.684 would be amended, effective January 1, 2021, to read:

Rule 5.682. Commencement of jurisdiction hearing–advisement of trial rights; admission, no contest, submission

(a)–(e) * * *

(f) Disposition

After accepting an admission, plea of no contest, or submission, the court must proceed to a disposition hearing under rule 5.690 or rule 5.697 if the child will turn 18 years old prior to the holding of the disposition hearing.

Rule 5.684. Contested hearing on petition

(a)–(e) * * *

(f) Disposition and continuance pending disposition hearing (§§ 356, 358)

After making the findings in (e), the court must proceed to a disposition hearing under rule 5.690 or rule 5.697 if the child will turn 18 years old prior to the holding of the disposition hearing. The court may continue the disposition hearing as provided in section 358.

(g) * * *

Rule 5.697. Disposition Hearing for a Nonminor (Welf. & Inst. Code, §§ 224.1, 295, 303, 358, 358.1, 361, 366.31, 390, 391)

(a) Purpose

This rule provides the procedures that must be followed when a disposition hearing for a nonminor is set under Welfare and Institution Code section 358, subdivision (d).

(b) Notice of hearing (§ 295)

(1) The social worker must serve written notice of the hearing in the manner provided in section 295 to all persons required to receive notice under section 295, including the nonminor's parent or guardian.

(2) The social worker must serve a copy of the *Nonminor's Informed Consent to Hold Disposition Hearing* (form JV-463) with the notice to the child or nonminor.

(c) Informed Consent (§§ 317, 358)

(1) The court must ensure that the nonminor understands the potential benefits of continued dependency, has been informed of his or her right to seek termination of dependency jurisdiction pursuant to section 391 if the court establishes dependency, and that the nonminor has been informed of his or her right to have dependency reinstated pursuant to subdivision (e) of section 388 if the court establishes dependency.

(2) The nonminor must give informed consent to the disposition hearing by completing and signing *Nonminor's Informed Consent to Hold Disposition Hearing* (form JV-463) and filing it with the court at least 10 days before the scheduled disposition hearing.

(3) If the nonminor is not competent to direct counsel and give informed consent, the court must appoint a guardian ad litem to make a determination on informed consent on the nonminor's behalf.

(d) Conduct of the hearing (§§ 295, 303, 358, 361)

(1) The hearing may be attended, as appropriate, by participants invited by the nonminor in addition to those entitled to notice under (b).

(2) The nonminor may appear by telephone as provided in rule 5.900.

(3) If the nonminor or the nonminor's guardian ad litem does not provide informed consent, the court must vacate the temporary orders made under section 319 and dependency or general jurisdiction must not be retained. Before dismissing jurisdiction, the court must make the following findings:

A. That notice was given as required by law;

B. That, unless a guardian ad litem has been appointed for the nonminor, the nonminor has had an opportunity to confer with his or her attorney on providing consent for a disposition hearing;

C. That, unless a guardian ad litem has been appointed for the nonminor, the nonminor has been informed of the potential benefits of continued dependency, has been informed of his or her right to seek termination

of dependency jurisdiction pursuant to section 391 if the court establishes dependency, and that the nonminor has been informed of his or her right to have dependency reinstated pursuant to subdivision (e) of section 388 if the court establishes dependency; and

D. That, if the reason for the nonminor not giving informed consent is because the social worker cannot locate the nonminor, the court must find that after reasonable and documented efforts the nonminor cannot be located.

(4) If the nonminor or the nonminor's guardian ad litem does provide informed consent, the court must proceed to a disposition hearing consistent with this rule and section 358(d). The parent or guardian of the nonminor may participate as a party in the disposition hearing, receive the social study and other evidence submitted for the hearing, and present evidence. The parent's participation is limited to addressing the court's consideration of whether one of the conditions of section 361(c) existed immediately prior to the nonminor attaining 18 years of age.

(e) Social Study (§§ 358, 358.1)

The petitioner must prepare a social study of the nonminor if the court proceeds to a disposition hearing. The social study must include a discussion of all matters relevant to disposition and a recommendation for disposition.

(1) The petitioner's social study must include information regarding:

(A) Whether one of the conditions of section 361(c) existed immediately prior to the youth attaining 18 years of age.

(B) Reasonable efforts made to prevent or eliminate the need for removal.

(C) A plan for achieving legal permanence or successful adulthood if reunification is not being considered.

(D) If reunification services are being considered:

(i) A plan for reuniting the nonminor with the family, including a plan of visitation. The plan should be developed in collaboration with the nonminor, the parents or legal guardian, and the child and family team;

(ii) Whether the nonminor and parent or guardian were actively involved in the development of the case plan;

(iii) The extent of progress the parent or guardian have made toward alleviating or mitigating the cause necessitating placement in foster care;

(iv) Whether the nonminor dependent and parent, parents, or guardian are in agreement with the continuation of reunification services;

(v) Whether continued reunification services are in the best interest of the nonminor dependent; and

(vi) Whether there is a substantial probability that the nonminor dependent will be able to safely reside in the home of the parent or guardian by the next review hearing date.

(E) The social worker's efforts to comply with rule 5.637, including but not limited to:

(i) The number of relatives identified and the relationship of each to the nonminor;

(ii) The number and relationship of those relatives described by item (i) who were located and notified;

(iii) The number and relationship of those relatives described by item (ii) who are interested in ongoing contact with the nonminor;

(iv) The number and relationship of those relatives described by item (ii) who are interested in providing placement for the nonminor; and

(v) If it is known or there is reason to know the nonminor is an Indian child, efforts to locate extended family members as defined in section 224.1, and evidence that all individuals contacted have been provided with information about the option of obtaining approval for placement through the tribe's license or approval procedure.

(F) If siblings are not placed together, an explanation of why they have not been placed together in the same home, what efforts are being made to

place the siblings together, or why making those efforts would be contrary to the safety and well-being of any of the siblings.

(G) How and when the Transitional Independent Living Case Plan was developed, including the nature and the extent of the nonminor's participation in its development, and, for the nonminor who has elected to have the Indian Child Welfare Act continue to apply, the extent of consultation with the tribal representative.

(H) The nonminor's plans to remain under juvenile court jurisdiction including the criteria in section 11403(b) that he or she meets.

(I) The efforts made by the social worker or probation officer to help the nonminor meet the criteria in section 11403(b).

(J) The efforts made by the social worker to comply with the nonminor's Transitional Independent Living Case Plan, including efforts to finalize the permanent plan and prepare him or her for successful adulthood.

(K) The continuing necessity for the nonminor's placement and the facts supporting the conclusion reached.

(L) The appropriateness of the nonminor's current foster care placement.

(M) Progress made by the nonminor toward meeting the Transitional Independent Living Case Plan goals and the need for any modifications to assist the nonminor in attaining the goals.

(N) Verification that the nonminor was provided with the information, documents, and services as required under section 391(e).

(2) The petitioner must submit the social study and copies of it to the court clerk at least 48 hours before the disposition hearing is set to begin, and the clerk must make the copies available to the parties and attorneys. A continuance within statutory time limits must be granted on the request of a party who has not been furnished a copy of the social study in accordance with this rule.

(f) Case Plan and Transitional Independent Living Case Plan (§§ 11401, 16501.1)

(1) Whenever child welfare services are provided, the social worker must prepare a case plan consistent with section 16501.1 and the requirements of rule 5.690(c).

(2) The nonminor's Transitional Independent Living Case Plan must be submitted with the social worker's report prepared for the hearing at least 48 hours before the hearing, and must include:

(A) The individualized plan for the nonminor to satisfy one or more of the criteria in section 11403(b) and the nonminor's anticipated placement as specified in section 11402; and

(B) The nonminor's alternate plan for his or her transition to independence, including housing, education, employment, and a support system in the event the nonminor does not remain under juvenile court jurisdiction.

(g) Evidence considered (§§ 358, 360)

At a hearing held under this rule, the court must receive in evidence and consider the following:

(1) The social study described in subdivision (d), the report of any CASA volunteer, and any relevant evidence offered by the petitioner, the nonminor, or the parent or guardian. The court may require production of other relevant evidence on its own motion. In the order of disposition, the court must state that the social study and the study or evaluation by the CASA volunteer, if any, have been read and considered by the court.

(2) The case plan if applicable, and the Transitional Independent Living Case plan.

(h) Findings and orders (§§ 358, 358.1, 361, 390)

After the nonminor provides informed consent, the court must consider the safety of the nonminor, determine if notice was given as required by law and, determine if by clear and convincing evidence one of the conditions of section 361(c) existed immediately prior to the youth attaining 18 years of age.

(1) If the court does not find by clear and convincing evidence that one of the conditions of section 361(c) existed immediately prior to the youth attaining 18 years of age, the court must vacate the temporary orders made under section 319 and dismiss dependency jurisdiction.

(2) If the court does find by clear and convincing evidence that one of the conditions of section 361(c) existed immediately prior to the youth attaining 18 years of age, it must declare dependency, and:

(A) Order the continuation of juvenile court jurisdiction, and set a nonminor dependent review hearing under rule 5.903 within 60 days or six months, or

(B) Set a hearing to consider termination of juvenile court jurisdiction over the nonminor dependent under rule 5.555 within 30 days if the nonminor dependent chooses not to remain in foster care.

(3) If the court makes the finding in (2), the court must consider the safety of the nonminor dependent, and the following findings and orders must be made and included in the written court documentation of the hearing, with the exception of those findings and orders stated in (C) that may be made instead at a nonminor dependent status review hearing pursuant to section 366.31 and rule 5.903 to be held within 60 days:

(A) Findings

(i) Whether reasonable efforts to prevent or eliminate the need for removal have been made;

(ii) Whether the social worker has exercised due diligence in conducting the required investigation to identify, locate, and notify the nonminor dependent's relatives consistent with section 309(e); and

(iii) Whether a nonminor who is an Indian child chooses to have the Indian Child Welfare Act apply to him or her as a nonminor dependent.

(B) Orders

(i) That placement and care is vested with the placing agency.

(ii) That the county agency comply with rule 5.481 if there was no inquiry or determination of whether the nonminor dependent was an Indian child prior to the nonminor dependent's 18th birthday, and the nonminor dependent requests an Indian Child Welfare Act determination.

(iii) The court may order family reunification services pursuant section 361.6 for the nonminor and the parent or legal guardian. The continuation of the court-ordered reunification services must not exceed the timeframes as set forth in section 361.5.

(C) The following findings and orders must be considered either at the nonminor disposition hearing held pursuant to this rule and section 358(d), or at a nonminor dependent status review hearing pursuant to rule 5.903 and section 366.31 held within 60 days of the nonminor disposition hearing:

(i) The findings contained in rule 5.903(e)(1)(A)–(P);

(ii) The orders contained in rule 5.903(e)(2)(A)(i) and (ii);

(iii) For a nonminor dependent whose case plan is court-ordered family reunification services, a determination of the following:

a. The extent of the agency's compliance with the case plan in making reasonable efforts or, in the case of an Indian child, active efforts, as described in section 361.7, to create a safe home of the parent or guardian for the nonminor dependent to reside in or to complete whatever steps are necessary to finalize the permanent placement of the nonminor dependent; and

b. The extent of progress the parents or legal guardians have made toward alleviating or mitigating the causes necessitating placement in foster care.

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
NONMINOR'S NAME:	
FINDINGS AND ORDERS AFTER NONMINOR DISPOSITION HEARING	CASE NUMBER:

1. This matter came before the court on the
   ☐ original petition ☐ subsequent petition ☐ supplemental petition ☐ other *(specify):*
   filed on *(date):*

2. ☐ The nonminor was removed and remains detained pursuant to Welf. & Inst. Code, § 319(c)
   a. Date of detention orders:

3. **Dispositional hearing**
   a. Date:
   b. Department:
   c. Judicial officer *(name):*
   d. Court clerk *(name):*
   e. Court reporter *(name):*
   f. Bailiff *(name):*
   g. Interpreter *(name and language):*

4. Parties present *(name)*:

	Present	Attorney *(name)*:	Present
a. Nonminor:	☐		☐
b. County Social Worker:	☐		☐
c. Parent:	☐		☐
d. Legal Guardian:	☐		☐
e. Others:	☐		☐

5. Tribal representative *(name)*: ☐ ☐

6. Others present in courtroom:
   a. ☐ Other *(specify)*:
   b. ☐ Other *(specify)*:
   c. ☐ Other *(specify)*:
   d. ☐ Other *(specify)*:

7. The court has read, and considered, and admits into evidence:
   a. Report of the social worker dated:
   b. CASA report dated:
   c. Other *(specify):*
   d. Other *(specify):*

Form Adopted for Mandatoryl Use
Judicial Council of California
JV-461 [New January 1, 2021]

NONMINOR'S NAME:	CASE NUMBER:

BASED ON THE FOREGOING AND ON ALL OTHER EVIDENCE RECEIVED, THE COURT FINDS AND ORDERS

8. ☐ Notice of the date, time, and location of the hearing was given as required by law.

9. ☐ The nonminor was neither present in court nor participating by phone and
   a. ☐ The nonminor expressed a wish not to appear for the hearing and did not appear
   b. ☐ The nonminor's current location is unknown. Reasonable efforts ☐ were ☐ were not made to find him or her.

10. The nonminor was found to be a child described under Welf. & Inst. Code, § 300 *(check all that apply):*
   a. ☐ 300(a) ☐ 300(b) ☐ 300(c) ☐ 300(d) ☐ 300(e)
      ☐ 300(f) ☐ 300(g) ☐ 300(h) ☐ 300(i) ☐ 300(j)
   b. ☐ On *(date):*

11. ☐ The nonminor is not competent to provide informed consent; a guardian ad litem has been appointed for the nonminor. *(proceed to item 16)*

12 ☐ The nonminor has had the opportunity to confer with his or her attorney on providing consent for the disposition hearing.

13. ☐ The nonminor was informed that if dependency is established, the nonminor has the right to have juvenile jurisdiction terminated following a hearing under rule 5.555 of the California Rules of Court.

14. ☐ The potential benefits of remaining under juvenile court jurisdiction as a nonminor dependent were explained to the nonminor, and that nonminor has stated that he or she understands those benefits.

15. ☐ The nonminor was informed that if dependency is established, he or she may have the right to file a request to return to foster care and to have the court resume jurisdiction over him or her as a nonminor dependent.

16. a. ☐ The nonminor or the nonminor's guardian ad litem has provided informed consent for the holding of a disposition hearing under Welf. & Inst. Code, § 358(d) by submitting form JV-463, and

   b. ☐ There is clear and convincing evidence that the circumstances stated in Welf. & Inst. Code, § 361 regarding the persons specified below existed immediately prior to the nonminor turning 18 years old *(check all that apply and proceed to findings and orders on item 17):*

	361(c)(1)	361(c)(2)	361(c)(3)	361(c)(4)	361(c)(5)
(1) Mother	☐	☐	☐	☐	☐
(2) Presumed father	☐	☐	☐	☐	☐
(3) Biological father	☐	☐	☐	☐	☐
(4) Legal guardian	☐	☐	☐	☐	☐
(5) Indian custodian	☐	☐	☐	☐	☐
(6) Other *(specify):*	☐	☐	☐	☐	☐

   The nonminor is adjudged a dependent of the court.

   c. ☐ Further disposition orders as stated in *Dispositional Attachment: Nonminor Dependent* (form JV-461(A)), which is attached and incorporated by reference.

NONMINOR'S NAME:	CASE NUMBER:

17. ☐ The nonminor or the nonminor's guardian ad litem has not provided informed consent for the holding of the disposition hearing, or

☐ There is not clear and convincing evidence that the circumstances in Welf. & Inst. Code, § 361 existed immediately prior to the nonminor turning 18 years old.

a. ☐ The temporary orders made under section 319 are vacated, and dependency jurisdiction or general jurisdiction is dismissed, or

b. ☐ The matter is set for a further hearing:

(1) ☐ The reason the nonminor has not provided informed consent is because items 12-15 have not been completed. The disposition hearing is continued to complete these requirements.

(2) ☐ The disposition hearing is continued to make reasonable efforts to locate the nonminor.

(3) ☐ Other *(specify):*

(4) ☐ Continued disposition hearing:

Hearing date:	Time:	Dept.:	Room:

18. Other orders:

Date:

JUDICIAL OFFICER

NONMINOR'S NAME:	CASE NUMBER:

DISPOSITIONAL ATTACHMENT: NONMINOR DEPENDENT

1. Reasonable efforts ☐ were ☐ were not made to prevent or eliminate the need for the nonminor's removal from the home.
2. Placement and care is vested with the county agency.
3. The county agency ☐ has ☐ has not exercised due diligence to locate an appropriate relative with whom the nonminor could be placed. Each relative who name has been submitted to the department ☐ has ☐ has not been evaluated.
4. The nonminor dependent who is an Indian child ☐ has ☐ has not chosen to have the Indian Child Welfare Act apply to him or her as a nonminor dependent.
5. ☐ There was no inquiry or determination of whether the nonminor dependent was an Indian child prior to the nonminor dependent's 18th birthday:
   a. ☐ The nonminor dependent would like an Indian Child Welfare Act determination. The county agency is ordered to comply with rule 5.481.
   b. ☐ The nonminor dependent would not like an Indian Child Welfare Act.
6. ☐ Family reunification services are ordered pursuant to Welf. & Inst. Code, § 361.6:
   a. ☐ The nonminor dependent and parent(s) or guardian(s) are in agreement with court-ordered family reunification services.
   b. ☐ The provision of family reunification services is in the best interests of the nonminor dependent.
   c. ☐ There is a substantial probability that the nonminor dependent will be able to safely reside in the home of the parent or guardian by the next review hearing.
7. Check one:
   a. ☐ A status review hearing will be held within 60 days on the date specified in item 28, the court does not make any further findings and orders, or
   b. ☐ The court proceeds to the remaining findings and orders.

THE COURT MUST MAKE THE FOLLOWING FINDINGS AND ORDERS AFTER THE NONMINOR DISPOSITION HEARING, OR SET A NONMINOR DEPENDENT STATUS REVIEW HEARING WITHIN 60 DAYS

8. a. ☐ The nonminor dependent's continued placement is necessary.
   b. ☐ The nonminor dependent's continued placement is no longer necessary.
9. a. ☐ The nonminor dependent's current placement is appropriate.
   b. ☐ The nonminor dependent's current placement is not appropriate. The county agency and the nonminor dependent must work collaboratively to locate an appropriate placement.
10. ☐ The nonminor dependent's Transitional Independent Living Case Plan does include a plan for him or her to satisfy at least one of the criteria in Welf. & Inst. Code, § 11403(b) to remain in foster care under juvenile court jurisdiction as indicated below:
    a. ☐ Attending high school or a high school equivalency certificate (GED) program.
    b. ☐ Attending a college, a community college, or vocational education program.
    c. ☐ Attending a program or participating in an activity that will promote or help remove a barrier to employment.
    d. ☐ Employed at least 80 hours per month.
    e. ☐ The nonminor dependent is not able to attend a high school, a high school equivalency certificate (GED) program, a college, a community college, a vocational education program, or an employment program or activity, or to work 80 hours per month due to a medical condition.
11. The county agency ☐ has ☐ has not made reasonable efforts and provided assistance to help the nonminor dependent establish and maintain compliance with one of the conditions in Welfare and Institutions Code section 11403(b).
12. The nonminor dependent ☐ was ☐ was not provided with the information, documents, and services as required under Welfare and Institutions Code section 391(e).

NONMINOR'S NAME:	CASE NUMBER:

13. The Transitional Independent Living Case Plan ☐ was ☐ was not developed jointly by the nonminor dependent and the county agency.

14. ☐ The nonminor dependent has elected to have the Indian Child Welfare act to apply, the representative from his or her tribe ☐ was ☐ was not consulted during the development of the nonminor dependent's Transitional Independent Living Case Plan.

15. The nonminor dependent's Transitional Independent Living Case Plan ☐ does ☐ does not reflect the living situation and services consistent, in the nonminor dependent's opinion, with what he or she needs to achieve successful adulthood and set out benchmarks that indicate how both the county agency and nonminor dependent will know when successful adulthood can be achieved.

16. The nonminor dependent's Transitional Independent Living Case Plan ☐ does ☐ does not include appropriate and meaningful independent living skill services that will help the youth transition from foster care to successful adulthood.

17. The county agency ☐ has ☐ has not made reasonable efforts to comply with the nonminor dependent's Transitional Independent Living Case Plan, including efforts to finalize the youth's permanent plan and prepare him or her for independence.

18. For a permanent plan of another planned permanent living arrangement, the county agency ☐ has ☐ has not made ongoing and intensive efforts to finalize the permanent plan.

19. The nonminor dependent ☐ did ☐ did not sign and receive a copy of the Transitional Independent Living Case Plan.

20. a. The extent of progress made by the nonminor dependent toward meeting the Transitional Independent Living Case Plan goals has been: ☐ excellent ☐ satisfactory ☐ minimal

    b. ☐ The modifications to the Transitional Independent Living Case Plan goals needed to assist the nonminor dependent in his or her efforts to attain those goals were stated on the record.

21. The county agency ☐ has ☐ has not made reasonable efforts to establish or maintain the nonminor dependent's relationship with his or her siblings who are under juvenile court jurisdiction.

22. The likely date by which it is anticipated the nonminor dependent will achieve successful adulthood is:

23. The nonminor dependent's permanent plan is:

    a. ☐ Return home
    b. ☐ Adoption
    c. ☐ Tribal customary adoption
    d. ☐ Placement with a fit and willing relative
    e. ☐ Another planned permanent living arrangement
    f. ☐ Other *(specify):*

24. For a permanent plan of another planned permanent living arrangement

    a. The court has considered the evidence before it and finds another planned permanent living arrangement is the best permanent plan because:

        (1) ☐ The nonminor is 18 or older.

        (2) ☐ Other *(specify):*

    b. The compelling reasons why other permanent plan options are not in the nonminor's best interest are:

        (1) ☐ The nonminor wants to live independently.

        (2) ☐ Other *(specify):*

NONMINOR'S NAME:	CASE NUMBER:

25. ☐ Family reunification services are ordered pursuant to Welf. & Inst. Code, § 361.6:

a. The county agency ☐ has ☐ has not complied with the case plan by making reasonable efforts or in the case of an Indian child, active efforts, as described in section 361.7, to create a safe home for the nonminor dependent to reside in and/or to complete whatever steps are necessary to finalize the permanent placement of the nonminor dependent.

b. The extent of progress the parents or legal guardians have made toward alleviating or mitigating the causes necessitating placement in foster care has been: ☐ excellent ☐ satisfactory ☐ minimal ☐ none

c. The likely date by which the nonminor dependent may safely reside in the family home or achieve successful adulthood is:

26. ☐ The nonminor dependent has elected not to remain in foster care. A hearing to consider termination of juvenile court jurisdiction under rule 5.555 of the California Rules of Court within 30 days is ordered.

27. ☐ Other findings and orders

a. ☐ See attachment 27a

b. ☐ (specify)*:*

28. The next hearings are scheduled as follows:

a. Nonminor dependent status review hearing (Welf. & Inst. Code, § 366.31; Cal. Rules of Court, rule 5.903)

Hearing date:	Time:	Dept.:	Room:

b. Hearing to consider termination of jurisdiction under rule 5.555 of the California Rules of Court.

Hearing date:	Time:	Dept.:	Room:

c. Other *(specify):*

Hearing date:	Time:	Dept.:	Room:

29. Number of pages attached:

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
NONMINOR'S NAME:	
Nonminor's Informed Consent to Hold Disposition Hearing	CASE NUMBER:

To the youth: This form is used to determine if you agree to a disposition hearing after you turn 18 years old. When you turn 18, you are an adult and therefore can decide if your case will remain open or not. Read this form carefully, and with your attorney. This completed form must be submitted to the court at least 10 days before the scheduled disposition hearing. For more information, read page 2 of this form.

1. Youth's information
   a. Youth's name:
   b. Date of Birth:
   c. ☐ The youth was found to be a minor described by section 300 prior to turning 18 years of age, and has been continuously and remains detained pursuant to section 319(c).
2. I *(name)* , understand I have the right to agree or to not agree to the holding of a disposition hearing as a nonminor and that the following are correct *(initial each box unless you have a question):*

		Initial
a. ☐	The potential benefits of continued dependency have been explained to me.	
b. ☐	I have been informed that if the court establishes dependency, I would have the right to seek termination of dependency and have dependency reinstated at a later date up until I turn 21 years old.	
c. ☐	I have talked to my attorney about the setting of the nonminor disposition hearing.	

3. Check whether you consent to a hearing or do not consent:
   a. ☐ I consent to proceed to a nonminor disposition hearing to consider whether I was at risk of harm in the home of my parent or guardian before I turned 18 years old, and to consider my status as a nonminor dependent.
   b. ☐ I do not consent to the setting of a nonminor disposition hearing. I understand that the court will dismiss jurisdiction, and I will not be eligible for extended foster care.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF YOUTH)

If the court has appointed a guardian ad litem for the nonminor, indicate in item 3 whether you consent on behalf of the nonminor to proceeding with a nonminor disposition hearing.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF GUARDIAN AD LITEM)

Declaration of Attorney (Required unless the nonminor is not competent to direct counsel)

5. I am the attorney for the youth named above. I declare under the penalty of perjury that I have discussed the implications of setting and not setting a nonminor disposition hearing with my client.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF ATTORNEY)

SEE PAGE TWO FOR INFORMATION ABOUT THE NONMINOR DISPOSITION HEARING

What is a Nonminor Disposition Hearing?

To the youth: This page provides information on your right to agree or not to agree to holding a disposition hearing after you turn 18 years old. When you turn 18, you are legally an adult and you have the decision making authority of an adult. This form will explain what a disposition hearing is, your rights as an adult, and extended foster care or "AB 12."

1 What is a nonminor disposition hearing?

A nonminor disposition hearing is a special hearing for a youth who became involved in the dependency court right around the time they turn 18 years old. It happens when the court take jurisdiction of someone as a child, but doesn't have the disposition hearing until after that child turns 18 years old. The disposition hearing therefore takes place when the youth is an adult.

2 What is a disposition hearing?

The disposition hearing occurs after the court takes jurisdiction of a child. The jurisdiction hearing determines whether the court should be involved in the child's life, and the disposition hearing determines what should happen to the child after the court has become involved. The court decides things such as: whether it is safe to live in the parent's or guardian's home; who the youth should live with; and what the plan will be to make the parent's or guardian's home safe.

3 What rights do I have as an adult?

When you turn 18 years old, you have all the legal decision making rights of an adult. This means that you decide things like where you live, whether you consent to medical care, where you go to school, and if your dependency case will remain open. A parent or social worker no longer make these decisions for you.

4 How is a nonminor disposition hearing different from a regular disposition hearing?

First, before the nonminor disposition hearing can be held, you have to agree to have the hearing. Also, unlike a disposition hearing for a child, the court does not decide if the youth should live with their parent or guardian. The court cannot tell an adult where to live or not live. However, while you can decide where you live, if you intend to participate in AB 12, you need to work with your social worker on where you will live and you must be in an approved placement.

5 How do I agree to the nonminor disposition hearing?

You will need to provide "informed consent." To do this, work with your attorney and submit this form JV-463, the *Nonminor's Informed Consent to Hold Disposition Hearing*. This form must be filed with the court 10 days before the disposition hearing.

6 What happens if I agree to the nonminor disposition hearing?

If you are 18 years old, and you agree to proceed with the nonminor disposition hearing, the court will hold the hearing to determine if you were in danger in the home of your parent or guardian immediately before you turned 18 years old. This finding must be made for you to be eligible for AB 12. If the court does not make this finding, the case will be dismissed. The court will consider evidence including the social worker's report and may hear testimony to make this decision.

7 What happens if I don't agree to the disposition hearing?

When you are an adult, the law gives you the right to decide if you want to have a nonminor disposition hearing. If you do not agree, the court will dismiss your case. Your social worker, your attorney, and the court will no longer be formally involved in your life. You will not eligible for AB 12.

It is important to remember that the decision to proceed with your case after you turn 18 years old belongs to you. A major factor in your decision may be whether you want to participate in AB 12. You should discuss this decision with your attorney and your social worker.

Item number:35

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Juvenile Law: Access to Sealed Records (Adopt Cal. Rules of Court, rule 5.860; revise forms JV-595 and JV-595-INFO; approve forms JV 592, JV-593, and JV-594)

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Tracy Kenny, 916-263-2838, tracy.kenny@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 10/28/2019
Project description from annual agenda: Legislative Changes from the 2018-2019 Legislative Session Project
Summary: As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration.
p. AB 1394 (Daly) Juveniles: sealing of records (Ch. 582, Statutes of 2019) Prohibits a court or probation department from charging any applicant a filing fee to petition to seal juvenile court records.
r. AB 1537 (Cunningham) Juvenile records: inspection: prosecutorial discovery (Ch. 50, Statutes of 2019) Expands a prosecutor's ability to request to access, inspect, or use specified sealed juvenile records if the prosecutor has reason to believe that the record may be necessary to meet a legal obligation to disclose favorable or exculpatory evidence to a defendant in a criminal case.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue . San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-23

Title
Juvenile Law: Access to Sealed Records

Proposed Rules, Forms, Standards, or Statutes
Adopt Cal. Rules of Court, rule 5.860; revise forms JV-595 and JV-595-INFO; approve forms JV-592, JV-593, and JV-594

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark Juhas, Cochair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Tracy Kenny, 916-263-2838
tracy.kenny@jud.ca.gov

Executive Summary and Origin

The Family and Juvenile Law Advisory Committee proposes adopting one new rule of court, revising two existing forms, and approving three new optional forms to assist courts with the implementation of recently enacted statutory provisions concerning the sealing of juvenile records and access to those records by prosecuting attorneys. The proposal would ensure that all forms accurately reflect the current state of the law on fees for sealing petitions, and would create procedures and forms for courts to consider requests for access to sealed records under recently enacted laws concerning prosecutorial duties to disclose favorable information to defendants.

Background

In 2014, the Legislature enacted Welfare and Institutions Code section 786[1] to require the sealing and dismissal of specified juvenile petitions when a child has satisfactorily completed probation. In that legislation and several subsequent bills, the Legislature has sought to provide access to those records for a variety of purposes. In 2018, Assembly Bill 2952 (Stone; Stats. 2018, ch. 1002) enacted an additional provision allowing access to the record by a prosecuting attorney when the attorney has reason to believe that the record may contain favorable or exculpatory information that must be disclosed to a defendant in a criminal case. These changes

[1] Hereinafter, all statutory references are to the Welfare and Institutions Code unless otherwise indicated.

require that the court notify the person whose records have been sealed that the prosecutor's request is being considered so that the person may have an opportunity to respond to the request. It further requires the court to review the records and make a specific order with regard to access that protects the confidentiality of the person whose records are being accessed. In 2019 the Judicial Council updated its information forms to reflect this change, and a question on the invitation to comment regarding the need for rules and forms to implement this requirement. The majority of commenters suggested that rules and forms would be of value to the courts in carrying out this duty.

In 2019, the Legislature amended other statutes on the sealing of juvenile records to allow prosecuting attorneys to request that the juvenile courts provide access to sealed records to fulfill their duties to provide favorable or exculpatory information to a criminal defendant. These provisions are modeled on a recent change to section 781 enacted by Senate Bill 312 (Skinner; Stats. 2017, ch. 679), and like that provision, do not require any notice to the person whose records are being accessed. However, the provision in section 781 is notably narrower than the others in that it only applies to files concerning 707(b) offenses adjudicated for those 14 years of age or older.

In 2015, the Legislature enacted legislation providing that fees for the investigation relating to sealing or a fee to file the petition could only be charged to nonindigent petitioners who were 26 years of age or older. Legislation[2] enacted last year eliminates the authority to charge fees for sealing to any petitioners.

The Proposal

The committee proposes adoption of a new rule of court and approval of three new optional forms to implement the provisions for prosecuting attorneys to request access to sealed files. In addition, the committee proposes revising existing forms to reflect statutory changes that provide that no fees can be charged for sealing.

Rule and forms to implement provisions on prosecutor access to sealed records

In order to provide procedural guidance and a mechanism to comply with specific notice and opportunity-to-respond requirements in some cases in which the prosecutor is seeking access to sealed records for the purpose of providing favorable or exculpatory information to a defendant, the committee is proposing that a new rule of court be adopted as well as three new optional forms described in detail below.

Rule 5.860

This proposed rule of court would set forth the requirements for the filing of a request by a prosecuting attorney, as well as very specific filing timelines for cases in which records sealed under section 786 are sought, as those requests must be provided to the person whose records are being sought and that person must have an opportunity to provide a written and/or in-person response to the court. When the records are requested from those files, the rule would require the

[2] AB 1537 (Daly; Stats. 2019, ch. 582)

requester to file a notice and response form along with the request so that the court can provide the required notice, and it would provide the person receiving notice with 15 days to submit a response to the court. It would require the court to set a hearing if an appearance is requested and notify the person whose records were sealed of the hearing date. In all cases except those in which an appearance has been requested, the rule would require the court to make an order on the request within 21 court days of the filing of the request. If a hearing is requested, an order would be required within five court days of the hearing.

Optional forms to implement requirements of rule 5.860

The committee is proposing that the council approve three new optional forms to implement the statutory requirements for prosecuting attorneys to make these requests, and that notice and an opportunity to respond be provided in appropriate cases. *Prosecutor Request for Access to Sealed Juvenile Case File* (form JV-592) would provide a form petition for the prosecuting attorney to request access from the juvenile court to sealed juvenile case files. It allows the prosecutor to specify which code section the file was sealed under and to set forth the reasons why access is needed. *Notice of Prosecutor Request for Access to Sealed Juvenile Case File* (form JV-593) could be used to notify a person whose records have been sealed under section 786 and their attorney of record that access is being sought and that there is a right to provide a response to the request to the court in writing and/or in person. *Response to Prosecutor Request for Access to Sealed Juvenile Case File* (form JV-594) would allow a person who has received notice of the request for access to file a written response for the court's consideration and/or to request an appearance before the court.

Revisions for existing forms to reflect recent statutory changes

The elimination of any authority for courts or probation departments to charge fees for record sealing requests or investigations requires changes to two forms that previously referenced those fees. Form JV-595 (*Request to Seal Juvenile Records*), item 4, and form JV-595-INFO (*How to Ask the Court to Seal Your Records*), item 5 in the instructions on page 2, would be revised to eliminate any reference to fees. In addition, form JV-595-INFO would be revised to reflect that a prosecuting attorney may access sealed records if they contain information favorable to a criminal defendant in another case.

Alternatives Considered

The committee considered implementing the recently enacted provisions on access to sealed juvenile records by prosecuting attorneys via a rule of court alone but opted to develop optional forms in order to assist with the notice and response requirements in section 786 that would be onerous for courts to implement without new forms.

Fiscal and Operational Impacts

Printing costs may be incurred by courts to provide the revised mandatory information forms. In addition, because the informational forms are available in other languages, there will be costs to translate the revised forms. All of these impacts are a result of legislative changes and are

necessary to make the forms legally accurate. The approval of optional forms should make it easier for courts to comply with their existing statutory duties.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Are the optional forms useful for complying with the notice and response provisions in section 786?
- Will the approach in this proposal of having a standalone rule and process for *Brady* access to sealed records improve the administration of these requests, or should this process be incorporated into the procedures for seeking access to juvenile records under section 827 and rule 5.552?
- Should the rule and or form address the narrow application of the statutory provision in section 781 to 707(b) offenses adjudicated for those 14 or over, or should it apply in any case in which a prosecutor might seek access to comply with *Brady* obligations?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would 4 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 5.860, at pages 5–6
2. Forms JV-592, JV-593, JV-594, JV-595, and JV-595-INFO, at pages 7–14
3. Link A: AB 2952, *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB2952*
4. Link B: AB 1537, *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1537*
5. Link C: SB 312, *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB312*

Rule 5.860 of the California Rules of Court would be adopted, effective January 1, 2021, to read:

Rule 5.860. Prosecuting Attorney Request to Access Sealed Juvenile Case Files

(a) Applicability

This rule applies when a prosecuting attorney is seeking to access, inspect, or utilize a record that has been sealed by the court under Penal Code section 851.7 or sections 781, 786, or 793 and the attorney has reason to believe that access to the record is necessary to meet the attorney's statutory or constitutional obligation to disclose favorable or exculpatory evidence to a defendant in a criminal case.

(b) Contents of the request

Any request filed with the juvenile court under this rule must include the prosecutor's rationale for believing that access to the information in the record may be necessary to meet the disclosure obligation and the date by which the records are needed. The date must allow for sufficient time to meet reasonable given the notice and hearing requirements of this rule. Form JV-592, *Prosecutor Request for Access to Sealed Juvenile Case File,* may be used for this purpose.

(c) Notice and opportunity to respond for persons with records sealed under section 786

(1) *Notice requirements when records were sealed under section 786*

(A) When the request concerns a file sealed under section 786, the request must include a form for the court to notify the person whose records are to be accessed as well as that person's attorney of record, and a form for those individuals to respond in writing or to request an appearance before the juvenile court. Forms JV-593, *Notice of Prosecutor Request for Access to Sealed Juvenile Case File,* and JV-594, *Response to Prosecutor Request for Access to Sealed Juvenile Case File,* may be used for this purpose.

(B) The juvenile court must notify the person with the sealed record and that person's attorney of record using the documents prepared by the prosecuting attorney within two court days of the request being filed.

(2) *Requirements if a response is filed*

(A) If a written response is filed no more than 15 days after the date the notice was issued and no appearance has been requested, the clerk of

the court must provide that response to the juvenile court for its consideration as it reviews the prosecuting attorney's request.

(B) If a response is filed no more than 15 days after the date the notice was issued and an appearance is requested, the clerk of the court must set a hearing and provide notice of the hearing to the person with the sealed record, the attorney of record for that person, and the prosecuting attorney who filed the request.

(d) Juvenile court review and order

The court must review the case file and records that have been referenced by the prosecuting attorney's request as well as any response provided as set forth in subdivision (c)(2). The court must approve the request if it determines that access to a specific sealed record or portion of a sealed record is necessary to enable the prosecuting attorney to comply with the disclosure obligation. If the court approves the request, it must state on the record appropriate limits on the access, inspection, and utilization of the sealed record information in order to protect the confidentiality of the person whose sealed record is at issue. The court must make its order within 21 court days of when the request is filed, unless an appearance has been requested under subdivision (c)(2), in which case the court must act within five court days of the date set for the appearance.

JV-592 Prosecutor Request for Access to Sealed Juvenile Case File

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Case Number:

1 Petitioner *(name):*

_____

is a prosecuting attorney requesting access to information in the sealed juvenile court file of:

Child's Name: _____

Case Name: _____

2 Petitioner has reason to believe that access is necessary to meet the constitutional obligation to disclose favorable or exculpatory evidence to a:

defendant *(name):* _____

in a criminal case *(case number):* _____

3 The file was sealed by the court pursuant to:

a. ☐ Penal Code section 851.7

b. ☐ Welfare and Institutions Code section 781

c. ☐ Welfare and Institutions Code section 793; or

d. ☐ Welfare and Institutions Code section 786, and I am filing a *Notice of Prosecutor Request for Access to Sealed Juvenile Case File* (form JV-593) with this petition to be served on the subject of the file and their attorney of record.

4 The records I need access to are:

_____

_____

_____

_____

_____

_____

☐ Continued on Attachment 4

5 The reasons that I need access to those records are:

_____

_____

_____

_____

_____

_____

☐ Continued on Attachment 5

Date Needed By: _____

Date: _____

▶ _____

Signature

JV-593 Notice of Prosecutor Request for Access to Sealed Juvenile Case File

Clerk stamps date here when form is filed.

DRAFT
Not approved by
the Judicial Council

DATE: _____

TO: _____

Child's name: _____

Address: _____

Attorney of record: _____

Address: _____

Fill in court name and street address:

Superior Court of California, County of

Case Number:

(1) A prosecuting attorney *(name)*: _____ is requesting access to the sealed juvenile file in case number: _____ concerning *(child's name)*: _____ because the attorney has reason to believe that there is information in the case file that may be necessary to disclose to a criminal defendant because it is evidence that may be favorable or exculpatory to that person.

(2) The information that the prosecuting attorney wants to access and the reasons why the attorney believes access may be necessary are described in the attached *Prosecutor Request for Access to Sealed Juvenile Case File* (form JV-592).

(3) You have the right (but are not required) to respond to the court before the judge decides if the prosecutor should get access to your file. You can respond in writing by completing the *Response to Prosecutor Request for Access to Sealed Juvenile Case File* (form JV-594) that came with this notice, and mailing it back to the court.

(4) You also have a right to ask the juvenile court for a hearing where you can appear to provide information to the court before it makes its decision. Check the box on item 3 on form JV-594 if you want the court to set a hearing.

(5) You must return form JV-594 to the court listed at the address above within **15** days of the date at the top of this form. If you do not act within that time frame, the court will make its determination on the request without your input.

JV-594

Response to Prosecutor Request for Access to Sealed Juvenile Case File

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

This form can be used to give the juvenile court your response when you receive notice that a prosecuting attorney wants to access your sealed records because they may contain information that would be helpful to the criminal defense of another person who was charged with a crime. You do not have to respond, but if you want to respond you must return this form to the court within 15 days of the date stamped on the *Notice of Prosecutor Request for Access to Sealed Juvenile Case File* (form JV-593) that came with this form.

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 My name: _____

2 Case Number *(from form JV-593):* _____

3 I understand that a prosecuting attorney is requesting access to my sealed juvenile court records in the action connected to the case number above, and I want the court to consider the following when it determines if the request should be approved:

_____

_____

_____

_____

_____

_____

4 ☐ I want to come to court to respond to the prosecuting attorney's request. The court can notify me of the date and time for my appearance at:

Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____

5 ☐ I have no written response to the request, and I do not wish to appear in court.

Date: _____

_____
Type or print your name

▶ _____
Sign your name

JV-595 Request to Seal Juvenile Records

Probation stamps date here when form is received.

DRAFT
Not approved by
the Judicial Council

This form can be used to petition the juvenile court to seal your juvenile records. More information about sealing is available on form JV-595-INFO, *How to Ask the Court to Seal Your Records*.

Submit this form to the probation department in the last county where you were on juvenile probation or, if you were not on probation, in any county where you had contact with law enforcement or probation that did not result in a court case. Once the probation department receives the completed form, it will have 90 days to file a record-sealing petition with the court for you, or 180 days if you include agencies outside of this county.

Fill in court name and street address:

Superior Court of California, County of

Fill in your name:

Name:

Fill in case number, if known:

Case Number:

1 My information:

a. Name: _____

b. AKA *(nickname or other family name):*

_____

c. Address: _____

d. City, state, zip: _____

e. Area code and telephone number: _____

f. Date of birth: _____

g. Email address: _____

2 ☐ I had a case(s) that went to court.

Case file number(s) *(if known)*: _____

The date probation was terminated *(if known):* _____

☐ I don't remember my case number and/or date.

☐ See attached. *(If you need more space, you may attach a separate page.)*

3 ☐ I had contact with law enforcement but did not go to court.

☐ Date(s) I had contact with law enforcement: _____

☐ Name(s) of law enforcement or other agency(ies): _____

☐ See attached. *(If you need more space, you may attach a separate page.)*

4 I understand that the probation department is responsible for requesting the juvenile court to seal the records of only those agencies in its records and those listed on page 2 of this form. I understand that after I file this document the probation department will have 90 days to conduct an investigation and file a record-sealing petition for me with the juvenile court. I also understand that some records may not be eligible for sealing. I am aware that form JV-595-INFO, *How to Ask the Court to Seal Your Records,* provides more information on this process.

Your name: _____

Case Number:

Note: When you file this form with the probation department, it will research your case history and attach a list of contacts and addresses of all agencies that it knows have records of the case(s) and contacts(s) you listed on page 1. If you have had contacts with law enforcement or another agency with a record of your offense and that entity may not have been reported to the probation department, please list it below, or that record may not be sealed. If your case was transferred from one county to another, your records in both counties will be sealed. If you have a probation record in more than one county and that record was not transferred, you may ask the court to seal that record as well. If the court does not seal that record, it will inform you that you need to file this form in that county. Contacts not included on this form may not be sealed. The court may seal only those records listed on the petition.

5 Include all contacts (with addresses) you had, before your 18th birthday, with the agencies below that might not be part of your probation records:

- ☐ Court: _____
- ☐ Probation Department: _____
- ☐ Sheriff's Department: _____
- ☐ Police Department: _____
- ☐ California Highway Patrol: _____
- ☐ Department of Motor Vehicles: _____
- ☐ Law Enforcement: _____
- ☐ School(s): _____
- ☐ Homeland Security: _____
- ☐ Other: _____
- ☐ See attached. *(If you need more space, you may attach a separate page or pages listing the contacts.)*

I declare that the information on this form is true and correct to the best of my knowledge.

Date: _____

_____
Type or print your name

▶ _____
Sign your name

JV-595-INFO How to Ask the Court to Seal Your Records

If you were arrested or subject to a court proceeding or had contact with the juvenile justice system when you were under 18, there may be records kept by courts, police, schools, or other public agencies about what you did. If the court makes those records **private** (sealed), it could be easier for you to:

- Find a job.
- Get a driver's license.
- Get a loan.
- Rent an apartment.
- Go to college.

If the court sealed your records when probation was terminated, you do not need to ask for them to be sealed.

There are now three ways that records may be sealed in California. As of January 1, 2015, courts are required to seal records in certain cases when the court finds that probation (formal, or informal) is satisfactorily completed or if your case was otherwise dismissed after the petition was filed. If the court sealed all of your records at the end of your case, you should have received a copy of the sealing order, and you do not need to ask the court to seal the records in that sealing order.

For more information about when the court seals your records at the completion of probation, see form **JV-596-INFO.**

If probation sealed your diversion records for satisfactory completion, you may wish to ask the court to seal any remaining records of your behavior.

As of January 1, 2018, if you participate in a diversion program or other supervision program instead of going to court, and the probation department determines that you satisfactorily completed that program, the probation department will seal your probation department records and the records for any program you were required to complete. If the probation department determines that you did not satisfactorily complete the program, it will not seal those records, but will give you a form to tell you why and a form that you can use to tell the court why you think you did satisfactorily complete the program. If the court agrees with you, it will order your probation and program records sealed. Because probation did not seal any arrest records at this time, you may want to ask the court to seal any other records relating to this conduct when you are eligible to ask for record sealing as explained on this form.

If you have more than one juvenile case or contact and/or are unsure if your records were sealed by the court, ask your attorney or probation officer or the juvenile court clerk in the county where you had a case or contact.

Who qualifies to ask the court to seal their juvenile records?

If the court has not already sealed your records, you can ask the court to make that order, if:

- You are at least **18** or it has been at least five years since your case was closed; and
- You have been rehabilitated to the satisfaction of the court.

What if you owe restitution or fines?

The court may seal your records even if you have not paid your full restitution order to the victim.
The court will not consider outstanding fines and court ordered fees when deciding whether to seal your records, but you are still required to pay the restitution, fines, and fees, and your records can be looked at to enforce those orders.

When do you *not* qualify to seal your records?

- If you were convicted as an adult of an offense involving moral turpitude, such as:
  - A sex or serious drug crime;
  - Murder or other violent crime; or
  - Forgery, welfare fraud, or other crime of dishonesty.
- If, when you were 14 or older, the court found that you committed a sex offense listed in Welfare and Institutions Code section 707(b) for which you must register under Penal Code section 290.008 because you were paroled from the Department of Juvenile facilities.

If you are unsure if you qualify, ask your attorney.

Who can see your sealed records?

- DMV can see your vehicle and traffic records and share them with insurance companies.
- The court may see your records if you are a witness or involved in a defamation case.
- If you apply for benefits as a nonminor dependent, the court may see your records.
- A prosecuting attorney may see your records that were sealed for an offense listed under Welfare and Institutions Code section 707(b) in a later proceeding for the reasons listed in section 781(d).

- If your sealed record was for a 707(b) offense when you were 14 or older, the prosecutor, probation, and the court may unseal your records if you are charged with a later felony.
- You can request the court to unseal your records if you want to have access to them or allow someone else to see them.
- If a prosecutor thinks something in your record would be helpful to the defense of someone who is charged with a crime in another case, the prosecutor can ask the court to provide that information.
- If you want to see your records or allow someone else to see them, you can ask the court to unseal them.

Can employers see your records if they are not sealed?

Juvenile records are not allowed to be disclosed to most employers, and employers are not allowed to ask about or consider your juvenile history in most cases. There are exceptions to this rule if you are applying to be a peace officer or to work in health settings. Also, federal employers may still have access to your juvenile history. You should seek legal advice if you have questions of what an employer can ask about you.

How do you ask to have your records sealed?

1. You must fill out a court form. Form JV-595, *Request to Seal Juvenile Records,* at *www.courts.ca.gov/forms.htm,* can be used, or your court may have a local form.
2. When you file your petition, the probation department will compile a list of every law enforcement agency, entity, or person the probation department knows has a record of your case, as well as a list of any prior contacts with law enforcement or probation, and attach it to your petition.
3. If you think there are agencies that might have records on you that were never sent to probation, you need to name those agencies, or the court will not know to seal those records.
   If you are not sure what contacts you might have had with law enforcement, you can get your criminal history record from the Department of Justice. See *http://oag.ca.gov/fingerprints/security* for more information.
4. Take your completed form to the probation department where you were on probation. (If you were not on probation, take your form to any county probation office where you have a juvenile record.) Note: A small number of counties require you to take your form to the court. More information on each county's specific requirements is available at *www.courts.ca.gov/28120.htm*.
5. Probation will review your form and submit it to the court within 90 days, or 180 days if you have records in two or more counties.
6. The court will review your petition. The court may decide right away to seal your juvenile records, or the court may order a hearing. If there is a hearing, you will receive a notice in the mail with the date, time, and location of the hearing. If the notice says your hearing is "unopposed" (meaning there is no disagreement with your request), you may choose not to go.
7. If you qualify to have your juvenile records sealed, the court will make an order to seal the eligible records listed on your petition.
   ***Important!* The court can seal only records it knows about. Make sure you list *all* records from *all* counties where you have any records. The court will tell you if it does not seal records from another court that were listed on your petition, and you will need to file a petition in that county to seal those records.**
8. If the court grants your request, it will order each agency, entity, or person on your list to seal your records. The court will also order the records destroyed by a certain date. If the sealed records are for a 707(b) offense committed when you were 14 or older, the court will not order those records destroyed.
9. The court will provide you with a copy of its order. Be sure to keep it in a safe place.

What about sex offender registration? (Penal Code, § 290)

If the court seals a record that required you to register as a sex offender, the order will say you do **not** have to continue to register.

If your records are sealed, do you have to report the offenses in the sealed records on job, school, or other applications?

No. Once your records are sealed, the law treats those offenses as if they did not occur and you do not need to report them. **However**, the military and some federal agencies may not recognize sealing of records and may be aware of your juvenile justice history, even if your records are sealed. If you want to enlist in the military or apply for a job requiring you to provide information about your juvenile records, seek legal advice about this issue.

Questions?

If you are not sure if you qualify to seal your records or if you have other questions, talk to a lawyer. The court is not allowed to give you legal advice. More information about sealing your records can be found at *www.courts.ca.gov/28120.htm*.

Item number: 36

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Juvenile Law: Guardianship Rules and Forms (amend Cal. Rules of Court, rules5.510, 5.620, 5.625, 5.695, 5.725, 5.735, 5.740, 5.785, and 5.815; revise forms JV-320 and JV-418

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Corby Sturges, 415-865-4507, corby.sturges@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration.
AB 819 (Stone) Foster care (Ch. 777, Statutes of 2019) Requires the court to terminate its dependency jurisdiction and to retain jurisdiction over the child as a ward of the legal guardianship, following establishment of a legal guardianship, if a relative of the child is appointed guardian, as authorized.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue . San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-24

Title
Juvenile Law: Guardianship Rules and Forms

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 5.510, 5.620, 5.625, 5.695, 5.725, 5.735, 5.740, 5.785, and 5.815; revise forms JV-320 and JV-418

Proposed by
Family and Juvenile Law Advisory Committee
Hon, Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Corby Sturges, 415-865-4507
Corby.Sturges@jud.ca.gov

Executive Summary and Origin

The Family and Juvenile Law Advisory Committee recommends amending nine rules of court addressing juvenile court proceedings to appoint, terminate, modify, or oversee guardianships and revising two forms used for court orders in those proceedings. The amendments and revisions are required to conform to recent statutory amendments, resolve inconsistencies with existing statutes and rules of court, and make technical corrections.

Background

The juvenile court has authority to appoint a guardian for a child in child welfare or juvenile justice proceedings as specified in sections 360, 366.26, 727.3, and 728 of the Welfare and Institutions Code.[1] After the establishment of a guardianship in a child welfare proceeding, the court generally has discretion to continue dependency jurisdiction over the child or terminate dependency jurisdiction and retain jurisdiction over the child as a ward of the guardianship under section 366.4.[2] Until December 31, 2019, if the court appointed a relative as guardian, section 366.3(a) required the court to terminate its dependency jurisdiction and proceed under section

[1] All subsequent statutory references are to the Welfare and Institutions Code unless otherwise specified.
[2] Welf. & Inst. Code, §§ 360(a), 366.3(a)(3).

366.4 *if the child had been placed with the relative for at least six months* unless the guardian objected to termination or the court made a finding of exceptional circumstances.

The Proposal

Effective January 1, 2020, Assembly Bill 819 (Stats. 2019, ch. 777, § 18) amended section 366.3(a)(3) to require the juvenile court, on appointment of a relative or nonrelative extended family member as guardian, to dismiss dependency jurisdiction *if the guardian's home had been approved for resource family status for at least six months.* This amendment requires conforming amendments to rules 5.735 and 5.740 of the California Rules of Court and a revision to form JV-320. In addition, review of the juvenile court rules and forms that apply to juvenile court guardianship proceedings revealed inconsistency with other statutes and rules of court. This proposal addresses these issues by bringing the rules and forms into harmony with the law and each other. Finally, the proposal recommends technical corrections to the rules and forms.

The Family and Juvenile Law Advisory Committee recommends amending rules 5.510, 5.620, 5.625, 5.695, 5.725, 5.735, 5.740, 5.785, and 5.815 of the California Rules of Court and revising Judicial Council forms JV-320 and JV-418, effective January 1, 2021, as follows:

- Amend rule 5.510(c)(1)(A) to clarify that the juvenile court has exclusive jurisdiction to hear guardianship proceedings after a dependency petition is filed until the petition is dismissed or dependency jurisdiction is terminated (Welf. & Inst. Code, § 304);
- Amend rule 5.620(d) to clarify that the authority to appoint a guardian in a dependency proceeding includes the authority to appoint a guardian at the dispositional hearing in section 360(a) and to correct a cross-reference to rule 5.695 (*Id.,* § 360(a));
- Amend rule 5.620(e) to clarify that it applies specifically to guardianships established under the Probate Code, to simplify the required procedures in line with statute, and to update a reference to the statute governing notice requirements (*Id.,* § 728(a) & (b));
- Amend rule 5.625(b) to clarify that the procedures for appointing a guardian in a juvenile justice proceeding are governed by section 366.26 and that the court has discretion to continue wardship or to terminate wardship and retain jurisdiction over the guardianship (*Id.,* § 728(c)–(e));
- Amend rule 5.625(c) to clarify that it applies specifically to guardianships established under the Probate Code, to simplify the required procedures in line with statute, and to update a reference to the statute governing notice requirements (*Id.,* § 728(a) & (b));
- Amend rule 5.695(a) to incorporate references to section 360(a) and to clarify that the clerk's duty to issue letters of guardianship does not arise until the appointed guardian has signed the required affirmation (*Id.,* § 360(a); Prob. Code, §§ 2300 & 2310);
- Amend rule 5.725(a), which applies expressly both to dependent children and wards of the juvenile court, to add references to statutes governing appointment of a guardian for a ward in juvenile justice proceedings (Welf. & Inst. Code, §§ 366.26, 727.3, 728(c)–(e));

- Amend rule 5.735 to clarify notice requirements in subdivision (b) and incorporate a reference to the requirements in section 366.3, as amended, to paragraph (c)(4), which addresses the court's discretion to retain or terminate dependency jurisdiction (*Id.,* §§ 366.26, 366.3);
- Amend rule 5.740(a)(4) to specify the limits on the court's discretion to retain or terminate dependency jurisdiction added by AB 819's amendments to section 366.3 (*Id.,* § 366.3);[3]
- Amend rule 5.785 to make a technical correction;
- Amend rule 5.815 to clarify that the procedures for appointment of a guardian in a juvenile justice proceeding are supplied by section 366.26, which governs a hearing to select a permanent plan, including appointment of a guardian, in a child welfare proceeding; specify the methods for the probation officer, the child's attorney, and the court to recommend, request, or consider appointing a guardian for a ward, replace text that duplicates statute with references to the appropriate code sections, (*Id.,* §§ 366.26, 727.3, 728(c)–(e));
- Revise *Orders Under Welfare and Institutions Code Sections 366.24, 366.26, 737.3, 727.31* (form JV-320) to add references to additional governing code sections and rules of court, clarify the instructions to courts or attorneys completing the form, replace or remove gender-specific terms when appropriate, clarify the standards for determining that the child is likely to be adopted, clarify in item 15 that the appointment of a guardian is not effective until letters of guardianship have been signed and issued, add instructions clarifying that the court must terminate its dependency jurisdiction if it appoints a relative or nonrelative extended family member as guardian and the guardian's home has been approved for six months as required by AB 819's amendment of section 366.3(a)(3), delete item 22 because it duplicates item 4b, renumber items 23–27 as items 22–26, and make technical corrections. (*Id.,* §§ 366.26, 366.3, 727.3, 727.31, 728(c)–(e)); and
- Revise *Dispositional Attachment: Appointment of Guardian* (form JV-418) to accommodate appointment of a guardian for a child who is not adjudged a dependent as authorized by section 360(a), to clarify that the court is required to have read and considered the report and assessment completed under section 361.5(g) before appointing a guardian under section 360(a), to specify that the appointment of a guardian is not effective until letters of guardianship have been signed and issued, and to make technical revisions. (*Id.,* §§ 360(a).)

The proposed amendments and revisions are urgently needed so the rules of court will conform with statutory requirements. They will also promote efficient proceedings when guardianship is considered as an option for a child under the juvenile court's child welfare or juvenile justice jurisdiction by clarifying the procedures for appointing a guardian in juvenile court.

[3] Additional amendments to rule 5.740 are proposed in Judicial Council of Cal., *Invitation to Comment, Juvenile Law: Information, Documents, and Services for Youth 16 Years of Age and Older* (Feb. 21, 2020).

Alternatives Considered

The committee considered limiting its recommendation to the amendments and revisions required by AB 819, but determined that the additional recommended rule amendments and form revisions were needed to conform to statute and resolve uncertainty about the procedures for juvenile court guardianship proceedings.

Fiscal and Operational Impacts

The committee does not anticipate that the proposal will have significant fiscal or operational impacts on the judicial branch, justice partners, attorneys, self-represented litigants, or others. The proposal may require courts to alter their minute order templates or local forms. Some of these changes would be required by the statutory amendments regardless of the proposal. Other elements of the proposal are intended to clarify procedures; these clarifications should promote more efficient court operations.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in receiving comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rules 5.510, 5.620, 5.625, 5.695, 5.725, 5.735, 5.740, 5.785 and 5.815, at pages 5–12
2. Forms JV-320 and JV-418, at pages 13–18

Rules 5.510, 5.620, 5.625, 5.695, 5.725, 5.735, 5.740, 5.785, and 5.815 of the California Rules of Court would be amended, effective January 1, 2021, to read:

Rule 5.510. Proper court; determination of child's residence; exclusive jurisdiction

(a)–(b) * * *

(c) Exclusive jurisdiction (§§ 304, 316.2, 726.4)

(1) Once a petition has been filed under section 300, the juvenile court has exclusive jurisdiction of the following:

(A) All issues regarding custody and visitation of the child, including guardianship; and

(B) * * *

(2) * * *

Rule 5.620. Orders after filing under section 300

(a)–(c) * * *

(d) Appointment of a ~~legal~~ guardian of the person (§§ 360, 366.26)

If the court finds that the child is described by section 300, it may appoint a ~~legal~~ guardian of the person at the disposition hearing, as described in section 360(a) and rule 5.695~~(b)~~(a), or at the hearing under section 366.26, as described in that section and rule 5.735. The juvenile court maintains jurisdiction over the guardianship, and petitions to terminate or modify such guardianships must be heard in juvenile court under rule 5.740(c).

(e) Termination or modification of previously established probate guardianships (§ 728)

At any time after the filing of a petition under section 300 and until the petition is dismissed or dependency is terminated, the court may terminate or modify a guardianship of the person previously established ~~by the juvenile court or the probate court~~ under the Probate Code.

~~If~~ The social worker may recommends to the court~~, by filing *Juvenile Dependency Petition (Version One)* (form JV-100) and *Request to Change Court Order* (form JV-180),~~ in a report accompanying an initial or supplemental petition, that an existing probate guardianship be modified or terminated~~, the court must order the~~

~~appropriate county agency to file the recommended motion~~. The guardian or the child's attorney may also file a motion to modify or terminate an existing probate guardianship.

(1) The hearing on the petition or motion may be held simultaneously with any regularly scheduled hearing regarding the child. ~~Notice~~ The notice requirements ~~under~~ in ~~Probate Code~~ section ~~1511~~ 294 apply.

(2) * * *

Rule 5.625. Orders after filing of petition under section 601 or 602

(a) * * *

(b) Appointment of a ~~legal~~ guardian of the person (§§ 727.3, 728)

At any time during wardship of a person under 18 years of age, the court may appoint a guardian of the person~~, or may terminate or modify a previously established guardianship,~~ of the ward in accordance with the requirements in section 366.26 and rule 5.815.

(1) On appointment of a guardian, the court may continue wardship and conditions of probation or may terminate wardship.

(2) The juvenile court retains jurisdiction over the guardianship. All proceedings to modify or terminate the guardianship must be held in juvenile court.

(c) Termination or modification of previously established probate guardianships (§ 728)

At any time after the filing of a petition under section 601 or 602 and until the petition is dismissed or wardship is terminated, the court may terminate or modify a guardianship of the person previously established under the Probate Code. The probation officer may recommend to the court in an initial or supplemental petition that an existing probate guardianship be modified or terminated. The guardian or the child's attorney may also file a motion to modify or terminate the guardianship.

(1) The hearing on the petition or motion may be held simultaneously with any regularly scheduled hearing regarding the child. The notice requirements in section 294 apply.

(2) If the court terminates or modifies a previously established probate guardianship, the court must provide notice of the order to the probate court that made the original appointment. The clerk of the probate court must file the notice in the probate file and send a copy of the notice to all parties of record identified in that file.

Rule 5.695. Findings and orders of the court—disposition

(a) Orders of the court (§§ 245.5, 358, 360, 361, 361.2, 390)

At the disposition hearing, the court may:

(1)–(2) * * *

(3) If the requirements of section 360(a) are met, appoint a legal guardian for the child without declaring dependency and order the clerk, as soon as the guardian has signed the required affirmation, to issue letters of guardianship, which are not subject to the confidential protections of juvenile court documents ~~as described~~ in section 827;

(4) If the requirements of section 360(a) are met, declare dependency, ~~and~~ appoint a legal guardian for the child, ~~if the requirements of section 360(a) are met~~ and order the clerk, as soon as the guardian has signed the required affirmation, to issue letters of guardianship, which are not subject to the confidential protections of juvenile court documents ~~as described~~ in section 827;

(5)–(7) * * *

(b)–(i) * * *

Rule 5.725. Selection of permanent plan (§§ 366.24, 366.26, 727.31)

(a) Application of rule

This rule applies to children who have been declared dependents or wards of the juvenile court.

(1) * * *

(2) ~~Only~~ Sections 360, 366.26, ~~and~~ 727.3, 727.31, and 728 ~~apply~~ provide the exclusive authority for the juvenile court to ~~establishing~~ establish a ~~legal~~ guardianship for a dependent child or ward of the court.

(3) * * *

(b)–(h) * * *

Rule 5.735. Legal guardianship

(a) Proceedings in juvenile court (§§ 360, 366.26~~(d)~~)

The proceedings for the appointment of a legal guardian for a dependent child must be held in the juvenile court. The request for appointment of a guardian must be included in the social study report prepared by the county welfare department or in the assessment prepared for the hearing under section 366.26. Neither a separate petition nor a separate hearing is required.

(b) Notice; hearing

Unless the court proceeds under section 360(a) at disposition, notice ~~for the guardianship~~ of the hearing at which the court considers appointing a guardian must be given under section 294, and the hearing must be conducted under the procedures in section 366.26.

(c) Findings and orders

(1) If the court finds that legal guardianship is the appropriate permanent plan, the court must appoint the guardian and order the clerk, as soon as the guardian has signed the required affirmation, to issue letters of guardianship, which will not be subject to the confidentiality protections ~~described~~ in section 827.

(2)–(3) * * *

(4) ~~On appointment of a guardian under section 366.26,~~ Subject to the requirements in section 366.3(a)(3) with respect to relatives or nonrelative extended family members, the court may retain dependency jurisdiction or terminate dependency on appointment of a guardian under section 360 or 366.26.

(d) * * *

Rule 5.740. Hearings subsequent to a permanent plan (§§ 366.26, 366.3, 16501.1)

(a) Review hearings—adoption and guardianship

Following an order for termination of parental rights or, in the case of tribal customary adoption, modification of parental rights, or a plan for the establishment of a guardianship under section 366.26, the court must retain jurisdiction and conduct review hearings at least every 6 months to ensure the expeditious completion of the adoption or guardianship.

(1)–(3) * * *

(4) ~~When legal~~ After a guardianship is ~~granted~~ established, the court may continue dependency jurisdiction ~~if it is in the best interest of the child,~~ or ~~the court~~ may terminate dependency jurisdiction and retain jurisdiction over the child as a ward of the guardianship under section 366.4. The court must terminate dependency jurisdiction if it appoints a relative or nonrelative extended family member as the child's guardian and the other requirements in section 366.3(a)(3) apply.

(5)–(6) * * *

(b)–(c) * * *

Rule 5.785. General conduct of hearing

(a)–(b) * * *

(c) Case plan

* * *

(1)–(2) * * *

(3) For a child 12 years of age or older and in a permanent placement, the court must consider the case plan and must find as follows:

(A) The child was given the opportunity to review the case plan, sign it, and receive a copy; or

(B) The child was not given the opportunity to review the case plan, sign it, and receive a copy. If the court makes such a finding, the court must order the probation officer to give the child the opportunity to review the case plan, sign it, and receive a copy, unless the court finds that the child was unable, unavailable, or unwilling to participate.

(4)–(5) * * *

Rule 5.815. ~~Appointment of legal guardians for wards of the juvenile court; modification or termination of guardianship~~ Legal guardianship—wards

(a) Proceedings in juvenile court (§ 728(c)–(d))

Proceedings for the appointment of a legal guardian for a child who is a ward of the juvenile court ~~under section 725(b)~~ may be held in the juvenile court~~.~~ under the procedures specified in section 366.26.

(b) Recommendation for guardianship (§§ 706.5, 706.6, 728(c))

On the recommendation of the probation officer supervising the child in the social study and case plan required by sections 706.5(c)–(d) and 706.6(n), the motion of the child's attorney ~~representing the child~~ under section 778, or the court's ~~own motion and order~~ determination under section 727.3 that a legal guardianship ~~should be appointed~~ is the appropriate permanent plan for the child, the court must set a hearing to consider the establishment of a legal guardianship and must order the probation officer to prepare ~~an~~ a report and assessment that includes:

(1) ~~A review of the existing relationship between the child and the proposed guardian;~~ All the elements required in the assessment prepared under sections 361.5(g), 366.21(i), 366.22(c), and 366.25(b), as required by section 366.26(d); and

~~(2) A summary of the child's medical, developmental, educational, mental, and emotional status;~~

~~(3) A social history of the proposed guardian, including a screening for criminal records and any prior referrals for child abuse or neglect;~~

~~(4) An assessment of the ability of the proposed guardian to meet the child's needs and the proposed guardian's understanding of the legal and financial rights and responsibilities of guardianship; and~~

~~(5)~~(2) A statement confirming that the proposed guardian has been provided with a copy of ~~*Guardianship Pamphlet*~~ *Becoming a Child's Guardian in Juvenile Court* (form JV-350-INFO) or ~~*Guardianship Pamphlet (Spanish)*~~ *La función de un tutor nombrado por la corte de menores* (form ~~JV-350S~~ JV-350-INFO S).

(c) ~~Forms~~ Recommendation

~~The probation officer or child's attorney may use *Juvenile Wardship Petition* (form JV-600) and *Petition to Modify Previous Orders—Change of Circumstances* (form JV-740) to request that a guardianship hearing be set.~~ The probation officer's recommendation or request for appointment of a guardian may be included in the social study report and case plan submitted under sections 706.5 and 706.6. Neither a separate petition nor a separate hearing is required.

(d) Notice (§ 728(c))

The clerk must provide notice of the hearing to the child, the child's parents, and other individuals as required by section 294.

(e) Conduct of hearing (§ 728(d))

The proceedings for appointment of a guardian must be conducted according to the requirements of section 366.26—except for subdivision (j)—and rule 5.735. The court must read and consider the assessment prepared by the probation officer and any other relevant evidence. The preparer of the assessment must be available for examination by the court or any party to the proceedings.

(f) Findings and orders

~~If the court finds that establishment of a legal guardianship is necessary or convenient and consistent with the rehabilitation and protection of the child and with public safety,~~ If the court makes the findings under section 366.26(c)(4)(A), the court must appoint a legal guardian for the child and order the clerk to issue letters of guardianship (*Letters of Guardianship (Juvenile)* (form JV-330)) as soon as the appointed guardian has signed them.

(1) The court may issue orders regarding visitation and contact between the child and a parent or other relative.

(2) After the appointment of a legal guardian, the court may continue juvenile court wardship and supervision or may terminate wardship.

(g) Modification or termination of ~~the~~ juvenile court guardianship, or appointment of a co-guardian or successor guardian

A petition to terminate a guardianship established by the juvenile court, to appoint a co-guardian or successor guardian, or to modify or supplement orders regarding the guardianship must be filed and heard in juvenile court. The procedures described in rule 5.570 must be followed, and ~~*Juvenile Wardship Petition* (form JV-600) and *Petition to Modify Previous Orders—Change of Circumstances* (form JV-740)~~ *Request to Change Court Order* (form JV-180) must be used. The hearing on the ~~motion~~ petition may be held ~~simultaneously~~ concurrently with any regularly scheduled hearing regarding the child.

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	FOR COURT USE ONLY
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
EMAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
CHILD'S NAME:		
ORDERS UNDER WELFARE AND INSTITUTIONS CODE SECTIONS 366.24, 366.26, 727.3, 727.31		CASE NUMBER:

Child's name:
Date of birth: Age:
Parent's name *(if known):*
Parent's name *(if known):*

1. a. Hearing date: Time: Dept.: Room:
   b. Judicial officer:
   c. Parties and attorneys present:

2. ☐ The court has read and considered the assessment prepared under Welfare and Institutions Code section 361.5(g), 366.21(i), 366.22(c), 366.25(b), or 727.31(b) and the report and recommendation of the
   ☐ social worker ☐ probation officer ☐ and other evidence.
3. ☐ The court has considered the wishes of the child, consistent with the child's age, and all findings and orders of the court are made in the best interest of the child.

THE COURT FINDS AND ORDERS

4. a. ☐ Notice has been given as required by law.
   b. ☐ This case involves an Indian child, and the court finds that notice has been given to the parents, Indian custodian, Indian child's tribe, and the Bureau of Indian Affairs (BIA) in accordance with Welfare and Institutions Code section 224.3; the original certified mail receipts, return cards, copies of all notices, and any responses to those notices are in the court file.
5. ☐ **For child 10 years of age or older who is not present:** The child was properly notified under Welfare and Institutions Code section 349(d) of his or her right to attend the hearing, was given an opportunity to be present, and there is no good cause for a continuance to enable the child to be present.
6. ☐ The court takes judicial notice of all prior findings, orders, and judgments in this proceeding.
7. ☐ The court previously made a finding denying or terminating reunification services under Welfare and Institutions Code section 361.5, 366.21, 366.22, 366.25, 727.2, or 727.3, for
   ☐ parent *(name):*
   ☐ parent *(name):*

Form Adopted for Mandatory Use
Judicial Council of California
JV-320 [Rev. January 1, 2021]

Welfare and Institutions Code, §§ 361.31, 361.7, 366.24, 366.26, 366.3, 727.3, 727.31, 727.4, 728, 16501.1; Cal. Rules of Court, rules 5.486, 5.504, 5.590, 5.725, 5.735, 5.810, 5.815, 5.820
www.courts.ca.gov

CHILD'S NAME:	CASE NUMBER:

8. a. ☐ The court finds, by clear and convincing evidence, that it is likely the child will be adopted.
   b. ☐ The child is an Indian child or ☐ there is reason to know that the child is an Indian child, and
      (1) ☐ The court has heard and considered all relevant, admissible evidence, including:
         (A) ☐ Qualified expert witness testimony provided by _____ (*Name of Witness*); and
         (B) ☐ Evidence regarding the prevailing social and cultural practices of the child's tribe; and
      (2) ☐ The court finds beyond a reasonable doubt that continued physical custody by the ☐ mother ☐ father ☐ Indian custodian ☐ other *(name and relationship to child):* is likely to result in serious emotional or physical damage to the child.

9. The parental rights of
   a. ☐ parent *(name):*
   b. ☐ parent *(name):*
   c. ☐ alleged fathers *(names):*
   d. ☐ unknown mother ☐ all unknown fathers
   are terminated, adoption is the child's permanent plan, and the child is referred to the California Department of Social Services or a local licensed adoption agency for adoptive placement.
   e. **The adoption is likely to be finalized by *(date):***
   (If item 9 is completed, skip items 10–16 and go directly to item 17.)

10. This case involves an Indian child. The parental rights of
   a. ☐ parent *(name):*
   b. ☐ parent *(name):*
   c. ☐ Indian custodians *(names):*
   d. ☐ alleged fathers *(names):*
   e. ☐ unknown mother ☐ all unknown fathers
   are modified in accordance with the tribal customary adoption order of the *(specify):* _____ tribe, dated _____ and comprising _____ pages, which is accorded full faith and credit and fully incorporated herein. The child is referred to the California Department of Social Services or a local licensed adoption agency for tribal customary adoptive placement in accordance with the tribal customary adoption order.
   (If item 10 is completed, skip items 11–16 and go directly to item 17.)

11. ☐ The child is living with a relative who is unable or unwilling to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of giving the child a stable and permanent home through legal guardianship. Removal of the child from the custody of this relative would be detrimental to the child's emotional well-being. *(If item 11 is checked, skip items 12–14 and go directly to item 15 (guardianship) or 16 (continued foster care with a permanent plan of guardianship).)*

12. ☐ Termination of parental rights would be detrimental to the child for the following reasons: *(If item 12 is checked, check the applicable reasons below, skip items 13–14, and go directly to item 15 (guardianship) or 16 (continued foster care).)*
   a. ☐ The parents or guardians have maintained regular visitation and contact with the child, and the child would benefit from continuing the relationship.
   b. ☐ The child is 12 years of age or older and objects to termination of parental rights.
   c. ☐ The child is placed in a residential treatment facility, adoption is unlikely or undesirable, and continuation of parental rights will not prevent a permanent family placement if the parents cannot resume custody when residential care is no longer needed.
   d. ☐ The child is living with a foster parent or Indian custodian who is unable or unwilling to adopt the child because of exceptional circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment. Removal of the child from the physical custody of the foster parent or Indian custodian would be detrimental to the emotional well-being of the child.
   NOTE: Do not check item 12d if the child is either:
   (1) under the age of 6; or
   (2) a member of a sibling group including at least one child under the age of 6 that is or should be placed together.

CHILD'S NAME:	CASE NUMBER:

12. e. ☐ There would be substantial interference with the child's sibling relationship.

f. ☐ The child is an Indian child, and there are compelling reasons for determining that termination of parental rights would not be in the best interest of the child, including, but not limited to:

(1) Termination of parental rights would substantially interfere with the child's connection to the tribal community or the child's tribal membership rights.

(2) The child's tribe has identified guardianship or another permanent plan for the child.

13. ☐ Termination of parental rights would not be detrimental to the child, but no adoptive parent has been identified or is available, and the child is difficult to place because the child *(if item 13 is checked, check reasons below and complete item 14):*

a. ☐ is a member of a sibling group that should stay together.

b. ☐ has a diagnosed medical, physical, or mental disability.

c. ☐ is 7 years of age or older.

14. a. ☐ Termination of parental rights is not ordered at this time. Adoption is the permanent plan, and efforts are to be made to locate an appropriate adoptive family. A report to the court is due by *(date, not to exceed 180 days from the date of this order):*

(Do not check item 14a for a tribal customary adoption. If item 14a is checked, provide for visitation in items 14b and 14c, as appropriate, skip items 15 and 16, and go directly to item 17.)

b. ☐ Visitation between the child and
☐ parent *(name):*
☐ parent *(name):*
☐ legal guardian *(name):*
☐ other *(name):*
is scheduled as follows *(specify):*

c. ☐ Visitation between the child and *(names):*
is detrimental to the child's physical or emotional well-being and is terminated.

15. ☐ The child's permanent plan is legal guardianship.
☐ *(Name):*
is appointed guardian of the child's person ☐ and estate. The clerk is ordered to issue *Letters of Guardianship* as soon as the appointed guardian has signed them. This appointment is not effective until letters have issued.

(Do not check item 15 for a tribal customary adoption. If item 15 is checked, provide for visitation in items 15a and 15b, as appropriate, complete item 15c or 15d, then skip item 16 and go directly to item 17.)

a. ☐ Visitation between the child and
☐ parent *(name):*
☐ parent *(name):*
☐ legal guardian *(name):*
☐ other *(name):*
is scheduled as follows *(specify):*

b. ☐ Visitation between the child and *(names):*
is detrimental to the child's physical or emotional well-being and is terminated.

c. ☐ Dependency ☐ Wardship jurisdiction is terminated.
(Check item 15c if the appointed guardian is a relative or nonrelative extended family member whose home has been approved as a resource family home for at least six months, unless the guardian objects or the court makes a finding of exceptional circumstances.)

The juvenile court retains jurisdiction over the guardianship under Welfare and Institutions Code section 366.4.

d. ☐ Dependency ☐ Wardship is **not** terminated. The likely date that dependency or wardship will be terminated is *(date):* _____

CHILD'S NAME:	CASE NUMBER:

16. a. ☐ The child remains placed with *(name of placement):*
with a permanent plan of *(specify):*

(1) ☐ Returning home
(2) ☐ Adoption
(3) ☐ Tribal customary adoption
(4) ☐ Legal guardianship
(5) ☐ Permanent placement with a fit and willing relative
(6) ☐ Independent living with identification of a caring adult to serve as a lifelong connection

The barriers to achieving the child's permanent plan are *(specify):*

The child's permanent plan is likely to be achieved by *(date):*

(If item 16a is checked, provide for visitation in items 16b and 16c, as appropriate, and go to item 17.)

b. ☐ Visitation between the child and
☐ parent *(name):*
☐ parent *(name):*
☐ legal guardian *(name):*
☐ other *(name):*

is scheduled as follows *(specify):*

c. ☐ Visitation between the child and *(names):*
is detrimental to the child's physical or emotional well-being and is terminated.

17. ☐ The child is an Indian child. The court finds that the child's permanent plan complies with the placement preferences because:

a. ☐ The permanent plan is not adoption, and *(choose one):*
(1) ☐ The child is placed with a member of the child's extended family as defined by Welf. & Inst. Code, § 224.1(c); or
(2) ☐ A diligent search was made for a placement with a member of the child's extended family, the efforts are documented in detail in the record, and the child is placed in a foster home licensed, approved, or specified by the Indian child's tribe; or
(3) ☐ A diligent search was made for a placement with a member of the child's extended family, in a foster home licensed, approved, or specified by the Indian child's tribe, the efforts are documented in detail in the record, and the child is placed in an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
(4) ☐ A diligent search was made for a placement with a member of the child's extended family, in a foster home licensed, approved, or specified by the Indian child's tribe or an Indian foster home licensed or approved by an authorized non-Indian licensing authority, the efforts are documented in detail in the record, and the child is placed in an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs; or
(5) ☐ The child is placed in accordance with the preferences established by the tribe; or
(6) ☐ The court finds by clear and convincing evidence that there is good cause to depart from the placement preferences based on the reasons set out in the record.

b. ☐ The permanent plan is adoption, and *(choose one):*
(1) ☐ The child is placed with a member of the child's extended family; or
(2) ☐ A diligent search was made for a placement with a member of the child's extended family, those efforts are documented in detail in the record, and the child is placed with other members of the child's tribe; or
(3) ☐ An diligent search was made for a placement with a member of the child's extended family or other member of the child's tribe, those efforts are documented in detail in the record, and the child is placed with another Indian family; or
(4) ☐ The child is placed in accordance with the preferences established by the tribe; or
(5) ☐ The court finds by clear and convincing evidence that there is good cause to depart from the placement preferences based on the reasons set out in detail in the record.

CHILD'S NAME:	CASE NUMBER:

18. ☐ The child's placement is necessary.

19. ☐ The child's placement is appropriate.

20. ☐ The agency has complied with the case plan by making reasonable efforts, including whatever steps are necessary to finalize the permanent plan. If this case involves an Indian child, the court finds that the agency has made active efforts to provide remedial and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proven unsuccessful.

21. ☐ The child is an Indian child and active efforts as detailed in the record ☐ were ☐ were not made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.
If active efforts were made, those efforts have proved ☐ successful ☐ unsuccessful.

22. ☐ The child remains a ☐ dependent ☐ ward of the court. *(If this item is checked, complete items 23 and 24, if applicable, and items 25 and 26.)*

23. ☐ All prior orders not in conflict with this order remain in full force and effect.

24. ☐ Other *(specify):*

25. ☐ Next hearing date: Time: Dept.: Room:
   a. ☐ Continued hearing under section 366.26 for receipt of report on attempts to locate an adoptive family
   b. ☐ Continued hearing under section 366.24(c)(6) for receipt of the tribal customary adoption order
   c. ☐ Six-month postpermanency review

26. The ☐ Parent *(name):*
   ☐ Parent *(name):*
   ☐ Indian custodian *(name):*
   ☐ Child
   ☐ Other *(name):*
   have been advised of their appeal rights (under Cal. Rules of Court, rule 5.590).

Date: _____ _____
JUDICIAL OFFICER

CHILD'S NAME:	CASE NUMBER:

DISPOSITIONAL ATTACHMENT: APPOINTMENT OF GUARDIAN
(Welf. & Inst. Code, § 360(a))

1. ☐ The child is a person described under Welf. & Inst. Code, § 300 *(check all that apply):*
   ☐ 300(a) ☐ 300(c) ☐ 300(e) ☐ 300(g) ☐ 300(i)
   ☐ 300(b) ☐ 300(d) ☐ 300(f) ☐ 300(h) ☐ 300(j)

2. ☐ The child ☐ is ☐ is not adjudged a dependent of the court.

3. a. ☐ Reasonable efforts ☐ were ☐ were not made to prevent or eliminate the need for removal from the home; or
   b. ☐ The child is an Indian child, and active efforts, as detailed in the record, ☐ were ☐ were not made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. If active efforts were made, those efforts have proved ☐ successful ☐ unsuccessful.

4. a. ☐ The county agency solicited and integrated into the case plan the input of the ☐ child ☐ mother ☐ father ☐ representative of child's identified Indian tribe ☐ other *(specify):* _____.
   b. ☐ The county agency did not solicit and integrate into the case plan the input of the ☐ child ☐ mother ☐ father ☐ representative of child's identified Indian tribe ☐ other *(specify):* _____, and the agency is ordered to do so and submit an updated case pan within 30 days of the date of this hearing.
   c. ☐ The county agency did not solicit and integrate into the case plan the input of the ☐ child ☐ mother ☐ father ☐ representative of child's identified Indian tribe ☐ other *(specify):* _____, and the county agency is not required to do so because these persons are unable, unavailable, or unwilling to participate.

5. The court advised the
   ☐ mother ☐ biological father ☐ legal guardian
   ☐ presumed father ☐ Indian custodian ☐ other *(specify):*
   that no reunification services will be provided as a result of the guardianship of the child established in this matter.

6. The ☐ mother ☐ biological father ☐ legal guardian
   ☐ presumed father ☐ Indian custodian ☐ other *(specify):*
   signed a *Guardianship (Juvenile)—Consent and Waiver of Rights* (form JV-419), agreeing to the guardianship of the child, the waiver of his or her rights to family maintenance services and family reunification services, and, in the case of an Indian child, the waiver of his or her rights under the Indian Child Welfare Act. A signed form JV-419 for each individual indicated above was filed with the court.

7. a. ☐ The child signed a *Guardianship (Juvenile)—Child's Consent and Waiver of Rights* (form JV-419A), agreeing to the establishment of the guardianship and the waiver of his or her rights to family maintenance services and family reunification services. The child's signed form JV-419A was filed with the court.
   b. ☐ The child is prevented from providing a meaningful response to the request for guardianship and a waiver of his or her rights to family maintenance services and family reunification services because of the child's
      (1) ☐ age.
      (2) ☐ physical condition.
      (3) ☐ emotional condition.
      (4) ☐ mental condition.

8. ☐ The child is an Indian child, and an authorized representative of the child's tribe signed a form JV-419 stating the tribe's agreement to the guardianship of the child, the waiver of the tribe's interests in family maintenance services and family reunification services, and the waiver of the tribe's rights under the Indian Child Welfare Act.

9. ☐ The court has read and considered the assessment specified in section 361.5(g). Based on that assessment and all other relevant evidence before the court, the court finds that the establishment of a guardianship and the appointment of the person named in item 11 are in the child's best interest.

10. The court appoints *(name):*
    to be the guardian of the child's person ☐ and estate and orders the clerk to issue letters of guardianship after the guardian has signed them. This appointment is not effective until letters have issued.

11. ☐ The county agency is ordered to release the child to the person named in item 11.

Form Approved for Optional Use
Judicial Council of California
JV-418 [Rev. January 1, 2021]

DISPOSITIONAL ATTACHMENT: APPOINTMENT OF GUARDIAN
(Welf. & Inst. Code, § 360(a))

Welfare and Institutions Code, § 360(a);
Cal. Rules of Court, rule 5.695
www.courts.ca.gov

Deferred

Item number: 38

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Rules and Forms: Compromise of Claim for Minor or Person With a Disability (amend Cal. Rules of Court, rules 7.101, 7.950, 7.950.5, 7.951, 7.952, and 7.955; revise forms MC-350, MC-350(A-13b(5)), MC-350EX, MC-351, MC-355, MC-356, MC-357, and MC-358)

Committee or other entity submitting the proposal:
Probate and Mental Health Advisory Committee

Staff contact (name, phone and e-mail): Corby Sturges, 415-865-4507, corby.sturges@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Recommend circulation of proposal to revise and consider renumbering the Judicial Council forms adopted for use in proceedings to approve the compromise of a claim on behalf of a minor or person with a disability and to order deposit or withdrawal of funds from a blocked account.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue . San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-25

Title
Rules and Forms: Compromise of Claim for Minor or Person With a Disability

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 7.101, 7.950, 7.950.5, 7.951, 7.952, and 7.955; revise forms MC-350, MC-350(A-13b(5)), MC-350EX, MC-351, MC-355, MC-356, MC-357, and MC-358

Proposed by
Probate and Mental Health Advisory Committee
Hon. Jayne C. Lee, Chair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Corby Sturges, 415-865-4507
Corby.Sturges@jud.ca.gov

Executive Summary and Origin

The Probate and Mental Health Advisory Committee recommends amending six rules of court and revising eight forms used in proceedings to approve the compromise of a claim or action or the disposition of proceeds of a judgment for a minor or person with a disability. The proposed amendments and revisions are needed (1) to clarify that the petitioner must completely disclose the effect of the compromise on the statutory and contractual lien rights of all parties, insurers, and medical service providers; (2) to clarify that a blocked account for the deposit of the proceeds of the compromise or judgment must be opened in the name of the petitioner in the petitioner's capacity as representative of the minor or person with a disability; (3) to clarify that an adult claimant who has the capacity to consent to orders approving a compromise or disposition and does not have a conservator of the estate must give express consent to those orders; and (4) to make technical and clarifying revisions to the forms' titles, language, and format. These revisions are needed to improve access to the courts, protect the interests of minors and persons with disabilities, and allow prompt and secure distribution of the proceeds of settlements and judgments in favor of minors and persons with disabilities.

Background

Effective January 1, 2002, the Judicial Council adopted rules 7.950–7.954 of the California Rules of Court[1] and forms MC-350, MC-351, MC-355, MC-356, MC-357, and MC-358 for mandatory use in proceedings to approve requests to compromise claims of minors and persons with disabilities and order funds from the proceeds of the compromise or a judgment deposited in blocked accounts. The rules provide detailed guidance for persons seeking approval of so-called minors' compromises and handling funds in blocked accounts. The forms implement a uniform, statewide process to petition for the settlement of claims of minors and persons with disabilities and for dealing with blocked accounts.[2]

Effective January 1, 2005, the Judicial Council revised forms MC-350 and MC-351 to reflect the amendment of sections 3600–3604 and 3610–3612 of the Probate Code[3] and the addition of section 3613 to the code by Assembly Bill 1851 (Stats. 2004, ch. 67). The statutory amendments replaced the term "incompetent person" with "person with a disability," defined that term to include persons with severe physical disabilities specified by federal law, and required that an adult claimant with a disability who nevertheless has capacity to consent to orders issued under sections 3600–3602 and 3610–3611 and does not have a conservator of the estate give express consent to orders issued under those sections.[4]

The Judicial Council also adopted section 40 of the California Standards of Judicial Administration, effective January 1, 2005. Section 40 urged the superior courts, in civil matters requiring approval of trusts to receive the proceeds of settlements or judgments in favor of minors or persons with disabilities under Probate Code section 3600, to develop practices and procedures to provide for determination of the trust issues by the courts' probate divisions. Section 40 was amended and renumbered as standard 7.10 effective January 1, 2007.

Effective January 1, 2010, the Judicial Council adopted rule 7.950.5 and form MC-350EX to provide an expedited process for judicial approval of uncontroversial, low-value compromises or settlements for minors or persons with disabilities.[5] At the same time, the council completely revised form MC-350 and approved form MC-350(A-13b(5)) for optional use.

The Proposal

Since the last substantial revision of the forms addressed in this proposal, courts, judicial officers, attorneys, other stakeholders, and staff have identified three areas requiring substantive revision. In addition, committee members and staff have reviewed the forms and recommend

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[1] All subsequent references to rules are to the California Rules of Court unless otherwise specified.
[2] Judicial Council of Cal., Advisory Com. Rep., *Minors' Compromises and Blocked Accounts: New Rules and Mandatory Forms* (Oct. 10, 2001), p. 2.
[3] All subsequent statutory references are to the Probate Code unless otherwise specified.
[4] Judicial Council of Cal., Advisory Com. Rep., *Proposal to Revise* Petition to Approve Compromise of Claim *and* Order Approving Compromise of Claim (Aug. 9, 2004), pp. 1–2.
[5] Judicial Council of Cal., Advisory Com. Rep., *Civil and Probate Practice and Procedure: Compromise of Minors' Claims, Settlement of Actions Involving Minors and Persons With Disabilities, and Disposition of Judgments in Favor of Minors and Persons With Disabilities* (Aug. 31, 2009), p. 8.

multiple technical revisions, including renaming the forms, updating statutory references, replacing misleading terms and phrases with simpler language, and using terms consistently across the form set.

The Probate and Mental Health Advisory Committee recommends amending rules 7.101, 7.950, 7.950.5, 7.951, 7.952, and 7.955 of the California Rules of Court and revising Judicial Council forms MC-350, MC-350(A-13b(5)), MC-350EX, MC-351, MC-355, MC-356, MC-357, and MC-358, effective January 1, 2021, as follows:

1. Amend rules 7.101, 7.950, and 7.950.5 to reflect the revised titles of forms MC-350 and MC-350EX and make technical changes;
2. Amend rules 7.951 and 7.952 to make technical changes;
3. Amend the references to the State Bar Rules of Professional Conduct in the advisory committee comment to rule 7.955 to conform to the numbering scheme of the new rules;[6]
4. Revise form MC-350 to:
    - Rename the form *Petition for Approval of Compromise or Disposition of Judgment Proceeds for Minor or Person With a Disability;*
    - Clarify the instructions for use of the form and alert petitioners to the possibility of filing a petition for expedited approval on form MC-350EX;
    - Combine items 1 and 3 to clarify that the petitioner is acting in a representative capacity on behalf of the claimant;
    - Revise item 2 and add item 21 to clarify that an adult claimant with capacity and without a conservator must give express consent to the requested orders and provide an opportunity for such a claimant to give consent;
    - Add language to item 12 to emphasize that petitioners must give the courts complete information about outstanding expenses and liens;
    - Clarify that item 14 addresses both fees and expenses; and
    - Update statutory references, simplify language, and make technical corrections throughout;
5. Revise form MC-350(A-13b(5)) to:
    - Rename the form *Attachment to Petition for Approval of Compromise or Disposition of Judgment Proceeds—Additional Medical Service Providers;*
    - Renumber the form as MC-350(A-12b(5)) to reflect the renumbering of item 13 on form MC-350 as item 12;
    - Clarify the instructions for using the form; and
    - Update statutory references and make technical corrections;
6. Revise form MC-350EX to:
    - Rename the form *Petition for Expedited Approval of Compromise or Disposition of Judgment Proceeds for Minor or Person With a Disability;*

[6] The new State Bar Rules of Professional Conduct were approved by the Supreme Court in *Order re Request for Approval of Proposed Amendments to the Rules of Professional Conduct of the State Bar of California* (admin. order 2018-05-09, issued May 10, 2018, S240991) and took effect November 1, 2018.

- Combine items 1 and 4 to clarify that the petitioner is acting in a representative capacity on behalf of the claimant;
- Revise item 2 and add item 21 to clarify that an adult claimant with capacity and without a conservator must give express consent to the requested orders and provide an opportunity for such a claimant to give consent;
- Revise item 3 to clarify the circumstances in which the form may and must be used;
- Clarify that item 15 addresses both fees and expenses;
- Update statutory references, simplify language, and make technical corrections throughout;

7. Revise form MC-351 to:
   - Rename the form *Order Approving Compromise or Disposition of Judgment Proceeds for Minor or Person With a Disability;*
   - Revise items 6 and 7 to clarify the orders regarding deposit of funds in a blocked account; and
   - Update statutory references, simplify language, and make technical corrections throughout;
8. Revise form MC-355 to:
   - Rename the form *Order to Deposit Funds Into Blocked Account;*
   - Specify in item 3 that the blocked account must be opened in the name of the petitioner as the specified representative of the minor or person with a disability; and
   - Update statutory references, simplify language, and make technical corrections throughout;
9. Revise form MC-356 to:
   - Rename the form *Acknowledgment of Receipt of Funds and Order to Deposit Funds Into Blocked Account* to reflect the dual purpose of the acknowledgment of receipt; and
   - Update statutory references, simplify language, and make technical corrections throughout;
10. Revise form MC-357 to:
    - Rename the form *Petition to Withdraw Funds From Blocked Account;*
    - Modify the references to parents in item 4 to recognize, in conformity with current law, that multiple parents may have the same gender; and
    - Update statutory references, simplify language, and make technical corrections throughout;
11. Revise form MC-358 to:
    - Clarify the language in item 2 to make it consistent with the terms used across the form set; and
    - Update statutory references, simplify language, and make technical corrections throughout;

Three substantive revisions require further discussion. The first revision responds to requests from courts that have consistently received insufficient information regarding the claimant's

medical expenses, especially outstanding expenses and liens against the proceeds of the settlement or judgment held by medical service providers or Medi-Cal. When presented with these incomplete petitions, courts must continue hearings until the petitioner provides all of the required information.

The committee proposes adding language to renumbered item 12 (former item 13) to notify the petitioner more explicitly that the petitioner must completely disclose the effect of the compromise or settlement on the statutory and contractual lien rights of all parties, public and private insurers, and medical service providers. The revisions would also allow the court and the petitioner to ensure that the terms of the proposed compromise, settlement, or disposition or proceeds address all financial interests at stake, thereby reducing delays, and protecting claimants from unexpected demands by Medi-Cal or medical service providers.

Second, the committee also proposes revising renumbered items 6c(2)(a) and 7a on form MC-351 and item 3 on form MC-355 to address difficulties faced by petitioners and attorneys in many counties when they attempt to deposit funds in a representative capacity, as ordered, in a blocked account for a minor or person with a disability. Items 6c(2)(a) and 7a on form MC-351 order the blocked account opened in the name of the petitioner *as trustee* for the beneficiary. Courts and stakeholders advised the committee that this language is often interpreted narrowly to exclude petitioners, such as guardians of minors' estates, acting in other authorized representative capacities, such as guardian of a minor's estate.

The committee therefore proposes replacing the term "as trustee" with the broader term "in the petitioner's representative capacity." In addition, the current language in item 3 of form MC-355 requires the account to be opened in the name of the claimant or beneficiary. Banks routinely decline to open these accounts in the name of the petitioner, as intended, because of this language. The petitioner or attorney must then seek a clarifying order from the court. This process reduces the balance of the settlement or judgment available to the claimant and delays the availability of that balance. The committee therefore proposes revising item 3 on form MC-355 to direct the account to be opened in the name of the petitioner and adding check boxes to identify the specific representative capacity in which the petitioner is acting.

The proposed revision to item 3 on form MC-355 revealed a third source of confusion on the petitions, forms MC-350 and MC-350EX. Item 3 on form MC-350 and item 4 on form MC-350EX identify the petitioner's legal relationship to the claimant. To emphasize the variety of representative relationships a petitioner might have with a claimant and promote consistency with the proposed specification of the appropriate relationship in item 3 on form MC-355, the committee chose to combine this item with the petitioner's name into item 1 on the petitions.

In the process of combining these items, the committee determined that the notice, stating that an adult claimant who had capacity to consent to the requested orders and did not have a conservator was required to consent, should be moved from the description of the petitioner to item 2 on each form, which describes the claimant. The committee also recommends adding item 21 to forms MC-350 and MC-350EX to provide an opportunity for a qualifying claimant to give express consent to the requested orders.

Finally, the committee recommends deleting from the petition forms the implicit invitation for the minor or person with a disability to file the petition. This item, 3e on form MC-350 and 4e on form MC-350EX, was added, effective January 1, 2005, as further response to the requirement in Probate Code section 3613 that a claimant with sufficient capacity must give express consent to the requested orders.[7] The committee is not aware of circumstances in which a claimant would also be a petitioner in the proceedings covered by these forms. If those circumstances should nevertheless arise, the petitioner could indicate that by checking "Other" relationship and inserting "self" in the adjacent field.

Alternatives Considered

The committee considered not revising the forms in this proposal, but determined that the costs and delays caused by the current forms' lack of clarity required the revisions to improve access to the courts, protect the interests of minors and persons with disabilities, and allow prompt and secure distribution of the proceeds of settlements and judgments in favor of minors and persons with disabilities. The committee also considered changing the category of these forms to reduce the number of forms in the "MC" (miscellaneous) category. The committee decided, however, that relettering these forms would potentially cause confusion because of the extensive use of the forms by self-represented litigants and the correspondence of the initials "MC" to the proceedings in which the forms are used, colloquially referred to as "minor's compromises." The committee has requested specific comment about renumbering the forms.

Fiscal and Operational Impacts

The proposal might require courts to input the new form titles into their case management systems. The revisions should not, however, require entry of any new data elements. The substantive revisions to form MC-350 are intended to help courts receive complete and accurate information in the original petition for approval, which will reduce continuances and protect the interests of the minor or person with a disability. The substantive revisions to forms MC-351 and MC-355 will reduce the need for court orders by clarifying to a financial institution that a parent or other person named on these orders may open a blocked account in their representative capacity and deposit funds for a minor or person with a disability without a further court order.

[7] Judicial Council of Cal., Advisory Com. Rep., *supra* note 5, at p. 2. Although added to the petitions, it was, tellingly, not reflected in an addition to form MC-351, the order in response to the revised petitions.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Should the forms be renumbered to move them from the MC form set and place them in a separate form set by themselves or with other forms?
- Are further revisions needed to ensure compliance with the legal requirements for establishing, administering, and accessing special needs trusts on behalf of claimants with disabilities?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rules 7.101, 7.950, 7.950.5, 7.951, 7.952, and 7.955, at pages 8–11
2. Forms MC-350, MC-350(A-12b(5)), MC-350EX, MC-351, MC-355, MC-356, MC-357, and MC-358, at pages 12–38

Rules 7.101, 7.950, 7.950.5, 7.951, 7.952, and 7.955 of the California Rules of Court would be amended, effective January 1, 2021, to read:

Rule 7.101. Use of Judicial Council forms

(a) * * *

(b) Alternative mandatory forms

The following forms have been adopted by the Judicial Council as alternative mandatory forms for use in probate proceedings or other proceedings governed by provisions of the Probate Code:

(1)–(2) * * *

(3) ~~*Petition to Approve Compromise of Disputed Claim or Pending Action or Disposition of Proceeds of Judgment*~~ *Petition for Approval of Compromise or Disposition of Judgment Proceeds for Minor or Person With a Disability* (form MC-350) and ~~*Expedited Petition to Approve Compromise of Disputed Claim or Pending Action*~~ *Petition for Expedited Approval of Compromise or Disposition of Judgment Proceeds ~~of Judgment~~ for Minor or Person With a Disability* (form MC-350EX).

(c) * * *

Rule 7.950. Petition for court approval of the compromise ~~of, or a covenant on, a disputed claim; a compromise or settlement~~ of a ~~pending~~ claim or action~~;~~ or the disposition of the proceeds of a judgment for a minor or person with a disability

A petition for court approval of a compromise of, or a covenant not to sue or enforce judgment on, a minor's disputed claim; a compromise or settlement of a pending action or proceeding to which a minor or person with a disability is a party; or the disposition of the proceeds of a judgment for a minor or person with a disability under ~~chapter 4 of part 8 of division 4 of the~~ Probate Code ~~(commencing with~~ sections 3600–3613~~)~~ or Code of Civil Procedure section 372 must be verified by the petitioner and must contain a full disclosure of all information that has any bearing upon the reasonableness of the compromise, covenant, settlement, or disposition. Except as provided in rule 7.950.5, the petition must be ~~prepared~~ submitted on a ~~fully~~ completed *Petition ~~to Approve~~ for Approval of Compromise ~~of Disputed Claim or Pending Action~~ or Disposition of Judgment Proceeds ~~of Judgment~~ for Minor or Person With a Disability* (form MC-350).

Rule 7.950.5 ~~Expedited~~ Petition for expedited court approval of the compromise ~~of, or a covenant on, a disputed claim; a compromise or settlement of a pending~~

of a claim or action~~;~~ or the disposition of the proceeds of a judgment for a minor or person with a disability

(a) Authorized use of ~~expedited~~ petition for expedited approval

Notwithstanding ~~the provisions of~~ rule 7.950, a petitioner for court approval of a compromise of, or a covenant not to sue or enforce judgment on, a minor's disputed claim; a compromise or settlement of a pending action or proceeding to which a minor or person with a disability is a party; or the disposition of the proceeds of a judgment for a minor or person with a disability under ~~chapter 4 of part 8 of division 4 of the~~ Probate Code ~~(commencing with~~ sections 3600–3613~~)~~ or Code of Civil Procedure section 372 may, in the following circumstances, ~~satisfy the information requirements of that rule by fully completing the *Expedited*~~ submit the petition on a completed *Petition ~~to Approve~~ for Expedited Approval of Compromise ~~of Disputed Claim or Pending Action~~ or Disposition of Judgment Proceeds ~~of Judgment~~ for Minor or Person With a Disability* (form MC-350EX):

(1)–(7) * * *

(8) The judgment for the minor or ~~disabled~~ claimant with a disability (exclusive of interest and costs) or the total amount payable to the minor or ~~disabled~~ claimant with a disability and all other parties under the proposed compromise or settlement is $50,000 or less or, if greater:

(A) The total amount payable to the minor or ~~disabled~~ claimant with a disability represents payment of the individual-person policy limits of all liability insurance policies covering all proposed contributing parties; and

(B) All proposed contributing parties would be substantially unable to discharge an adverse judgment on the ~~minor's or disabled person's~~ claim from assets other than the proceeds of their liability insurance policies; and

(9) The court does not otherwise order~~;~~.

(b) Determination of ~~expedited~~ petition

~~An expedited~~ A petition for expedited approval must be determined by the court not more than 35 days after it is filed, unless a hearing is requested, required, or scheduled under (c), or the time for determination is extended for good cause by order of the court.

(c) Hearing on ~~expedited~~ petition

(1) The ~~expedited~~ petition for expedited approval must be determined by the court without a hearing unless:

(A) A hearing is requested by the petitioner at the time the ~~expedited~~ petition is filed~~,~~;

(B) An objection or other opposition to the petition is filed by an interested party~~,~~; or

(C) A hearing is scheduled by the court under (2) or (3).

(2) The court may on its own motion elect to schedule and conduct a hearing on ~~an expedited~~ a petition for expedited approval. The court must make its election to schedule the hearing and must give notice of its election and the date, time, and place of the hearing to the petitioner and all other interested parties not more than 25 days after the date the ~~expedited~~ petition is filed.

(3) If the court decides not to grant ~~an expedited~~ a petition for expedited approval in full as requested, it must schedule a hearing and give notice of its intended ruling and the date, time, and place of the hearing to the petitioner and all other interested parties within the time provided in (2).

Rule 7.951. Disclosure of ~~the~~ attorney's interest in ~~a~~ petition to approve compromise ~~a~~ of claim

If the petitioner has been represented or assisted by an attorney in preparing the petition to approve the compromise of the claim or in any other respect with regard to the claim, the petition must disclose the following information:

(1)–(6) * * *

Rule 7.952. Attendance at hearing on ~~the~~ petition to approve compromise ~~a~~ of claim

(a) Attendance of ~~the~~ petitioner and claimant

The person petitioning for approval of the ~~compromising~~ compromise of the claim on behalf of the minor or person with a disability and the minor or person with a disability must attend the hearing on the ~~compromise of the claim~~ petition unless the court for good cause dispenses with their personal appearance.

(b) Attendance of ~~the~~ physician and other witnesses

~~At the hearing,~~ The court may require the presence and testimony of witnesses, including the attending or examining physician, at the hearing.

Rule 7.955. Attorney's fees for services to a minor or a person with a disability

(a)–(d) * * *

Advisory Committee Comment

This rule requires the court to approve and allow attorney's fees in an amount that is reasonable under all the facts and circumstances, under Probate Code section 3601. The rule is declaratory of existing law concerning attorney's fees under a contingency fee agreement when the fees must be approved by the court. The facts and circumstances that the court may consider are discussed in a large body of decisional law under section 3601 and under other statutes that require the court to determine reasonable attorney's fees. The factors listed in rule 7.955(b) are modeled in part after those provided in rule ~~4-200~~ 1.5 of the Rules of Professional Conduct of the State Bar of California concerning an unconscionable attorney's fee, but the advisory committee does not intend to suggest or imply that an attorney's fee must be found to be unconscionable under rule ~~4-200~~ 1.5 to be determined to be unreasonable under this rule.

* * *

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO. : EMAIL ADDRESS: ATTORNEY FOR (*Name*):		**DRAFT** **Not approved by** **the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
CASE NAME:		CASE NUMBER:
PETITION FOR APPROVAL OF COMPROMISE OR DISPOSITION OF JUDGMENT PROCEEDS FOR MINOR OR PERSON WITH A DISABILITY		HEARING DATE: DEPT: TIME:

NOTICE TO PETITIONER

Except as noted below, you must use this form to request court approval of (1) the compromise of a minor's disputed claim, (2) the compromise or settlement of a pending action in which a minor or a person with a disability (including a conservatee) is a party, or (3) the disposition of the proceeds of a judgment awarded to a minor or a person with a disability. (See Code Civ. Proc., § 372; Prob. Code, §§ 3500, 3600–3613.)

Both you and the minor or person with a disability must attend the hearing on this petition unless the court dispenses with a personal appearance. The court may require the presence and testimony of witnesses, including the attending or examining physician, and the presentation of other evidence relating to the claim and the nature and extent of the injury, care, treatment, and hospitalization.

The court has authority to consider a request for expedited approval without a hearing of the compromise of certain claims or actions or the disposition of the proceeds of certain judgments. To determine whether your claim, action, or judgment qualifies, see Cal. Rules of Court, rule 7.950.5. If you want to request expedited consideration, you must use form MC-350EX.

1. Petitioner *(name):*
   is the *(check all boxes that apply):* ☐ Parent ☐ Guardian ad litem ☐ Guardian ☐ Conservator
   ☐ Other *(specify relationship):*
   of the claimant identified in item 2.

2. Claimant *(name):*
   a. Address:
   b. Date of birth: c. Age: d. ☐ Minor or ☐ Person with a disability
   e. ☐ Has the capacity, within the meaning of Probate Code section 812, to consent to the requested order or judgment.
   f. ☐ Does not have a conservator of the estate.
   (An adult claimant with a disability who (1) has capacity to consent to the order requested and (2) does not have a conservator must give express consent to the order requested. (Prob. Code, 3613.) See item 22, below.)

3. **Nature of claim** The claim of the minor or adult person with a disability *(check one):*
   a. ☐ Has not been filed in an action or proceeding. *(Complete items 4–23.)*
   b. ☐ Is the subject of a pending action or proceeding that will be compromised or settled without a trial. *(Complete items 4–23.)*
      Name of court:
      Case no.: Trial date:
   c. ☐ Is the subject of an action or proceeding in which a judgment has been or will be entered for the claimant against the defendants named below in the amount (excluding interest and costs) of *(specify total):* $.
      Defendants *(names):*

      ☐ Additional defendants listed on Attachment 3.
      ☐ The judgment was filed on *(date):*
   (Attach a copy of the (proposed) judgment as Attachment 3c and complete items 12–23.)

Form Adopted for Alternative Mandatory Use
Instead of Form MC-350EX
Judicial Council of California
MC-350 [Rev. January 1, 2021]

Code of Civil Procedure, § 372;
Probate Code, §§ 3500, 3600–3613;
Cal. Rules of Court, rules 3.1384, 7.101, 7.950–7.952
www.courts.ca.gov

CASE NAME:	CASE NUMBER:

4. ☐ **Incident or accident** The incident or accident occurred as follows:
   a. Date and time:
   b. Place:
   c. Persons involved *(names):*

   ☐ Continued on Attachment 4.

5. ☐ **Nature of incident or accident**
   The facts, events, and circumstances of the incident or accident are *(describe):*

   ☐ Continued on Attachment 5.

6. ☐ **Injuries**
   The following injuries were sustained by the claimant as a result of the incident or accident *(describe):*

   ☐ Continued on Attachment 6.

7. ☐ **Treatment**
   The claimant received the following care and treatment for the injuries described in item 6 *(describe):*

   ☐ Continued on Attachment 7.

8. ☐ **Extent of injuries and recovery** *(An original or a photocopy of all doctors' reports containing a diagnosis of and prognosis for the claimant's injuries, and a report of the claimant's current condition, must be attached to this petition as Attachment 8. A new report is not necessary if a previous report accurately describes the claimant's current condition.)*
   a. ☐ The claimant has recovered completely from the effects of the injuries described in item 6, and there are no permanent injuries.
   b. ☐ The claimant has not recovered completely from the effects of the injuries described in item 6, and the following injuries from which the claimant has not recovered are temporary *(describe the remaining temporary injuries):*

      ☐ Continued on Attachment 8b.
   c. ☐ The claimant has not recovered completely from the effects of the injuries described in item 6, and the following injuries from which the claimant has not recovered are permanent *(describe the permanent injuries):*

      ☐ Continued on Attachment 8c.

CASE NAME:	CASE NUMBER:

9. ☐ **Petitioner has made a careful and diligent inquiry and investigation into the facts and circumstances of the incident or accident in which the claimant was injured; the responsibility for the incident or accident; and the nature, extent, and seriousness of the claimant's injuries. Petitioner understands that if the compromise proposed in this petition is approved by the court and consummated, the claimant will never be able to recover any more compensation from the settling defendants named below even if the claimant's injuries turn out to be more serious than they now appear.**

10. ☐ **Amount and terms of settlement**

To settle the claim in item 3a or 3b, the defendants named below have offered to pay the following amounts to the claimant:

a. The total amount offered by all defendants named below is *(specify):* $

b. The defendants and amounts offered by each are as follows *(specify):*

Defendants *(names)*	Amounts
	$
	$
	$
	$
	$

☐ Defendants and amounts offered continued on Attachment 10b.

c. The terms of settlement are as follows *(if the settlement is to be paid in installments, both the total amount and the present value of the settlement must be included):*

☐ Continued on Attachment 10c.

11. **Settlement payments to others**

a. ☐ No defendant named in item 10b has offered to pay money to any person or persons other than the claimant to settle claims arising out of the same incident or accident that resulted in the claimant's injury.

b. ☐ To settle claims arising out of the same incident or accident that resulted in the claimant's injury, one or more defendants named in item 10b have also offered to pay money to a person or persons other than claimant.

(1) The total amount offered by all defendants to others is *(specify):* $

(2) Petitioner ☐ does not have ☐ has a claim against the recovery of the claimant (other than for reimbursement of fees or expenses paid by petitioner and listed under item 14).
(If you answered "has," explain in Attachment 11b(2) the circumstances and the effect your claim has on the proposed compromise of the claim described in this petition.)

(3) Petitioner ☐ is not ☐ is a plaintiff in the same action with the claimant.
(If you answered "is," explain in Attachment 11b(3) the circumstances and the effect your claim and its disposition has on the proposed compromise of the claim or action described in this petition.)

(4) ☐ Petitioner would receive money under the proposed settlement.

(5) The settlement payments are to be apportioned and distributed as follows:

Other plaintiffs or claimants *(names)*	Amounts
	$
	$
	$
	$

☐ Additional plaintiffs or claimants and amounts are listed on Attachment 11b(5).

(6) Reasons for the apportionment of the settlement payments between the claimant and each other plaintiff or claimant named above are specified on Attachment 11b(6).

CASE NAME:	CASE NUMBER:

12. **Claimant's medical expenses—including medical expenses paid by petitioner, Medicare, Medi-Cal, and private insurers—to be paid or reimbursed from proceeds of settlement or judgment**

a. **Totals**

(1) Total medical expenses: $

(2) Total outstanding medical expenses to be paid from the proceeds: $

(3) Total out-of-pocket, co-payments, or deductible payments to be reimbursed from proceeds: $

b. Medical expenses were paid and are to be reimbursed from proceeds as follows:

(1) ☐ Paid by petitioner in the amount of: $

(2) ☐ Paid by private health insurance or a self-funded plan under:

(a) ☐ An Employee Retirement Income Security Act (ERISA) insured plan.

(b) ☐ An ERISA self-funded plan.

(c) ☐ A Non-ERISA insured plan.

(d) ☐ A Non-ERISA self-funded plan.

(e) Amount paid by plan: $

(f) Amount of reimbursement to the plan from proceeds of settlement or judgment:

(i) ☐ No reimbursement is requested by the plan.

(ii) ☐ Reimbursement is to be made to the plan, and:

(A) ☐ There is a contractual reduction of: ($)

(B) ☐ There is a negotiated reduction of: ($)

(C) ☐ No reduction has been agreed to,

for a **total reimbursement** to the plan, in full satisfaction of its lien rights, in the amount of: $

(3) ☐ Paid by Medicare in the amount of: $

less the statutory reduction in the amount of: ($)

for a **total reimbursement** to Medicare in the amount of: $

(Attach a copy of the final Medicare demand letter or letter agreement as Attachment 12b(3).)

(4) ☐ Paid by Medi-Cal in the amount of: $

(a) ☐ Notice of this claim or action has been given to the State Director of Health Care Services under Welfare and Institutions Code section 14124.73. A copy of the notice and proof of its delivery ☐ is attached.
☐ was filed in this matter on *(date):*

(b) ☐ Notice of this claim or action has **not** been given to the State Director of Health Care Services. *(Explain why notice has not been given in Attachment 12b(4)(b).)*

(c) ☐ In full satisfaction of its lien rights, Medi-Cal has agreed to accept reimbursement in the amount of:
$
(Attach a copy of the final Medi-Cal demand letter or letter agreement as Attachment 12b(4)(c).)

(d) ☐ Petitioner is entitled to a reduction of the Medi-Cal lien under Welfare and Institutions Code section 14124.76 and *(check one):*

(i) ☐ Is filing a motion seeking a reduction of the lien concurrently with this petition.

(ii) ☐ Requests that the court reserve jurisdiction over this issue.

The amount of the lien in dispute is: $

(5) (a) ☐ There are one or more statutory or contractual liens of medical service providers for payment of claimant's medical expenses. The total amount claimed under these liens is: $
In full satisfaction of their lien claims, the lienholders have agreed to accept the sum of: $
(Provide requested information for each lienholder and other specified medical service providers on next page.)

CASE NAME:	CASE NUMBER:

12. **Claimant's medical expenses** (continued)

b. (5) (b) The name of each medical service provider that furnished care and treatment to claimant and (1) has a lien for all or any part of the charges or (2) was paid (or will be paid from the proceeds) by petitioner, for which payment petitioner requests reimbursement; the amounts charged and paid; the amount of negotiated reductions of charges, if any; and the amount to be paid from the proceeds of the settlement or judgment to each provider are as follows:

(i) (A) Provider *(name):*
(B) Address:

(C) Amount charged: $
(D) Amount paid (whether or not by insurance): ($)
(E) Negotiated reduction, if any: ($)
(F) Amount to be paid from proceeds of settlement or judgment: $

(ii) (A) Provider *(name):*
(B) Address:

(C) Amount charged: $
(D) Amount paid (whether or not by insurance): ($)
(E) Negotiated reduction, if any: ($)
(F) Amount to be paid from proceeds of settlement or judgment: $

(iii) (A) Provider *(name):*
(B) Address:

(C) Amount charged: $
(D) Amount paid (whether or not by insurance): ($)
(E) Negotiated reduction, if any: ($)
(F) Amount to be paid from proceeds of settlement or judgment: $

☐ Continued on Attachment 12b(5). *(Provide information about additional providers in the above format, including providers paid or to be paid by petitioner, and for which payment reimbursement is requested in item 12b(1), above. You may use form MC-350(A-12b(5)) for this purpose.)*

13. **Claimant's attorney's fees and all other expenses (except for medical expenses), including expenses advanced by claimant's attorney or paid or incurred by petitioner, to be reimbursed from proceeds of settlement or judgment**

a. Total amount of attorney's fees for which court approval is requested: $

(If fees are requested, attach as Attachment 13a a declaration from the attorney explaining the basis for the request, including a discussion of applicable factors listed in rule 7.955(b) of the Cal. Rules of Court. Respond to item 17a(2) on page 7 and attach a copy of any written attorney fee agreement as Attachment 17a.)

b. The following additional items of expense (other than medical expenses) have been incurred or paid, are reasonable, resulted from the incident or accident, and should be paid out of claimant's share of the proceeds of the settlement or judgment:

Items	Payees *(names)*	Amounts
		$
		$
		$
		$
		$
		$
		$
		$

☐ Continued on Attachment 13b. Total: $

CASE NAME:	CASE NUMBER:

14. Reimbursement of fees and expenses paid by petitioner

a. ☐ Petitioner has paid none of the fees or expenses listed in items 12 and 13 for which reimbursement is requested.

b. ☐ Petitioner has paid (or become obligated to pay) the following total amounts of the claimant's fees and expenses for which reimbursement is requested.

(1) ☐ Medical expenses listed in item 12: $

(2) ☐ Attorney's fees included in the total fee amount shown in item 13a: $

(3) ☐ Other expenses included in the total shown in item 13b: $

Total: $

(Attach proofs of the fees and expenses incurred and the payments made or obligations to pay incurred, e.g., bills or invoices, canceled checks, credit card statements, explanations of benefits from insurers, etc.)

15. Net balance of proceeds for the claimant

The balance of the proceeds of the proposed settlement or judgment remaining for the claimant after payment of all requested fees and expenses is: $

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16. SUMMARY

a. Gross amount of proceeds of settlement or judgment for claimant: $

b. Medical expenses to be paid from proceeds of settlement or judgment: $

c. Attorney's fees to be paid from proceeds of settlement or judgment: $

d. Expenses (other than medical) to be paid from proceeds of settlement or judgment: $

e. Total fees and expenses to be paid from proceeds of settlement or judgment *(add (b), (c), and (d)):* ($)

f. Balance of proceeds of settlement or judgment available for claimant after payment of all fees and expenses *(subtract (e) from (a)):* $

CASE NAME:	CASE NUMBER:

17. Information about attorney representing or assisting petitioner

a. (1) ☐ Petitioner has not been represented or assisted by an attorney in preparing this petition or in any other way with respect to the claim asserted. *(Skip the rest of item 17 and go to item 18.)*

(2) ☐ Petitioner has been represented or assisted by an attorney in preparing this petition or with respect to the claim asserted. Petitioner and the attorney ☐ do not ☐ do have an agreement for services provided in connection with the claim giving rise to this petition.
(If you answered "do," attach a copy of the agreement as Attachment 17a, and complete items 17b–17f.)

b. The attorney who has represented or assisted petitioner is *(name):*

(1) State Bar number:
(2) Law firm:
(3) Address:

(4) Telephone number: (5) Email:

c. The attorney ☐ has not ☐ has received attorney's fees or other compensation in addition to that requested in this petition for services provided in connection with the claim giving rise to this petition. *(If you answered "has," identify the person who paid the fees or other compensation, the amounts paid, and the dates of payment):*

From whom *(names)*	Amounts	Dates
	$	
	$	
	$	
	$	
	$	

☐ Continued on Attachment 17c.

d. The attorney ☐ did not ☐ did become concerned with this matter, directly or indirectly, at the instance of a party against whom the claim is asserted or a party's insurance carrier. *(If you answered "did," explain the circumstances in Attachment 17d.)*

e. The attorney ☐ is not ☐ is representing or employed by any other party or any insurance carrier involved in the matter. *(If you answered "is," identify the party or carrier and explain the relationship in Attachment 17e.)*

f. The attorney ☐ does not ☐ does expect to receive attorney's fees or other compensation in addition to that requested in this petition for services provided in connection with the claim giving rise to this petition. *(If you answered "does," identify the person who will pay the fees or other compensation, the amounts to be paid, and the expected dates of payment):*

From whom *(names)*	Amounts	Expected dates
	$	
	$	
	$	
	$	
	$	

☐ Continued on Attachment 17f.

CASE NAME:	CASE NUMBER:

18. **Disposition of balance of proceeds of settlement or judgment** *(check either a or b, then check each option requested):*

a. ☐ There **is** a guardianship of the estate of the minor or a conservatorship of the estate of the adult person with a disability filed in *(name of court):*
Case no.:

(1) ☐ Petitioner requests that $ of the proceeds in money or other property be paid or delivered to the guardian or the conservator of the estate. The money or other property is specified in Attachment 18a(1).

(2) ☐ Petitioner is the guardian or conservator of the estate of the minor or the adult person with a disability. Petitioner requests authority to deposit or invest $ of the money or other property to be paid or delivered under 18a(1) in insured accounts in one or more financial institutions in this state or with a trust company, subject to withdrawal only on authorization of the court. The money or other property and the name, branch, and address of each financial institution or trust company are specified in Attachment 18a(2).

(3) ☐ Petitioner proposes that all or a portion of the proceeds **not** become part of the guardianship or conservatorship estate. Petitioner requests authority to deposit or transfer these proceeds as follows *(check all that apply):*

(a) ☐ $ to be deposited in insured accounts in one or more financial institutions in this state, subject to withdrawal only on authorization of the court. The name, branch, and address of each depository are specified in Attachment 18a(3)(a).

(b) ☐ $ to be invested in a single-premium deferred annuity, subject to withdrawal only on authorization of the court. The terms and conditions of the annuity are specified in Attachment 18a(3)(b).

(c) ☐ $ to be transferred to a custodian for the benefit of the minor under the California Uniform Transfers to Minors Act. The name and address of the proposed custodian and the property to be transferred are specified in Attachment 18a(3)(c).

(d) ☐ $ to be transferred to the trustee of a trust that is either created by or approved in the order approving the settlement or judgment for the minor. This trust is revocable when the minor reaches 18 years of age and contains all other terms and conditions determined to be necessary by the court to protect the minor's interests. The terms of the proposed trust and the property to be transferred are specified in Attachment 18a(3)(d).
☐ A copy of the (proposed) judgment is attached as Attachment 3c.

(e) ☐ $ to be transferred to the trustee of a special needs trust under Probate Code section 3604 for the benefit of the minor or the adult person with a disability. The terms of the proposed special needs trust and the property to be transferred are specified in Attachment 18a(3)(e).

b. ☐ There is **no** guardianship or conservatorship of the estate of the claimant. Petitioner requests that the court order the disposition of the balance of the proceeds of the settlement or judgment as follows *(check each option requested):*

(1) ☐ A guardian of the estate of the minor or a conservator of the estate of the adult person with a disability be appointed and $ of money and other property be paid or delivered to the person so appointed. The money or other property are specified in Attachment 18b(1).

(2) ☐ $ be deposited in insured accounts in one or more financial institutions in this state, subject to withdrawal only on authorization of the court. The name, branch, and address of each depository are specified in Attachment 18b(2).

(3) ☐ $ be invested in a single-premium deferred annuity, subject to withdrawal only on authorization of the court. The terms and conditions of the annuity are specified in Attachment 18b(3).

(4) ☐ $ be paid or transferred to the trustee of a special needs trust under Probate Code section 3604 for the benefit of the minor or the adult person with a disability. The terms of the proposed special needs trust and the money or other property to be paid or transferred are specified in Attachment 18b(4).

(5) ☐ $ be paid or delivered to a parent of the minor, without bond, on the terms and under the conditions specified in Probate Code sections 3401–3402. The name and address of the parent and the money or other property to be delivered are specified in Attachment 18b(5). *(Value of minor's entire estate, including the money or property to be delivered, must not exceed $5,000.)*

(6) ☐ $ be transferred to a custodian for the benefit of the minor under the California Uniform Transfers to Minors Act. The name and address of the proposed custodian and the money or other property to be transferred are specified in Attachment 18b(6).

CASE NAME:	CASE NUMBER:

18. **Disposition of balance of proceeds of settlement or judgment** (continued)

b. ☐ There is **no** guardianship or conservatorship of the claimant's estate. Petitioner requests that the court order the disposition of the balance of the proceeds of the settlement or judgment as follows *(check each option requested)*:

(7) ☐ $ be transferred to the trustee of a trust that is either created by or approved in the order approving the settlement or judgment for the minor. This trust is revocable when the minor reaches 18 years of age, and contains all other terms and conditions determined to be necessary by the court to protect the minor's interests. The terms of the proposed trust and the money or other property to be transferred are specified in Attachment 18b(7).
☐ A copy of the (proposed) judgment is attached as Attachment 3c.

(8) ☐ $ of money be held on any conditions the court determines are in the best interest of the minor or the adult person with a disability. The proposed conditions are specified on Attachment 18b(8). *(Value must not exceed $20,000.)*

(9) ☐ $ of property other than money be held on the conditions that the court determines are in the best interest of the minor or the adult person with a disability. The proposed conditions and the property are specified in Attachment 18b(9).

(10) ☐ $ be deposited with the county treasurer of the County of *(name)*:
The deposit is authorized under and subject to the conditions specified in Probate Code section 3611(h).

(11) ☐ $ be paid or delivered to the adult person with a disability. The money or other property is specified in Attachment 18b(11).

19. ☐ **Statutory liens for special needs trust**
Petitioner requests an order for payment of funds to a special needs trust *(explain how statutory liens under Probate Code section 3604, if any, will be satisfied)*:

☐ Continued on Attachment 19.

20. ☐ **Additional orders**
Petitioner requests the following additional orders *(specify and explain)*:

☐ Continued on Attachment 20.

CASE NAME:	CASE NUMBER:

21. ☐ Claimant consents to the requested orders or judgment *(required if claimant is an adult with a disability who has the capacity, under Probate Code section 812, to consent to orders under sections 3600–3602 and 3610–3611 and does not have a conservator of the estate. See Prob. Code, § 3613.)*

Date:

(TYPE OR PRINT NAME OF CLAIMANT) ▶ (SIGNATURE OF CLAIMANT)

22. Petitioner recommends approval of the proposed compromise, settlement, or disposition of judgment proceeds to the court as fair, reasonable, and in the best interest of the claimant. Petitioner requests that the court approve this compromise, settlement, or disposition and make any other orders that are just and reasonable.

23. Number of pages attached: _____

Date:

(TYPE OR PRINT NAME OF ATTORNEY) ▶ (SIGNATURE OF ATTORNEY)

I declare under penalty of perjury under the laws of the State of California that the information provided on this form and all attachments is true and correct.

Date:

(TYPE OR PRINT NAME OF PETITIONER) ▶ (SIGNATURE OF PETITIONER)

CASE NAME:	CASE NUMBER:

ATTACHMENT TO PETITION FOR APPROVAL OF COMPROMISE OR DISPOSITION OF JUDGMENT PROCEEDS— ADDITIONAL MEDICAL SERVICE PROVIDERS

If you are using form MC-350 to file a petition for court approval of the compromise of a claim or action or the disposition of judgment proceeds for a minor or person with a disability, you must provide complete information in item 12b(5) of form MC-350 about any medical service providers (1) that have liens for payment for medical services provided to the minor or person with a disability or (2) that you paid (or will pay from the proceeds), for which payment you request reimbursement from the proceeds of the compromise or judgment. If you don't have enough room on form MC-350, you may use one or more copies of this form to provide the required information about additional medical service providers.

Attachment 12b(5) to form MC-350

12. b. (5) (b) Each medical service provider that furnished care and treatment to claimant and (1) has a lien for all or any part of the charges or (2) was paid (or will be paid from the proceeds) by petitioner, for which payment petitioner requests reimbursement; the amounts charged and paid; the amount of negotiated reductions of charges, if any; and the amount to be paid from the proceeds of the settlement or judgment to each provider are as follows:

___(A) Provider *(name):*
(B) Address:

(C) Amount charged: $
(D) Amount paid (whether or not by insurance): ($)
(E) Negotiated reduction, if any: ($)
(F) Amount to be paid from proceeds of settlement or judgment: $

___(A) Provider *(name):*
(B) Address:

(C) Amount charged: $
(D) Amount paid (whether or not by insurance): ($)
(E) Negotiated reduction, if any: ($)
(F) Amount to be paid from proceeds of settlement or judgment: $

___(A) Provider *(name):*
(B) Address:

(C) Amount charged: $
(D) Amount paid (whether or not by insurance): ($)
(E) Negotiated reduction, if any: ($)
(F) Amount to be paid from proceeds of settlement or judgment: $

___(A) Provider *(name):*
(B) Address:

(C) Amount charged: $
(D) Amount paid (whether or not by insurance): ($)
(E) Negotiated reduction, if any: ($)
(F) Amount to be paid from proceeds of settlement or judgment: $

Form Approved for Optional Use
Judicial Council of California
MC-350(A-12b(5)) [Rev. January 1, 2021]

Code of Civil Procedure, § 372 et seq.;
Probate Code, §§ 3500, 3600–3613;
Cal. Rules of Court, rules 3.1384, 7.950
www.courts.ca.gov

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):		**DRAFT** **Not approved by** **the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
CASE NAME:		CASE NUMBER:
PETITION FOR EXPEDITED APPROVAL OF COMPROMISE OR DISPOSITION OF JUDGMENT PROCEEDS FOR MINOR OR PERSON WITH A DISABILITY		☐ No hearing date is requested. ☐ HEARING DATE: DEPT.: TIME:

NOTICE TO PETITIONER

You must use this form to request expedited court approval of a qualifying (1) compromise of a minor's disputed claim, (2) compromise of a pending action or proceeding in which a minor or a person with a disability (including a conservatee) is a party, or (3) disposition of the proceeds of a judgment for a minor or person with a disability. (See Code Civ. Proc., § 372; Prob. Code, §§ 3500, 3600–3613.) You may request expedited approval ***only if*** (1) you are represented by an attorney; (2) the statements in items 3a, 3b, 3c, 3d, 3e, 3f, and either 3g(1) or 3g(2), below, are true; and (3) the court does not otherwise order.

If your compromise or judgment qualifies and you choose to use this form, the court may consider and act on your petition without a hearing. If your compromise or judgment qualifies for expedited consideration but you choose not to use this form or your compromise or judgment does not qualify for expedited consideration, you *must* use *Petition for Approval of Compromise or Disposition of Judgment Proceeds for Minor or Person With a Disability* (form MC-350), and the court will schedule a hearing.

1. Petitioner *(name):*
   is the *(check all boxes that apply):* ☐ Parent ☐ Guardian ad litem ☐ Guardian ☐ Conservator
   ☐ Other *(specify relationship):*
   of the claimant identified in item 2.

2. **Claimant** *(name):*
   a. Address:
   b. Date of birth: c. Age: d. ☐ Minor or ☐ Person with a disability
   e. ☐ Has the capacity, within the meaning of Probate Code section 812, to consent to the requested order or judgment.
   f. ☐ Does not have a conservator of the estate.
   (An adult claimant with a disability who (1) has capacity to consent to the order requested and (2) does not have a conservator of the estate must give express consent to the order requested. (Prob. Code, 3613.) See item 21, below.)

3. **Qualification for Expedited Approval**
   a. The claimant's claim or action is **not** for damages for the death of a person caused by the wrongful act or neglect of another.
   b. No portion of the net proceeds of the judgment or settlement in favor of the claimant is to be placed in a trust.
   c. There are no unresolved disputes concerning liens to be satisfied from the proceeds of the judgment or settlement.
   d. Petitioner's attorney did not become involved with this matter, directly or indirectly, at the request of a party against whom the claim is asserted or a party's insurance carrier.
   e. Petitioner's attorney is not representing, employed by, or associated with a defendant in this matter or an insurance carrier.
   f. All defendants that have appeared in a pending action on the claim are participating in the proposed compromise **or** the court has made a final determination that all settling parties entered into the settlement in good faith.
   g. (1) ☐ The judgment described in item 4c (exclusive of interest and costs) or the total settlement described in items 11 and 12 payable to the claimant and all other persons named in item 12 is in the amount of $50,000 or less; or
      (2) ☐ The settlement described in item 11 represents payment of the single-person policy limits of all liability insurance policies covering the defendants named in that item. The investigation described in Attachment 3 shows that all of those defendants are judgment-proof outside of their insurance coverage. *(Describe investigation and results in Attachment 3.)*

Form Adopted for Alternative Mandatory Use
Instead of Form MC-350
Judicial Council of California
MC-350EX [Rev. January 1, 2021]

Code of Civil Procedure § 372;
Probate Code, §§ 3500, 3600–3613;
Cal. Rules of Court, rules 3.1384, 7.101, 7.950, 7.950.5, 7.951
www.courts.ca.gov

CASE NAME:	CASE NUMBER:

4. **Claim** The claim of the minor or adult person with a disability:
   a. ☐ Is not the subject of a pending action or proceeding. *(Complete items 5–23.)*
   b. ☐ Is the subject of a pending action or proceeding that will be compromised without a trial. *(Complete items 5–23.)*
      Name of court:
      Case no.: Trial date:
   c. ☐ Is the subject of an action or proceeding in which a judgment has been or will be entered for the claimant against the defendants named below in the amount (exclusive of interest and costs) of *(specify):* $

      Defendants *(names)*

      ☐ Additional defendants listed on Attachment 4. ☐ The judgment was filed on *(date):*
      (Attach a copy of the (proposed) judgment as Attachment 4c and complete items 13–23.)

5. **Incident or accident** The incident or accident occurred as follows:
   a. Date: Time:
   b. Place:
   c. Persons involved *(names):*

      ☐ Additional persons listed on Attachment 5.

6. **Nature of incident or accident**
   The facts, events, and circumstances of the incident or accident are *(describe what happened):*

   ☐ Continued on Attachment 6.

7. **Injuries**
   The following injuries were sustained by the claimant as a result of the incident or accident *(describe):*

   ☐ Continued on Attachment 7.

8. **Treatment**
   The claimant received the following care and treatment for the injuries described in item 7 *(describe):*

   ☐ Continued on Attachment 8.

CASE NAME:	CASE NUMBER:

9. ☐ **Recovery from injuries** *(An original or a photocopy of all doctors' reports containing a diagnosis of and prognosis for the claimant's injuries, and a report of the claimant's current condition, must be attached to this petition as Attachment 9. A new report is not necessary if a previous report accurately describes the claimant's current condition.)*
   a. ☐ The claimant has recovered completely from the effects of the injuries described in item 7, and there are no permanent injuries.
   b. ☐ The claimant has not recovered completely from the effects of the injuries described in item 7, and the following injuries from which the claimant has not recovered are temporary *(describe the remaining temporary injuries):*

      ☐ Continued on Attachment 9b.
   c. ☐ The claimant has not recovered completely from the effects of the injuries described in item 7, and the following injuries from which the claimant has not recovered are permanent *(describe the permanent injuries):*

      ☐ Continued on Attachment 9c.

10. ☐ **Petitioner has made a careful and diligent inquiry and investigation into the facts and circumstances of the incident or accident in which the claimant was injured; the responsibility for the incident or accident; and the nature, extent, and seriousness of the claimant's injuries. Petitioner understands that if the compromise proposed in this petition is approved by the court and consummated, the claimant will never be able to recover any more compensation from the settling defendants named below even if the claimant's injuries turn out to be more serious than they now appear.**

11. ☐ **Amount and terms of settlement**

To settle the claim in 4a or 4b, the defendants named below have offered to pay the following amounts to the claimant:

   a. The total amount offered by all defendants named below is *(specify):* $
   b. The defendants and amounts offered by each are as follows *(specify):*

Defendants *(names)*	Amounts
	$
	$
	$
	$

      ☐ Additional defendants and amounts offered are listed on Attachment 11b.
   c. The terms of settlement are described on Attachment 11c. *(If the settlement is to be paid in installments, both the total amount and the present value of the settlement must be included.)*

12. ☐ **Settlement payments to others**
   a. ☐ No defendant named in item 11b has offered to pay money to any person or persons other than the claimant to settle claims arising out of the same incident or accident that resulted in the claimant's injury.
   b. ☐ One or more of the defendants named in item 11b have also offered to pay money to a person or persons other than claimant to settle claims arising out of the same incident or accident that resulted in the claimant's injury.
      (1) The total amount offered by all defendants to others is *(specify):* $
      (2) ☐ Petitioner would receive money under the proposed settlement.
      (3) The settlement payments are to be apportioned and distributed as follows:

Other plaintiffs or claimants *(names)*	Amounts
	$
	$
	$
	$

      ☐ Additional plaintiffs or claimants and amounts are listed on Attachment 12.
      (4) ☐ The settlement payments are apportioned between the claimant and each other plaintiff or claimant named above on a pro rata basis, based upon the special damages claimed by each. The special damages claimed by each other plaintiff or claimant are specified on Attachment 12.
      (5) ☐ Reasons for the apportionment of the settlement payments between the claimant and each other plaintiff or claimant named above are specified on Attachment 12.

CASE NAME:	CASE NUMBER:

13. **Claimant's *medical expenses*—including expenses paid by petitioner, Medicare, Medi-Cal, and private insurers—that are to be paid or reimbursed from the proceeds of the settlement or judgment**

a. **Totals**

(1) Total expenses: $

(2) Total amount paid (including payments by private insurance, Medi-Cal, or Medicare): ($)

(3) Total of negotiated reductions, if any: ($)

(4) Total amount of medical expenses to be paid or reimbursed from proceeds: $

(5) Total amount of medical liens, if any: $

(Identify each medical expense payer and the amount each paid, and explain any differences between items 13a(1), (4), and (5) in Attachment 13a.)

b. (1) ☐ None of the claimant's medical expenses have been paid by Medicare.

(2) ☐ Medicare paid some or all of claimant's medical expenses. In full satisfaction of its lien rights, Medicare will be reimbursed in the amount of $

(Attach a copy of the final Medicare demand letter or letter agreement as Attachment 13b(2).)

c. (1) ☐ None of the claimant's medical expenses have been paid by Medi-Cal.

(2) ☐ Medi-Cal paid some or all of claimant's medical expenses.

(a) Notice of this claim or action has been given to the State Director of Health Care Services under Welfare and Institutions Code section 14124.73. A copy of the notice and proof of its delivery ☐ is attached.
☐ was filed in this matter on *(date):*

(b) In full satisfaction of its lien rights, Medi-Cal has agreed to accept reimbursement in the amount of: $

(Attach a copy of the final Medi-Cal demand letter or letter agreement as Attachment 13c(2).)

d. ☐ The claimant's health plan is requesting reimbursement for medical expenses paid under the plan. In full satisfaction of the plan's lien rights, it will be reimbursed in the amount of: $

(Attach statements from the plan showing expense payments and requesting reimbursement.)

e. ☐ Petitioner has paid claimant's medical expenses to be reimbursed in the amount of: $

(See instructions for item 15.)

f. ☐ There are one or more liens from medical service providers for payment of claimant's medical expenses. In full satisfaction of their lien claims, the lienholders have agreed to accept the sum of: $

g. *(Select (1) or (2) below.)*

(1) ☐ Latest statements from all medical service providers are attached as Attachment 13g.

(2) ☐ All medical expenses have been paid by private insurance, Medicare, or Medi-Cal.

14. **Claimant's attorney's fees and all other expenses (except medical expenses), including fees or expenses paid by petitioner and claimant's attorney, to be paid or reimbursed from proceeds of settlement or judgment**

a. Total amount of attorney's fees for which court approval is requested: $

(If fees are requested, attach as Attachment 14a a declaration from the attorney explaining the basis for the request, including a discussion of applicable factors listed in rule 7.955(b) of the Cal. Rules of Court. Include a copy of any written attorney fee agreement in Attachment 14a.)

b. The following additional items of expense (other than medical expenses) have been incurred or paid, are reasonable, resulted from the incident or accident, and should be paid or reimbursed out of claimant's share of the proceeds of the settlement or judgment:

Items	Payees *(names)*	Amounts
		$
		$
		$
		$
		$
		$
		$
		$

☐ Continued on Attachment 14b. **Total:** $

c. ☐ Costs of suit attributable to more than one settling plaintiff are **not** apportioned between them on a pro rata basis based on their gross settlement amounts. The apportionment of these costs is described and explained in Attachment 14c.

CASE NAME:	CASE NUMBER:

15. Reimbursement of fees and expenses paid by petitioner

a. ☐ Petitioner has paid none of the fees or expenses listed in items 13 and 14 for which reimbursement is requested.

b. ☐ Petitioner has paid the following total amounts of the claimant's fees and expenses for which reimbursement is requested.

(1) ☐ Medical expenses listed in item 13: $

(2) ☐ Attorney's fees included in the total fee amount shown in item 14a: $

(3) ☐ Other expenses included in the total shown in item 14b: $

(Attach proofs of the fees and expenses incurred and payments made, e.g., bills or invoices, canceled checks, credit card statements, explanations of benefits from insurers, etc.)

Total: $

16. Net balance of proceeds remaining for claimant

The balance of the proceeds of the proposed settlement or judgment remaining for the claimant after payment or reimbursement of all requested fees and expenses is *(specify):* $

---

17. Summary

a. Gross amount of proceeds of settlement or judgment for claimant:		$
b. Medical expenses to be paid from proceeds of settlement or judgment:	$	
c. Attorney's fees to be paid from proceeds of settlement or judgment:	$	
d. Expenses (other than medical) to be paid from proceeds of settlement or judgment:	$	
e. Total fees and expenses to be paid from proceeds of settlement or judgment *(add (b), (c), and (d)):*		($)
f. Balance of proceeds of settlement or judgment available for claimant after payment of all fees and expenses *(subtract (e) from (a)):*		$

---

18. Information about attorney representing or assisting petitioner

a. The attorney ☐ is not ☐ is representing or employed by any other party involved in this matter.
(If you answered "is," identify the other party and explain the relationship in Attachment 18a. If the other party is a defendant, you must use form MC-350 for your petition and are not eligible for expedited consideration by the court. See item 3e on page 1 and Cal. Rules of Court, rule 7.950.5(a)(6).)

b. The attorney ☐ has neither received nor expects to receive ☐ has received or expects to receive attorney's fees or other compensation in addition to that requested in this petition for services provided in connection with the claim giving rise to this petition *(if you answered "has received or expects to receive," identify the person who paid or will pay the fees or other compensation, the amounts paid or to be paid, and the dates of payment or expected payment):*

From Whom Paid or Expected *(name):*	Date Paid or Expected	Amount Paid or Expected
		$
		$
		$
		$
		$
		$
		$

☐ Continued on Attachment 18b.

Total: $

CASE NAME:	CASE NUMBER:

19. **Disposition of balance of proceeds of settlement or judgment** *(check either a or b, then check each option requested):*

a. ☐ There **is** a guardianship of the estate of the minor or a conservatorship of the estate of the adult person with a disability filed in *(name of court):*
Case no.:

(1) ☐ Petitioner requests that $ of the proceeds in money or other property be paid or delivered to the guardian of the estate of the minor or the conservator of the estate of the conservatee. The money or other property is specified in Attachment 19a(1).

(2) ☐ Petitioner is the guardian or conservator of the estate of the minor or the adult person with a disability. Petitioner requests authority to deposit or invest $ of the money or other property to be paid or delivered under 19a(1) in one or more insured accounts with financial institutions in this state or with a trust company, subject to withdrawal only on authorization of the court. The money or other property and the name, branch, and address of each financial institution or trust company are specified in Attachment 19a(2).

(3) ☐ Petitioner proposes that all or a portion of the proceeds **not** become part of the guardianship or conservatorship estate. Petitioner requests authority to deposit or transfer these proceeds as follows *(check all that apply):*

(a) ☐ $ to be deposited in insured accounts in one or more financial institutions in this state, subject to withdrawal only on authorization of the court. The name, branch, and address of each depository are specified in Attachment 19a(3)(a).

(b) ☐ $ to be invested in a single-premium deferred annuity, subject to withdrawal only on authorization of the court. The terms and conditions of the annuity are specified in Attachment 19a(3)(b).

(c) ☐ $ to be transferred to a custodian for the benefit of the minor under the California Uniform Transfers to Minors Act. The name and address of the proposed custodian and the property to be transferred are specified in Attachment 19a(3)(c).

b. ☐ There is **no** guardianship of the estate of the minor or conservatorship of the estate of the adult person with a disability. Petitioner requests that the balance of the proceeds of the settlement or judgment be disbursed as follows *(check all that apply):*

(1) ☐ A guardian of the estate of the minor or a conservator of the estate of the adult person with a disability be appointed and $ of money and other property be paid or delivered to the person so appointed. The money or other property are specified in Attachment 19b(1).

(2) ☐ $ of money be deposited in insured accounts in one or more financial institutions in this state, subject to withdrawal only on authorization of the court. The name, branch, and address of each depository are specified in Attachment 19b(2).

(3) ☐ $ of money be invested in a single-premium deferred annuity, subject to withdrawal only on authorization of the court. The terms and conditions of the annuity are specified in Attachment 19b(3).

(4) ☐ $ be paid or delivered to a parent of the minor on the terms and under the conditions specified in Probate Code sections 3401–3402, without bond. The name and address of the parent and the money or other property to be delivered are specified in Attachment 19b(4). *(Value of minor's entire estate, including the money or property to be delivered, must not exceed $5,000.)*

(5) ☐ $ be transferred to a custodian for the benefit of the minor under the California Uniform Transfers to Minors Act. The name and address of the proposed custodian and the money or other property to be transferred are specified in Attachment 19b(5).

(6) ☐ $ of money be held on the conditions that the court determines to be in the best interest of the minor or adult person with a disability. The proposed conditions are specified on Attachment 19b(6). *(Value must not exceed $20,000.)*

(7) ☐ $ of property other than money be held on the conditions that the court determines to be in the best interest of the minor or adult person with a disability. The proposed conditions and the property are specified in Attachment 19b(7).

(8) ☐ $ be deposited with the county treasurer of the County of *(name):*
The deposit is authorized under and subject to the conditions specified in Probate Code section 3611(h).

(9) ☐ $ be paid or transferred to the adult person with a disability. The money or other property is specified in Attachment 19b(9).

CASE NAME:	CASE NUMBER:

20. ☐ **Additional orders**

Petitioner requests the following additional orders *(specify and explain):*

☐ Continued on Attachment 20.

21. ☐ Claimant consents to the requested orders or judgment *(required if claimant is an adult with a disability who has the capacity, under Probate Code section 812, to consent to orders under sections 3600–3602 and 3610–3611 and does not have a conservator of the estate. See Prob. Code, § 3613.)*

Date:

(TYPE OR PRINT NAME OF CLAIMANT) ▶ (SIGNATURE OF CLAIMANT)

22. Petitioner recommends the proposed compromise, settlement, or disposition of judgment proceeds for the claimant to the court as being fair, reasonable, and in the best interest of the claimant. Petitioner requests that the court approve this compromise, settlement, or disposition and make any other orders that are just and reasonable.

23. Number of pages attached: _____

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF ATTORNEY)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME OF PETITIONER) ▶ (SIGNATURE OF PETITIONER)

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):		**DRAFT** **Not approved by** **the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
CASE NAME:		
ORDER APPROVING COMPROMISE OR DISPOSITION OF JUDGMENT PROCEEDS FOR MINOR OR PERSON WITH A DISABILITY	CASE NUMBER:	
	HEARING DATE, IF ANY:	DEPT.:

1. **Petitioner** *(name):*
   is the *(check all relationships or representative capacities that apply):* ☐ parent ☐ guardian ad litem ☐ guardian ☐ conservator ☐ other *(specify):*
   of the claimant named in item 3. Petitioner has requested approval of the compromise or settlement of a disputed claim or pending action or the disposition of the proceeds of a judgment for a minor or a person with a disability.

2. **Hearing**
   a. ☐ No hearing was held. The petition sought expedited approval under rule 7.950.5 of the California Rules of Court.
   b. ☐ A hearing was held: Date: Time: Dept.:
   c. Judicial officer:

3. **Claimant** *(name):*
   a. ☐ is a minor.
   b. ☐ is a "person with a disability" within the meaning of Probate Code section 3603 who is:
      (1) ☐ An adult. Claimant's date of birth is *(specify):*
         (a) ☐ A person without a conservator. Claimant has the capacity to consent to this order within the meaning of Probate Code section 812, and has consented to this order.
         (b) ☐ A conservatee, a person for whom a conservator may be appointed, or a person who lacks the capacity to consent to this order within the meaning of Probate Code section 812.
      (2) ☐ A minor described in Probate Code section 3603(b)(3).

4. **Defendant**
   The claim or action to be compromised or settled is asserted, or the judgment is entered, against *(name of settling or judgment defendant or defendants (the "payer")):*

Form Adopted for Mandatory Use
Judicial Council of California
MC-351 [Rev. January 1, 2021]

Code of Civil Procedure, § 372;
Probate Code, §§ 3500, 3600–3613;
Cal. Rules of Court, rules 3.1384, 7.953
www.courts.ca.gov

CASE NAME:	CASE NUMBER:

5. **THE COURT FINDS** that all notices required by law have been given.

6. **THE COURT ORDERS**

a. The petition is granted and the proposed compromise or settlement, or the proposed disposition of the proceeds of the judgment, is approved. The gross amount or value of the settlement or judgment in favor of claimant is $

b. ☐ Until further order of the court, jurisdiction is reserved to determine a claim for a reduction of a Medi-Cal lien under Welfare and Institutions Code section 14124.76. The amount shown payable to the Department of Health Care Services in item 6c(1)(d) of this order is the full amount of the lien claimed by the department but is subject to reduction on further order of the court upon determination of the claim for reduction.

c. The payer must disburse the proceeds of the settlement or judgment approved by this order in the following manner:

(1) **Payment of fees and expenses**

Fees and expenses shall be paid by one or more checks or drafts drawn payable to the order of the petitioner and the petitioner's attorney, if any, or directly to third parties entitled to receive payment identified in this order for the following items of expense or damage, which are hereby authorized to be paid out of the proceeds of the settlement or judgment:

(a) ☐ Attorney's fees in the total amount of: $ payable to *(specify):*

(b) ☐ Reimbursement for medical and all other expenses paid by the petitioner or the petitioner's attorney in the total amount of: $

(c) ☐ Medical, hospital, ambulance, nursing, and other similar expenses payable directly to providers as follows, in the total amount of: $

(i) Payee *(name):*
(A) address:

(B) Amount: $

(ii) Payee *(name):*
(A) address:

(B) Amount: $

☐ Continued on Attachment 6c(1)(c). *(Provide information about additional payees in the above format.)*

(d) ☐ Other authorized disbursements payable directly to third parties in the total amount of: $
(Describe and state the amount of each item and provide the name and address of each payee):

☐ Continued on Attachment 6c(1)(d).

(e) ☐ Total allowance for fees and expenses from the settlement or judgment: $

CASE NAME:	CASE NUMBER:

6. **THE COURT ORDERS** (continued)

c. The payer shall disburse the proceeds of the compromise, settlement, or judgment approved by this order as follows:

(2) **Balance**

The balance of the settlement or judgment available for claimant after payment of all allowed fees and expenses is: $

The balance shall be disbursed as follows:

(a) ☐ By one or more checks or drafts in the total amount of *(specify):* $ drawn payable to the order of the petitioner. Each check or draft must bear an endorsement on the face or reverse that it is for deposit in one or more interest-bearing, federally insured accounts in the name of the petitioner in the petitioner's representative capacity. No withdrawals may be made from these accounts ("blocked accounts") except as provided in the *Order to Deposit Funds Into Blocked Account* (form MC-355), which is signed at the same time as this order .

(b) ☐ By the following method(s) *(describe each method, including the amount to be disbursed by each):*

☐ Continued on Attachment 6c(2)(b).

(c) ☐ If money is to be paid to a special needs trust under Probate Code section 3604, all statutory liens in favor of the state Department of Health Care Services, the state Department of Mental Health, the state Department of Developmental Services, and any city and county in California must first be satisfied by the following method *(specify):*

☐ Continued on Attachment 6c(2)(c).

7. ☐ **Further orders of the court concerning blocked accounts**

The court makes the following additional orders concerning any part of the balance ordered to be deposited in a blocked account under item 6c(2)(a):

a. Within 48 hours of receipt of a check or draft described in item 6c(2)(a), the petitioner and the petitioner's attorney, if any, must deposit the check or draft in the name of petitioner in the petitioner's representative capacity in one or more blocked accounts at *(specify name, branch, and address of each depository, and the amount of each account):*

☐ Continued on Attachment 7a.

CASE NAME:	CASE NUMBER:

7. **Further orders of the court concerning blocked accounts** (continued)

The court makes the following additional orders concerning any part of the balance ordered to be deposited in a blocked account under item 6c(2)(a):

b. The petitioner and the petitioner's attorney, if any, must deliver to each depository at the time of deposit three copies of the *Order to Deposit Funds Into Blocked Account* (form MC-355), which is signed at the same time as this order, and three copies of the *Acknowledgment of Receipt of Funds and Order to Deposit Funds Into Blocked Account* (form MC-356). The petitioner or the petitioner's attorney must file a copy of the receipt with this court within 15 days of the deposit. The sole responsibilities of the petitioner and the petitioner's attorney, if any, are to place the balance in a blocked account or accounts and to file a copy of the receipt on time.

c. The balance of the proceeds of the settlement or judgment deposited in a blocked account or accounts under item 6c(2)(a) may be withdrawn only as follows (*check (1) or (2)):*

(1) ☐ No withdrawals of principal or interest may be made from the blocked account or accounts without a further written order under this case name and number, signed by a judicial officer, and file-stamped by this court. The money on deposit is not subject to escheat.

(2) ☐ The blocked account or accounts belong to a minor, who was born on *(date):*
No withdrawals of principal or interest may be made from the blocked account or accounts without a further written order under this case name and number, signed by a judicial officer, and file-stamped by this court, until the minor reaches 18 years of age. When the minor reaches 18 years of age, the depository, without further order of this court, is authorized and directed to pay by check or draft directly to the former minor, upon proper demand, all funds, including interest, deposited under this order. The money on deposit is not subject to escheat.

8. ☐ **Authorization to execute settlement documents**

The petitioner is authorized to execute settlement documents as follows *(check only one):*

a. ☐ On receipt of the full amount of the settlement sum approved by this order and the deposit of funds, the petitioner is authorized and directed to execute and deliver to the payer (1) a full, complete, and final release and discharge of any and all claims and demands of the claimant by reason of the accident or incident described in the petition and the resultant injuries to the claimant and (2) a properly executed dismissal with prejudice.

b. ☐ The petitioner is authorized and directed to execute any and all documents reasonably necessary to carry out the terms of the settlement.

c. ☐ The petitioner is authorized and directed to *(specify):*

☐ Continued on Attachment 8c.

9. Bond is ☐ ordered and fixed in the amount of: $ ☐ not required.

10. A copy of this order must be served on the payer immediately.

11. ☐ **Additional orders**
The court makes the following additional orders *(specify):*

☐ Continued on Attachment 11.

Date:

JUDICIAL OFFICER

☐ SIGNATURE FOLLOWS LAST ATTACHMENT

ATTORNEY OR PARTY WITHOUT ATTORNEY STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
ORDER TO DEPOSIT FUNDS INTO BLOCKED ACCOUNT	CASE NUMBER:

1. The petition of *(name):*
   as *(specify representative capacity):* to deposit
   funds in a blocked account or blocked accounts came on for hearing on *(date):* at *(time):*
   in Dept.:

THE COURT ORDERS

2. Funds that belong to *(name):*
   must be deposited in one or more interest-bearing, federally insured blocked accounts.

3. Each account must be opened in the name of the petitioner as ☐ custodian ☐ guardian ☐ conservator ☐ trustee for the person named in 2.

4. The total amount authorized for deposit, including any accrued interest, is: $

5. Withdrawals *(check a or b):*

   a. ☐ No withdrawal of principal or interest may be made from the blocked account or accounts without a written order under this case name and number signed by a judicial officer and file-stamped by this court. The money on deposit is not subject to escheat.

   b. ☐ The funds in the blocked account or accounts belong to a minor, who was born on *(date):* .
   No withdrawal of principal or interest may be made from the blocked account or accounts without a written order under this case name and number signed by a judicial officer and file-stamped by this court until the minor reaches 18 years of age.
   When the minor reaches 18 years of age, the depository, without further order of this court, is authorized and directed to pay by check or draft directly to the former minor, upon proper demand, all funds, including interest, deposited under this order. The money on deposit is not subject to escheat.

6. The petitioner and the petitioner's attorney, if any, must (1) deliver a copy of this order to each depository in which funds are deposited under this order and (2) file with this court an acknowledgment from each depository of receipt of this order and the funds within 15 days of deposit.

Date:

▶ _____
JUDICIAL OFFICER

Form Adopted for Mandatory Use
Judicial Council of California
MC-355 [Rev. January 1, 2021]

Code of Civil Procedure, § 372;
Probate Code, §§ 3500, 3600–3613;
Cal. Rules of Court, rules 3.1384, 7.953
www.courts.ca.gov

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):		**DRAFT** **Not approved by** **the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
CASE NAME:		
ACKNOWLEDGMENT OF RECEIPT OF FUNDS AND ORDER TO DEPOSIT FUNDS INTO BLOCKED ACCOUNT		CASE NUMBER:

(Attach a copy of Order to Deposit Funds Into Blocked Account *(form MC-355) to this receipt.)*

1. I acknowledge receipt of the funds specified in 7, below, and the *Order to Deposit Funds Into Blocked Account* (form MC-355), a copy of which is attached.
2. The account described below, in which funds have been deposited under the court's order, is an interest-bearing, federally insured blocked account.
3. Name and title on account:
4. Name of depository:
   a. Branch:
   b. Address:
5. Account number:
6. Date account opened:
7. Amount of initial deposit: $
8. Current balance: $

I certify that the foregoing information is true and correct, that I am authorized to execute this acknowledgment of receipt on behalf of the depository named in 4, and that no withdrawal of principal or interest from this account will be permitted without a signed, file-stamped order under this case name and number from the court above.

Date:

(TYPE OR PRINT NAME)

(AUTHORIZED SIGNATURE)

Title:

Form Adopted for Mandatory Use
Judicial Council of California
MC-356 [Rev. January 1, 2021]

Code of Civil Procedure, § 372;
Probate Code, §§ 3500, 3600–3613;
Cal. Rules of Court, rules 3.1384, 7.953
www.courts.ca.gov

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):		**DRAFT** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
CASE NAME:		
PETITION TO WITHDRAW FUNDS FROM BLOCKED ACCOUNT ☐ **EX PARTE**		CASE NUMBER:

1. Petitioner *(name):*
   requests an order permitting the withdrawal of funds belonging to the person described in item 2.

2. The person whose funds are to be withdrawn *(name):* is
   a. ☐ a minor.
   b. ☐ a conservatee.
   c. ☐ a beneficiary.
   d. ☐ other *(specify):*

3. The information about the person identified in item 2 is as follows:
   a. Date of birth:
   b. Address:
   c. Telephone number: d. Email address:
   e. Current school *(name and address):*
   f. Current employer *(name and address):*

4. If the person identified in item 2 is a minor, the minor's parents are
   a. ☐ *(Name, address, phone number, and email):*
   b. ☐ *(Name, address, phone number, and email):*

5. Petitioner brings this petition as *(indicate representative capacity):*
   a. ☐ parent
   b. ☐ guardian
   c. ☐ conservator
   d. ☐ custodian
   e. ☐ trustee
   f. ☐ other *(specify):*

6. Account status
   a. Name and title on account:
   b. Depository *(name):*
      (1) Branch:
      (2) Address:
   c. Account number:
   d. Current balance: $

Form Adopted for Mandatory Use
Judicial Council of California
MC-357 [Rev. January 1, 2021]

Cal. Rules of Court, rules 3.1384, 7.954
www.courts.ca.gov

CASE NAME:	CASE NUMBER:

6. Account status (continued)
   e. Previous withdrawals from this account *(select one):*
      (1) ☐ None.
      (2) ☐ As follows:
         (a) Amount: $
         (b) Date:
         (c) Purpose:

      ☐ Additional previous withdrawals from this account are detailed in Attachment 6 *(for each additional previous withdrawal, give the information required by 6e(2)(a)–(c)).*

   ☐ Additional accounts from which petitioner seeks to withdraw funds are described in Attachment 6 *(for each additional account, give all the information required in 6a–6e*).

7. Amount of funds to be disbursed under this petition:
   a. ☐ Balance of account or accounts.
   b. ☐ *Other (specify total amount to be disbursed):* $

8. Reasons for disbursement of funds:
   a. ☐ Minor has reached 18 years of age, and this is a final distribution.
   b. ☐ Other *(describe):*

9. Payee to whom funds will be distributed:
   a. Payee *(name):*
      (1) Address:
      (2) Amount: $
      (3) Purpose:
   b. Payee *(name):*
      (1) Address:
      (2) Amount: $
      (3) Purpose:
   c. Payee *(name):*
      (1) Address:
      (2) Amount: $
      (3) Purpose:
   d. Payee *(name):*
      (1) Address:
      (2) Amount: $
      (3) Purpose:

   ☐ Additional payees and amounts to be distributed are listed on Attachment 9.

10. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF PETITIONER)

☐ SIGNATURE FOLLOWS LAST ATTACHMENT

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):		**DRAFT** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
CASE NAME:		
ORDER FOR WITHDRAWAL OF FUNDS FROM BLOCKED ACCOUNT		CASE NUMBER:

1. The petition of *(name):* to withdraw funds
   a. ☐ was heard ex parte.
   b. ☐ came on regularly for hearing in this court on *(date):*

THE COURT ORDERS

2. Petitioner is authorized to withdraw, and the depository is ordered, on presentation of a file-stamped copy of this order, to permit the petitioner to withdraw funds in the total amount of: $.

3. The funds are held in the following account:
   a. Name and title on the account:
   b. Depository *(name):*
      (1) Branch:
      (2) Address:
   c. Account number:

4. The funds are to be distributed by the depository, remittance payable as follows:
   a. Payee *(name):*
      Amount: $
   b. Payee *(name):*
      Amount: $
   c. Payee *(name):*
      Amount: $
   d. Payee *(name):*
      Amount: $

   ☐ Additional payees and amounts to be distributed are listed on Attachment 4.

5. ☐ The court further orders:

6. Number of pages attached: _____

Date:

▶ _____
JUDICIAL OFFICER

☐ SIGNATURE FOLLOWS LAST ATTACHMENT

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Recommend JC approval (has circulated for comment)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Protective Orders: Forms and Procedures for Protecting Minors' Information

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee and Civil and Small Claims Advisory Commitee

Staff contact (name, phone and e-mail): Frances Ho, 415-865-7662, frances.ho@jud.ca.gov; Kristi Morioka, 916-643-7056, kristi.morioka@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda:
Family and Juvenile Law Advisory Committee. As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration. AB 925 (Gloria) Protective orders: confidential information regarding minors (Ch. 294, Statutes of 2019) Expands the circumstances in which it is permissible to disclose a minor's confidential information contained in certain protective orders.

Civil and Small Claims Advisory Committee. Assembly Bill 925 expands the circumstances in which it is permissible to disclose a minor's confidential information relating to certain protective orders. Work with POWG (under lead of Family and Juvenile Law Advisory Committee) to revise forms relating to domestic violence and civil protective orders as appropriate to implement this bill. Some additional revisions to make the forms more user-friendly may be made at the same time.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.:
For business meeting on:

Title
Protective Orders: Forms and Procedures for Protecting Minors' Information

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 3.1161 and 5.382; adopt forms CH-176, CH-177, CH-178, CH-179, DV-176, DV-177, DV-178, and DV-179; revise forms CH-109, CH-160, CH-160-INFO, CH-165, CH-170, CH-175, DV-109, DV-160, DV-160-INFO, DV-165, DV-170, and DV-175

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair
Civil and Small Claims Advisory Committee
Hon. Ann I. Jones, Chair

Agenda Item Type
Action Required

Effective Date
September 1, 2020

Date of Report
April 2, 2020

Contact
Frances Ho
frances.ho@jud.ca.gov
(415) 865-7662

Kristi Morioka
kristi.morioka@jud.ca.gov
(916) 643-7056

Executive Summary

Current law provides that a minor or minor's legal guardian may ask the court to make certain information regarding the minor confidential in a domestic violence or civil harassment restraining order proceeding. Assembly Bill 925 (Stats. 2019, ch. 294) changes the penalty associated with misuse or disclosure of a minor's confidential information, provides circumstances in which the confidential information may be disclosed, and allows third-party access to the confidential information under limited circumstances. This proposal is urgently needed because AB 925 took effect on January 1, 2020.

Recommendation

The Family and Juvenile Law Advisory Committee and the Civil and Small Claims Advisory Committee jointly recommend amending rules of court, adopting eight forms (a set of four in the Domestic Violence Prevention series and a set of four in the Civil Harassment Prevention series), and revising several forms, in order to implement the provisions in AB 925. Specifically, the committees recommend that the Judicial Council, effective September 1, 2020:

1. Amend rules 3.1161 (civil harassment) and 5.382 (domestic violence);

2. Adopt *Request for Release of Minor's Confidential Information* (forms CH-176 and DV-176);

3. Adopt *Notice of Request for Release of Minor's Confidential Information* (forms CH-177 and DV-177);

4. Adopt *Response to Request for Release of Minor's Confidential Information* (forms CH-178 and DV-178);

5. Adopt *Order on Request for Release of Minor's Confidential Information* (forms CH-179 and DV-179);

6. Revise *Notice of Court Hearing* (forms CH-109 and DV-109);

7. Revise *Request to Keep Minor's Information Confidential* (forms CH-160 and DV-160);

8. Revise *Privacy Protection for a Minor (Person Under 18 Years Old)* (forms CH-160-INFO and DV-160-INFO);

9. Revise *Order on Request to Keep Minor's Information Confidential* (forms CH-165 and DV-165);

10. Revise *Notice of Order Protecting Information of Minor* (forms CH-170 and DV-170); and

11. Revise *Cover Sheet for Confidential Information* (forms CH-175 and DV-175).

The text of the amended rules and the new and revised forms are attached at pages 10-83.

Relevant Previous Council Action

The existing rules and forms for requesting confidentiality of minor's information went into effect on January 1, 2019. No changes have been made to those rules and forms since they were adopted. Forms CH 109 and DV 109 were part of the same proposal that adopted the new forms for minor's confidentiality and have not been revised since.

Analysis/Rationale

This proposal is urgently needed to implement AB 925,[1] which took effect on January 1, 2020. AB 925 changed the statutory requirements in civil harassment and domestic violence proceedings in three main ways:

1. Allows court to release confidential information to third parties;

2. Changes the penalty for misuse or unlawful disclosure to a sanction rather than contempt of court and provides for certain exceptions where disclosure is permitted without court order; and

3. Provides that an order for confidentiality made in a civil harassment or domestic violence restraining order proceeding applies to certain civil proceedings.

As most litigants in domestic violence and civil harassment restraining order proceedings are self-represented, the forms proposed here would eliminate the need for parties to create their own pleadings and draft orders. Additionally, the proposed amendments to rules are needed to provide consistency in how these requests and orders are processed.

Court-ordered release of confidential information to third parties

Effective January 1, 2020, the court may allow disclosure of information regarding a minor that has been made confidential, if the disclosure is necessary to effectuate the underlying purpose of the restraining order,[2] or if it is in the best interest of the minor. The court may do so on its own motion or by request of any person. If by request, the person (the minor or minor's legal guardian) who asked the court to make the minor's information confidential must be personally served or by first-class mail with a copy of the request (form CH-176 or DV-176) and must have the opportunity to object to the request.

To implement the above, the committees propose amending rules 3.1161 and 5.382 to describe consistent procedures for this process.

Rules 3.1161 and 5.382

These rules would be amended to:

- Require the person asking the court to release a minor's confidential information to make the request on form CH-176 or DV-176 and to submit to the court a proposed order (form CH-179 or DV-179) along with the request;
- Provide that the court, within 10 days of the filing of form CH-176 or DV-176, provide, by first-class mail, a copy of the request, the blank response form, the notice of request, and a blank cover sheet for confidential information to the person who made the request

[1] AB 925 amends section 6301.5 of the Family Code and section 527.6(v) of the Code of Civil Procedure.

[2] For domestic violence restraining orders, see Family Code section 6220; for civil harassment restraining orders, see Code of Civil Procedure section 527.6(v)(3).

for confidential information. The court must provide notice because the name and address of the person who made the request to keep a minor's information confidential is contained on a confidential form (CH-160 or DV-160) and so may not be available to the person making the request;

- Require that the person (the minor or minor's legal guardian) who asked the court to make the minor's information confidential, if objecting to the request, file the objection on form CH-178 or DV-178 within 20 days from the date of mailing of the notice by the court;
- Allow the court to deny the request for release of minor's confidential information based on the papers;
- Allow the court to schedule a hearing if the minor/legal guardian objects to the request, or to obtain more information regarding the request for release of a minor's confidential information. Any court hearing would be closed and would require at least 10 days' notice to the persons needed at the hearing;
- Require forms containing confidential information be redacted prior to filing in a public file; and
- Provide that the court will provide notice of any order granting or denying a request for release of confidential information if the court's ruling was based on the papers alone (i.e., no court hearing).

New forms CH-176 and DV-176, Request for Release of Minor's Confidential Information
This form would be used by any person who wants access to a minor's information that has been made confidential. In some cases, the person may already know the information (e.g., a minor's name or address) but needs an unredacted copy of a court order that involves the minor, like a restraining order protecting the minor.

New forms CH-177 and DV-177, Notice of Request for Release of Minor's Confidential Information
This mandatory notice form would be completed by the court and mailed to the minor or legal guardian who made the request to keep the minor's information confidential (i.e., the person who filed form CH-160 or DV-160). The court would also mail a copy of the completed form (CH-176 or DV-176), a blank copy of the response form (CH-178 or DV-178), and a blank cover sheet (CH-175 or DV-175).

New forms CH-178 and DV-178, Response to Request for Release of Minor's Confidential Information
This response form would be completed by the person (the minor or minor's legal guardian) who asked the court to make the minor's information confidential. If confidential information is provided on this form, two copies of the form must be provided to the court, along with a copy of

the mandatory cover sheet (form CH-175 or DV-175).[3] If the person who made the request for confidentiality does not agree with the request to release minor's confidential information, the response must be filed within 20 days from the time the notice is mailed by the court.

New forms CH-179 and DV-179, Order on Request for Release of Minor's Confidential Information

An order granting, denying, or setting a court hearing would be made on this form. If the court is making an order to release confidential information, a redacted copy would have to be prepared and filed in a public file and the unredacted copy would be filed in a confidential file. As with the *Order on Request to Keep Minor's Information Confidential* (forms CH-165 and DV-165), if the court issues a denial, only page 1 would be filed and the remaining pages discarded.

Revisions to forms CH-160 and DV-160, CH-165 and DV-165

An additional item would be added to the *Request to Keep Minor's Information Confidential* (forms CH-160 and DV-160), at item 9, to allow the minor or legal guardian to ask the court to give certain third parties access to unredacted restraining order forms. A parallel item would be included on the *Order on Request to Keep Minor's Information Confidential* (forms CH-165 and DV-165), at item 10. These revisions reflect the amendments in AB 925 that provide that courts may authorize disclosure of the confidential information to certain individuals or entities as necessary to implement the protective order or if otherwise in the best interest of the child. (See Code Civ. Proc, § 527.6(v)(4), eff. Jan. 1, 2020, and Fam. Code, § 6301.5(d), eff. Jan. 1, 2020.)

Revisions to forms CH-160-INFO and DV-160-INFO

The item "Is there a penalty for disclosing confidential information?" on page 3 would be revised to include an updated warning about misusing information and provide examples of when disclosure of confidential information is allowed by statute. (See the discussion of AB 925's amendments to the sanctions provisions below.) On page 2, an additional section would be added to "Tips for Step 1: Complete the forms" to explain how a person can ask the court to give third-party access to unredacted documents.

Monetary sanctions may be imposed for the misuse or disclosure of minor's confidential information

Effective January 1, 2020, the penalty for misuse or disclosure is a sanction of up to $1,000, and no longer punishable as contempt of court. Prior to imposition of a sanction, the court is required to assess the person's ability to pay. Under limited circumstances, disclosure without a court order is permitted, including any disclosure by a minor who has alleged abuse.[4]

[3] This procedure is called for under current rules 3.1161(i) (for civil harassment cases) and 5.382(i) (for domestic violence cases) for the filing of documents with information that the court has ordered be kept confidential.

[4] See Code Civ. Proc., § 527.6(v)(3); Fam. Code, § 6301.5(c).

Consistent with these changes in the law, the committees propose revising forms CH-165 and DV-165, at item 7, to include the following language:

> **Warning:** Unless authorized by the court or by law, if the information listed below is misused or disclosed to anyone other than law enforcement you may be sanctioned up to $1,000 or face other court penalties. See [code section][5] for the limited situations in which disclosures can be made without a court order.

A substantially identical warning would be included on the *Notice of Order Protecting Information of Minor* (forms CH-170 and DV-170), at item 4. Forms CH-109 and DV-109, at item 5b, would also be revised to change the penalty from "contempt of court" to "sanction."

Order for confidentiality applies to other cases

Currently, an order making a minor's information confidential applies in any civil proceeding. Effective January 1, 2020, an order for confidentiality would only apply to civil cases between the same parties in the civil harassment or domestic violence restraining order proceedings, and any proceeding initiated under the Family Code if the order for confidentiality was made in a domestic violence restraining order proceeding.[6] The following forms and rules would be revised to reflect this change:

- Rules 3.1161(i) and 5.382(i);
- Forms CH-165 and DV-165 (items 11 and 12, respectively);
- Forms CH-170 and DV-170 (item 3); and
- Forms CH-175 and DV-175 (item 2).

Technical change to rule 5.382 and minor changes to existing forms

A technical change to rule 5.382 is needed to correct the title of a form cited in the rule. In subdivision (e)(2)(D), the title of form DV-160 should read *Request to Keep Minor's Information Confidential* instead of *Request for Domestic Violence Restraining Order*.

Some commenters suggested minor changes to language, most of which the committees accepted. Other minor changes to formatting and language were made with the goal of making the forms more user-friendly for self-represented litigants.

Policy implications

No policy implications were identified for this proposal.

Comments

This proposal received nine comments. All commenters stated that the proposal appropriately implements AB 925. Four agreed with the proposal, including the Family Violence Appellate

[5] Code Civ. Proc., § 527.6(v)(3) (for civil harassment); Fam. Code, § 6301.5(c)(2) (for domestic violence).

[6] Code Civ. Proc., § 527.6(v)(3)(A); Fam. Code, § 6301.5(c)(1).

Project (FVAP), which sponsored AB 925, three agreed if modified, and two did not indicate a position.

Commenters were the Superior Court of Los Angeles County; the Superior Court of Orange County's Civil and Appellate Divisions; the Superior Court of Orange County's Juvenile and Family Divisions; the Superior Court of San Diego County; FVAP; the Joint Rules Subcommittee (JRS) of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee; the Family Law Section of the California Lawyers Association (FLEXCOM); the Orange County Bar Association; and the Public Law Center in Orange County. Most of the comments received were suggestions for improving language and correcting typographical errors. A chart with the full text of the comments received and the committee's responses is attached at pages xx-xx.

The committees sought specific comment on whether item 8a(1) on the current versions of forms CH-160 and DV-160 should be removed as it raises potential due process concerns. This item allows the person requesting confidentiality to request that the name of the minor be made confidential from the restrained party. Six commenters responded to this question: one commenter suggested that the item be removed for the due process concerns cited in the invitation to comment while five commenters suggested keeping the option on the current form. After discussion, the committees agreed with the five commenters that the item should remain on the form and any due process issues addressed by the court on a case-by-case basis.

Based on a comment received, committee members discussed whether, under certain circumstances, the person requesting release of confidential information should be responsible for serving that request on the person who made the request for confidentiality. In the proposed rules, the court would be responsible for service because, in many circumstances, the information of the person who made the request for confidentiality will be confidential. In other words, the person seeking release of confidential information would not have access to the person's name and/or address and, therefore, unable to serve them. One court suggested that courts not be responsible for service in cases where the needed information, like the address, is not made confidential. The committees discussed this issue and believed that creating multiple processes for service in these instances would be confusing and possibly cause additional work that would offset any reduction in workload for the court. The committees did not adopt this suggestion.

The FVAP, sponsor of AB 925, suggested that the order forms include a space for the court to state its reasons for denying a request. While the committees see the value in including this on the form, especially for these types of proceedings where most individuals are representing themselves, the committees did not adopt this suggestion. This addition would be a significant change to the form and would require recirculation of the form for comment, delaying implementation of the form. . The committees will consider this revision in the future.

Alternatives considered

The committees considered including a rule of court that would provide a process for the court to determine a person's ability to pay before imposition of a sanction. The committees rejected this idea because courts are accustomed to making this type of determination and are best suited to decide how to make this determination on a case-by-case basis.

The committees considered not recommending new request, response, and order forms for release of confidential information. The committees decided against this as most litigants in these cases are self-represented and providing forms increases their access to the court system. Also, the committees believe that statewide order forms and processes are necessary in these cases, given the sensitive nature of the information.

Fiscal and Operational Impacts

This proposal is required by statute. It will result in costs incurred by courts to train court staff and judicial officers on this new procedure, provide assistance to self-represented litigants in self-help centers, and ensure that filed documents are properly redacted. This proposal is intended to help parties and courts implement these new provisions. In addition, courts will have to update their existing manual and electronic processes.

All court commenters noted that three months would be sufficient time to implement this proposal. However, the Joint Rules Subcommittee suggested that implementation be delayed until January 1, 2021. The committees discussed the possibility of delaying implementation and decided not to delay implementation, as these new forms and processes are already needed. The committees believe that filings for these types of requests will be relatively low, which should give courts some flexibility in implementation.

Attachments and Links

1. Cal. Rules of Court, rules 3.1161 and 5.382, at pages ___
2. Forms CH-109, CH-160, CH-160-INFO, CH-165, CH-170, CH-175, CH-176, CH-177, CH-178, CH-179, DV-109, DV-160, DV-160-INFO, DV-165, DV-170, DV-175, DV-176, DV-177, DV-178, and DV-179, at pages ____
3. Chart of comments, at pages ____
4. Link A: Assembly Bill 925, http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB925

Rules 3.1161 and 5.382 of the California Rules of Court is amended, effective September 1, 2020, to read:

Title 3. Civil Rules

Division 11. Law and Motion

Chapter 3. Provisional and Injunctive Relief

Article 4. Protective Orders

Rule 3.1161. Request to make minor's information confidential in civil harassment protective order proceedings

(a) Application of rule

This rule applies to requests and orders made under Code of Civil Procedure section 527.6(v) to keep a minor's information confidential in a civil harassment protective order proceeding.

Wherever used in this rule, "legal guardian" means either parent if both parents have legal custody, or the parent or person having legal custody, or the guardian, of a minor.

(b)–(f) * * *

(g) Factors in selecting redaction procedures * * *

(h) ~~Sharing of information about a protected minor~~ Releasing minor's confidential information

(1) ~~*Sharing of information with the respondent*~~ *To respondent*

Information about a protected minor must be released to the respondent only as provided in Code of Civil Procedure section 527.6(v)(4)~~(B)~~(A)(ii), limited to information necessary to allow the respondent to respond to the request for the protective order and to comply with the confidentiality order and the protective order.

(2) ~~*Sharing of information with law enforcement*~~ *To law enforcement*

Information about a ~~protected~~ minor must be shared with law enforcement ~~only~~ as provided in Code of Civil Procedure section 527.6(v)(4)(A)(i) or by court order.

(3) *To other persons*

If the court finds it is necessary to prevent harassment or is in the best interest of the minor, the court may release confidential information on the request of any person or entity or on the court's own motion.

(A) *Request for release of confidential information*

(i) Any person or entity may request the release of confidential information by filing *Request for Release of Minor's Confidential Information* (form CH-176) and a proposed, *Order on Request for Release of Minor's Confidential Information* (form CH-179), with the court.

(ii) Within 10 days after filing form CH-176 with the clerk, the clerk must serve, by first-class mail, the following documents on the minor or legal guardian who made the request to keep the minor's information confidential:

a. *Cover Sheet for Confidential Information* (form CH-175);

b. *Request for Release of Minor's Confidential Information* (form CH-176);

c. *Notice of Request for Release of Minor's Confidential Information* (form CH-177);

d. *Response to Request for Release of Minor's Confidential Information* (form CH-178) (blank copy);

e. *Order on Request for Release of Minor's Confidential Information* (form CH-179).

(B) *Opportunity to object*

(i) The person who made the request for confidentiality has the right to object by filing form CH-178 within 20 days from the date of the mailing of form CH-177, or verbally objecting at a hearing, if one is held.

(ii) The person filing a response must serve a copy of the response (form CH-178) on the person requesting release of confidential information. Service must occur before filing the response form with the court unless the response form contains confidential

information. If the response form contains confidential information, service must be done as soon as possible after the response form has been redacted.

(iii) If the person who made the request for confidentiality objects to the release of information, the court may set the matter for a closed hearing.

(C) *Rulings*

The request may be granted or denied in whole or in part without a hearing. Alternatively, the court may set the matter for hearing on at least 10 days' notice to the person who made the request for release of confidential information and the person who made the request for confidential information. Any hearing must be confidential.

(i) *Order granting release of confidential information*

a. The order (form CH-179) granting the release of confidential information must be prepared in a manner consistent with the procedures outlined in (f).

b. A redacted copy of the order (form CH-179) must be filed in a public file and an unredacted copy of the order must be filed in a confidential file.

c. *Service*

If the court grants the request for release of information based on the pleadings, the court must mail a copy of form CH-179 to the person who filed form CH-176 and the person who made the request to keep the minor's information confidential. Parties may be served in court if present at the hearing.

(ii) *Order denying request to release minor's confidential information*

a. The court may deny a request to release confidential information based on the request alone.

b. The order (form CH-179) denying the release of confidential information must be filed in a public file and must not include any confidential information.

c. *Service*

If the court denies the request for release of information based on the pleadings, the court must mail a copy of form CH-179 to the person who filed form CH-176 and the person who made the request to keep the minor's information confidential. Parties may be served in court if present at the hearing.

(iii) If the court finds that the request to release confidential information is insufficiently specific to meet the requirements under Code of Civil Procedure section 527.6(v)(4)(C), the court may conduct a closed hearing to determine if there are additional facts that would support granting the request. The court may receive any relevant evidence, including testimony from the person requesting the release of a minor's confidential information, the minor, the legal guardian, the person who requested the restraining order, or other competent witness.

(i) Protecting information in subsequent filings and other civil cases

(1) * * *

(2) *Other civil case*

(A) Information subject to an order of confidentiality issued under Code of Civil Procedure section 527.6(v) must be kept confidential in any other civil case with the same parties.

(B) The minor or person making the request for confidentiality and any person who has been served with a notice of confidentiality must submit a copy of the order of confidentiality (form CH-165) in any other civil case ~~involving~~ with the same parties.

Title 5. Family and Juvenile Rules

Division 1. Family Rules

Chapter 11. Domestic Violence Cases

Article 1. Domestic Violence Prevention Act Cases

Rule 5.382. Request to make minor's information confidential in domestic violence protective order proceedings

(a)–(d) * * *

(e) Orders on request for confidentiality

(1) * * *

(2) *Order granting request for confidentiality*

(A)–(C) * * *

(D) *Service and copies*

The other party, or both parties if the person making the request for confidentiality is not a party to the action, must be served with a copy of the ~~*Request for Domestic Violence Restraining Order*~~ *Request to Keep Minor's Information Confidential* (form DV-160), *Order on Request to Keep Minor's Information Confidential* (form DV-165), and *Notice of Order Protecting Information of Minor* (form DV-170), redacted if required under (f)(4).

The protected person and the person requesting confidentiality (if not the protected person) must be provided up to three copies of redacted and unredacted copies of any request or order form.

(3) * * *

(f)–(g) * * *

(h) ~~Sharing of information about a protected minor~~ Releasing minor's confidential information

(1) ~~*Sharing of information with the respondent*~~ *To respondent*

Information about a ~~protected~~ minor must be shared with the respondent only as provided in Family Code section 6301.5(d)~~(2)~~(1)(B), limited to information necessary to allow the respondent to respond to the request for the protective order and to comply with the confidentiality order and the protective order.

(2) ~~*Sharing of information with law enforcement*~~ *To law enforcement*

Information about a ~~protected~~ minor must be shared with law enforcement ~~only~~ as provided in Family Code section 6301.5(d)(1)(A) or by court order.

(3) *To other persons*

If the court finds it is necessary to prevent abuse within the meaning of Family Code section 6220, or is in the best interest of the minor, the court may release confidential information on the request of any person or entity or on the court's own motion.

(A) *Request for release of confidential information*

(i) Any person or entity may request the release of confidential information by filing *Request for Release of Minor's Confidential Information* (form DV-176) and a proposed order, *Order on Request for Release of Minor's Confidential Information* (form DV-179), with the court.

(ii) Within 10 days after filing form DV-176 with the clerk, the clerk must serve, by first-class mail, the following documents on the minor or legal guardian who made the request to keep the minor's information confidential:

a. *Cover Sheet for Confidential Information* (form DV-175);

b. *Request for Release of Minor's Confidential Information* (form DV-176);

c. *Notice of Request for Release of Minor's Confidential Information* (form DV-177);

d. *Response to Request for Release of Minor's Confidential Information* (form DV-178) (blank copy);

e. *Order on Request for Release of Minor's Confidential Information* (form DV-179).

(B) *Opportunity to object*

(i) The person who made the request for confidentiality has the right to object by filing form DV-178 within 20 days from the date of the mailing of form DV-177, or verbally objecting at a hearing, if one is held.

(ii) The person filing a response must serve a copy of the response (form DV-178) on the person requesting release of confidential information. Service must occur before filing the response form with the court unless the response form contains confidential information. If the response form contains confidential information, service must be done as soon as possible after the response form has been redacted.

(iii) If the person who made the request for confidentiality objects to the release of information, the court may set the matter for a closed hearing.

(C) *Rulings*

The request may be granted or denied in whole or in part without a hearing. Alternatively, the court may set the matter for hearing on at least 10 days' notice to the person who made the request for release of confidential information and the person who made the request for confidential information. Any hearing must be confidential.

(i) *Order granting release of confidential information*

a. The order (form DV-179) granting the release of confidential information must be prepared in a manner consistent with the procedures outlined in (f).

b. A redacted copy of the order (form DV-179) must be filed in a public file and an unredacted copy of the order must be filed in a confidential file.

c. *Service*

If the court grants the request for release of information based on the pleadings, the court must mail a copy of form DV-179 to the person who filed form DV-176 and the person who made

the request to keep the minor's information confidential. Parties may be served in court if present at the hearing.

(ii) *Order denying request to release minor's confidential information*

a. The court may deny a request to release confidential information based on the request alone.

b. The order (form DV-179) denying the release of confidential information must be filed in a public file and must not include any confidential information.

c. *Service*

If the court denies the request for release of information based on the pleadings, the court must mail a copy of form DV-179 to the person who filed form DV-176 and the person who made the request to keep the minor's information confidential. Parties may be served in court if present at the hearing.

(iii) If the court finds that the request to release confidential information is insufficiently specific to meet the requirements under Family Code section 6301.5(d)(3), the court may conduct a closed hearing to determine if there are additional facts that would support granting the request. The court may receive any relevant evidence, including testimony from the person requesting release of the minor's confidential information, the minor, the legal guardian, the person who requested the restraining order, or other competent witness.

(i) Protecting information in subsequent filings and other civil cases

(1) * * *

(2) *Other civil case*

(A) Information subject to an order of confidentiality issued under Family Code section 6301.5 must be kept confidential in any family law case and any other civil case with the same parties.

(B) The minor or person making the request for confidentiality and any person who has been served with a notice of confidentiality must submit

a copy of the order of confidentiality (form DV-165) in any family law case and any other civil case ~~involving~~ with the same parties.

CH-109 Notice of Court Hearing

Clerk stamps date here when form is filed.

Draft 3.21.2020

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 Person Seeking Protection

a. Your Full Name:

Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*

Address: _____

City: _____ State: ____ Zip: _____

Telephone: _____ Fax: _____

E-Mail Address: _____

2 Person From Whom Protection Is Sought

Full Name: _____

The court will complete the rest of this form.

3 Notice of Hearing

A court hearing is scheduled on the request for restraining orders against the person in 2:

Hearing Date → Date: _____ Time: _____

Dept.: _____ Room: _____

Name and address of court if different from above:

_____

_____

_____

_____

4 Temporary Restraining Orders *(Any orders granted are on form CH-110, served with this notice.)*

a. Temporary Restraining Orders for personal conduct and stay-away orders as requested in form CH-100, *Request for Civil Harassment Restraining Orders,* are *(check only one box below):*

(1) ☐ All **GRANTED** until the court hearing.

(2) ☐ All **DENIED** until the court hearing. *(Specify reasons for denial in b, below.)*

(3) ☐ Partly **GRANTED** and partly **DENIED** until the court hearing. *(Specify reasons for denial in b, below.)*

b. Reasons for denial of some or all of those personal conduct and stay-away orders as requested in form CH-100, *Request for Civil Harassment Restraining Orders,* are:

(1) ☐ The facts as stated in form CH-100 do not sufficiently show acts of violence, threats of violence, or a course of conduct that seriously alarmed, annoyed, or harassed the person in (1) and caused substantial emotional distress.

(2) ☐ Other *(specify):* ☐ As set forth on Attachment 4b.

(5) Confidential Information Regarding Minor

a. ☐ A *Request to Keep Minor's Information Confidential* (form CH-160) was made and **GRANTED**. (*See form CH-165,* Order on Request to Keep Minor's Information Confidential, *served with this form.)*

b. **If the request was granted, the information described in item (7) on the order (form CH-165) must be kept CONFIDENTIAL. The disclosure or misuse of the information is punishable as a sanction, with a fine of up to $1,000 or other court penalties.**

(6) Service of Documents for the Person in (1)

At least ☐ **five** ☐ _____ **days before the hearing**, someone age 18 or older—**not you or anyone to be protected**—must personally give (serve) a court's file-stamped copy of this form CH-109 to the person in (2) along with a copy of all the forms indicated below:

a. CH-100, *Request for Civil Harassment Restraining Orders* (file-stamped)
b. ☐ CH-110, *Temporary Restraining Order* (file-stamped) **IF GRANTED**
c. CH-120, *Response to Request for Civil Harassment Restraining Orders* (blank form)
d. CH-120-INFO, *How Can I Respond to a Request for Civil Harassment Restraining Orders?*
e. CH-250, *Proof of Service of Response by Mail* (blank form)
f. ☐ CH-170, *Notice of Order Protecting Information of Minor* and CH-165*, Order on Request to Keep Minor's Information Confidential* (file-stamped) **IF GRANTED**
g. ☐ Other *(specify):* _____

Date: _____ ▶ _____
Judicial Officer

Case Number:

To the Person in (1):

- The court cannot make the restraining orders after the court hearing unless the person in (2) has been personally given (served) a copy of your request and any temporary orders. To show that the person in (2) has been served, the person who served the forms must fill out a proof of service form. Form CH-200, *Proof of Personal Service,* may be used.
- For information about service, read form CH-200-INFO, *What Is "Proof of Personal Service"?*
- If you are unable to serve the person in (2) in time, you may ask for more time to serve the documents. Use form CH-115, *Request to Continue Court Hearing and to Reissue Temporary Restraining Order*.

To the Person in (2):

- If you want to respond to the request for orders in writing, file form CH-120, *Response to Request for Civil Harassment Restraining Orders,* and have someone age 18 or older—**not you or anyone to be protected—**mail it to the person in (1).
- The person who mailed the form must fill out a proof of service form. Form CH-250, *Proof of Service of Response by Mail,* may be used. File the completed form with the court before the hearing and bring a copy with you to the court hearing.
- Whether or not you respond in writing, go to the hearing if you want the judge to hear from you before making an order. You may tell the judge why you agree or disagree with the orders requested.
- You may bring witnesses and other evidence.
- At the hearing, the judge may make restraining orders against you that could last up to five years and may order you to turn in to law enforcement, or sell to or store with a licensed gun dealer, any firearms that you own or possess.

Request for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the hearing. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons with Disabilities and Response* (form MC-410). (Civ. Code, § 54.8.)

(Clerk will fill out this part.)

—Clerk's Certificate—

I certify that this *Notice of Court Hearing* is a true and correct copy of the original on file in the court.

Clerk's Certificate
[seal]

Date: _____

Clerk, by _____, Deputy

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

CH-160 Request to Keep Minor's Information Confidential

CONFIDENTIAL

Clerk stamps date here when form is filed.

DRAFT- Not approved by
Judicial Council
April 2, 2020

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

When do I use this form?
Complete this form if you want the court to keep information about a minor in a civil harassment restraining order proceeding confidential and not available to the public or the restrained person. If you only want to keep your home address confidential, you may use a mailing address on your other forms rather than using this form.

What if there is information I don't want the restrained person to have?
You can make this request at item (8) if you want to ask the court to keep information confidential from the restrained person. If the court grants your request to keep certain information confidential from the restrained person, the information will have to be redacted (whited or blacked out) from all forms before the restrained person gets a copy. But be aware that if the court denies your request, the information may be provided to the restrained person.

Who will see this form?
The public will NOT have access to this form.
The restrained person will have access to the entire form unless the court grants the request made in item (8) below.

(1) Parties in This Case

a. Person who requested restraining order (form CH-100, item (1)):
Full Name: _____

b. Person to be restrained (form CH-100, item (2)):
Full Name: _____

(2) Person Making Request for Confidentiality

a. Full Name: _____

b. I am:

(1) ☐ The minor requesting confidentiality.

(2) ☐ The ☐ parent ☐ legal guardian of the minor or minors listed below.

List all the minors that you are making the request for:

Name: _____

Name: _____

Name: _____

Name: _____

☐ *Check here if there are additional minors. Attach a sheet of paper and write "Attachment 2b(2)—Additional Minors" for a title.*

This is not a Court Order.

Case Number:

3 Contact Information

Address where you can receive mail

This address will be used by the court and the person in 2 to notify you in this case. If you want to keep your home address private, you can use another address like a post office box or another person's address, if you have their permission. If you have a lawyer, give your lawyer's address and contact information.

Address: _____

City: _____ State: _____ Zip: _____

Your contact information *(optional)*

Telephone: _____ Fax: _____

E-mail address: _____

Lawyer's information *(skip if you do not have one)*

Name: _____ State Bar No.: _____

4 ☐ Requests for More Than One Minor *(ONLY for parents or legal guardians)*

I am making this request for two or more minors.

a. ☐ The information I want confidential (as checked in item 5) is the SAME for all minors.

b. ☐ The information I want confidential (as checked in item 5) is NOT the same for all minors.

If you checked 4b, make sure you list all the information you want confidential for each minor in 5. If you need more space in 5, attach a separate piece of paper.

5 Information to Be Kept Confidential From the Public

I want the information checked below to be made confidential and NOT available to the public.

(Check all that apply:)

a. ☐ **Minor's name**

(Note: If your request is granted, the public will not have access to the minor's name in this case, but law enforcement must be given this information.)

b. ☐ **Minor's address**

(Note: You do NOT have to make this request if you use a mailing address that does not need to be kept confidential. Use that mailing address on all forms in this case and any other civil case.)

The address I want kept confidential is: _____

_____

_____

This is not a Court Order.

c. ☐ **Information relating to the minor**

(Note: If information relating to the minor is made confidential by the court, the public will not have access to this information but the restrained person must be given the information that is necessary to comply with the restraining order and to respond to the restraining order request. Also, the court may give permission to release confidential information in this case to other people like the minor's childcare provider or school, or anyone who needs the information to protect the minor's best interest or to prevent harassment.)

Describe all information in the documents that will be filed that you want kept confidential.

You may either *(check one)*:

(1) ☐ Attach a copy of form CH-100 or other document that you are filing. Circle all the information you want kept confidential.

(2) ☐ List the information below, identifying the location of the statements in form CH-100 or other document that you are filing.

Location of Information *(for example, form #, page #, paragraph #, line #, attachment #, or exhibit #)*	**Information to Be Redacted** *(not viewable by the public)*

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 5c(2)" for a title.*

(a) _____ _____

(b) _____ _____

(c) _____ _____

(d) _____ _____

This is not a Court Order.

6 Reasons for Request

To approve your request in 5, the court must expressly find all of the following:

- The minor's right to privacy overcomes the right of the public access to the information;
- There is a substantial probability that the minor's interest will be prejudiced if the information is not kept confidential;
- The order to keep the information confidential is narrowly tailored; and
- No less restrictive means exist to protect the minor's privacy.

Use these four requirements to help you answer the questions below.

a. Why should the information about the minor provided in item 5 be kept private or confidential?

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 6a" for a title.*

b. What do you think would happen if the information is NOT made private or confidential?

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 6b" for a title.*

This is not a Court Order.

*(Skip items 7 and 8 if you are **not** the person requesting the restraining order.)*

7 If any portion of the request for confidentiality from the public (item 5) is denied, I want to *(check one)*:

a. ☐ **Cancel my request for restraining order**
I ask the court NOT to make a decision on my *Request for Civil Harassment Restraining Orders* (form CH-100). I understand that canceling my request means that I will not receive a restraining order at this time. *(Note: You may file a request on the same or different facts at a later date.)*

b. ☐ **Move forward with my request for restraining order**
I ask the court to make a decision on my *Request for Civil Harassment Restraining Orders* (form CH-100). *(Note: Choosing this option means that the information in your completed form CH-100 and other court papers in this case will be available to the public and must be seen by the restrained person.*

8 ☐ Information to Be Kept Confidential From the Restrained Person

(Note: The restrained person must be given information necessary to comply with the restraining order and to respond to the restraining order request.)

I do not want the restrained person to have access to some of the information checked in item 5.

a. What information do you want to be confidential and not given to the restrained person?

(1) ☐ Minor's name

(2) ☐ Minor's address

(3) ☐ Other information relating to the minor from item 5 *(specify):*

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 8a(3)" for a title.*

b. Why should the information listed in 8a be kept confidential and not given to the restrained person?

c. What do you think would happen if the information listed in 8a is given to the restrained person?

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 8" for a title.*

This is not a Court Order.

d. If any portion of the request for confidentiality from the restrained person (item 8) is denied, I want to:

(1) ☐ **Cancel my request for restraining order**
I ask the court NOT to make a decision on my *Request for Civil Harassment Restraining Orders* (form CH-100). I understand that canceling my request means that I will not receive a restraining order at this time. *(Note: You may file a request on the same or different facts at a later date.)*

(2) ☐ **Move forward with my request for restraining order**
I ask the court to make a decision on my *Request for Civil Harassment Restraining Orders* (form CH-100). (*Note: Choosing this option means that all of the information in your completed form CH-100 must be seen by the restrained person.)*

9 People I Want to Have Access to Confidential Information

(Note: If you want other people to have unredacted copies of restraining order forms in this case, you should complete this item.)

a. If my request in item 5 is granted, I want to be allowed to give the following people or entities *(check all that apply)*:

(1) ☐ Minor's school and after-school program

(2) ☐ Minor's childcare provider

(3) ☐ Supervised visitation provider

(4) ☐ Other (*name*): _____

b. copies of documents in this case with the following information *(check all that apply)*:

(1) ☐ Minor's name

(2) ☐ Minor's address

(3) ☐ Information listed in item 5c.

10 Number of pages attached to this form, if any: _____

11 Signature

I declare under penalty of perjury under the laws of the State of California that the information above and in all attached papers is true and correct.

Date: _____

_____ ▶ _____
Type or print your name | Sign your name

12 Lawyer's Signature *(skip if you do not have one)*

Date: _____ ▶ _____
Lawyer's sign

This is not a Court Order.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

CH-160-INFO Privacy Protection for a Minor (Person Under 18 Years Old) Civil Harassment Prevention

Can I keep information about a minor confidential?

Yes. In a civil harassment restraining order case, you can ask a judge to make information about a minor confidential. Confidential means that the public is unable to see the information, because the information is kept private. This is important because most papers in your court case are available for the public to see. This means anyone can view information on your papers, including information about a minor. If the judge grants your request, the public will not be able to see the minor's information on your paperwork.

Who can make this request?

Several people can make this request, including a minor's parent or legal guardian. Any minor protected by a restraining order can make this request, as well. Also, any person, including a minor, who is the accused person in a case may make this request.

A minor can make this request without the help of an adult. This depends on the minor's age, though. If the minor is 12 years old or younger, the judge may want an adult to help the minor make this request.

For more information on who can make this request, contact your local self-help center or a lawyer.

What information can I ask the judge to make confidential?

A judge can make any information about a minor confidential. That means that you can ask to make confidential the minor's name, address, and any statements about what the minor experienced or witnessed.

If you want to protect the minor's address only, you do not have to make this request. Instead, you can use a different address on your restraining order request, such as a mailing address that is not where the minor lives, a P.O. box, or someone else's address. If you use someone else's address, be sure to get their permission first.

Whatever address you use, make sure you will get your mail regularly. This is important, because the address you use is the address the court and other party will use to send you papers for your case.

Does this request cost money?

That depends on the type of harassment. If the person you want to restrain used or threatened to use violence against you or stalked you, you do not have to pay a filing fee. Otherwise, you must pay a filing fee.

If you cannot afford to pay the filing fee, ask the court clerk how to apply for a fee waiver. You will need to fill out form FW-001.

If the protective order is based on prior acts of violence, a credible threat of violence, or stalking, the sheriff or marshal must serve your order for free. Also, if you are eligible for a fee waiver, you can ask the sheriff or marshal to serve the order for free. If you are not eligible for free service, you must pay the sheriff or marshal to serve the order.

I need an interpreter. How can I get help?

You may use form INT-300 to request an interpreter. Ask court staff for information.

I have a disability. How can I get help?

You may use form MC-410 to request assistance. Contact the disability/ADA coordinator at your local court for more information.

Do I need a lawyer to make this request?

No, but this type of request can be hard to get through on your own. Free help may be available at your local court's self-help center. (See below.)

Where can I find a self-help center?

Find your local court's self-help center at www.courts.ca.gov/selfhelp. Self-help center staff will not act as your lawyer but may be able to give you information to help you decide what to do in your case.

Where can I find other help?

For safety tips or other help, call or visit the following hotlines online:
National Human Trafficking Hotline, 1-888-373-788; TTY: 711; www.humantraffickinghotline.org
National Sexual Assault Hotline, 1-800-656-4673, www.rainn.org
Stalking Hotline, 1-855-484-2846, www.victimconnect.org/statistics/stalking/

What do I have to do to make information about a minor confidential?

You can use these steps as a checklist.

◯ **Step 1: Complete the forms.**
You will need to complete these forms to make your request:
◯ Form CH-160
◯ Form CH-165 (complete items 1 and 2 only)
You can find these forms online at www.courts.ca.gov/forms.
► See tips to complete the forms.
To request a restraining order, you need to complete different forms. See form CH-100-INFO for a list of forms you need to complete to request a restraining order.

◯ **Step 2: Take the forms to your court clerk to file.**
Find out which courthouse to take your forms to by calling your local court or searching online at *www.courts.ca.gov/find-my-court.htm*.

◯ **Step 3: Understand the judge's order.**
The judge will write your orders on form CH-165.
The judge will **grant** or **deny** your request.
► See page 3 for what this means.

◯ **Step 4: Give court papers to other parties.**
In some cases, you will need to have your server give court papers to the other parties in your case. This process is called service.
► See page 4 for tips to complete service.

Tips for Step 1: Complete the forms.

I only want to protect the minor's address. If you only want to protect the minor's address, you do not have to make this request. See "What information can I ask the judge to make confidential?" on page 1 for more information.

I want to protect more than one minor. Only an adult who is the minors' parent or legal guardian may make a request to protect more than one minor's information.

I want to give the minor's school or others copies of court orders from this case. If the court grants your request to make information regarding a minor confidential, you may want to ask the court for permission to give other people copies of certain documents in your case. You can make this request at item 9 on form CH-160.

My right to cancel my restraining order request: You have the right to cancel your request for a restraining order if the judge does not grant your request to make information confidential. This right only applies if you are asking for a restraining order at the same time as your request to make information confidential. To cancel your request for a restraining order, check the box on **form CH-160**, item 7a, and item 8d(1), if it applies.

If you cancel your restraining order request, you will **not** receive a civil harassment restraining order at this time.

If, **after** canceling your request for a restraining order, you want to ask for a restraining order based on the same facts, you must start the process over. See form CH-100-INFO for more information.

▶Tips for Step 3: Understand the judge's order.

Look at form CH-165 to see what the judge decided.

What if the judge granted my request?

Look closely at form CH-165, items 7 and 8, to see what information the judge made confidential in your case. If the judge granted your request to keep information confidential, the information the judge decided to keep confidential will not be available to the public. The information will be available only to the parties in the case.

At times, the judge may make information confidential from the other party in your case. If this happens, the judge will complete item 8 on form CH-165.

Now, take a close look at item 10 on form CH-165. This tells you who is responsible for redacting the information on your paperwork and the deadline for filing it with the court.

Redacting means to hide (blacken or whiten out) information so it cannot be seen. If the judge makes you responsible for redacting the information, your local self-help center may be able to help you.

What if the judge did not grant (denied) my request?

This means that if you move forward with your case, the minor's information will not be confidential. This is important because anyone can go to your local courthouse and ask to see the documents you filed in this case.

If the judge does not grant your request, you may have other legal options available to you. Visit your local court's self-help center or talk with a lawyer.

▷ **What if I asked to cancel my restraining order request?**

If you checked box 7a or 8d(1) on form CH-160 and the judge denied your request, the paperwork you turned in with this request will not be available to the public, except for page 1 of form CH-165. This includes form CH-100 and any proposed order forms. The court will either return these forms to you, destroy them, or delete them from its records unless you give the court permission to file the forms.

▷ **What if I file documents with the court in the future?**

If you file documents with the court in the future, be sure to use form CH-175 as a cover sheet and follow the instructions at the top of the form.

Is there a penalty for disclosing confidential information?

Misusing or giving out confidential information can result in the court ordering you to pay up to $1,000 or other court penalties. You will not be penalized if you:

- Give information to police to help them enforce the judge's orders; or
- If you are the minor who has claimed harassment, violence, or threats of violence.

CH-160-INFO Privacy Protection for a Minor (Person Under 18 Years Old) Civil Harassment Prevention

▶Tips for Step 4: Give court papers to all parties in your case.

In some cases, the judge will order you to serve your court papers. Look at form CH-165 to see what the judge decided.

What did the judge decide in your case?

The judge **granted** my request to keep some of the minor's information confidential.

Your papers must be served. Follow steps 1–5 below.

The judge **denied** (did not grant) my request to keep some information confidential. I did not cancel my request for a restraining order. The **case is still open.**

If this is your situation, forms CH-160 and CH-165 must be served by mail or in person. Follow steps 3–5 below.

The judge **denied** (did not grant) my request to keep some information confidential. I **canceled** my request for a restraining order and there is **no other issue** in this case for a judge to decide on.

Your papers do not need to be served. You may stop here.

◯ Step 1: Find out which papers you need to serve.

The judge will check which papers you need to serve to the other parties in your case on form CH-165, item 13.

◯ Step 2: Find out whether you need to serve the other parties personally or by mail.

The judge will check how you need to serve your court papers to the other parties in your case on form CH-165, item 13.

If the judge checks item 13a, you will need to have your server personally serve (give) your court papers to the other parties in your case.

If the judge checks item 13b, you will need to have your server mail your court papers.

◯ Step 3: Choose a server.

The person who serves your papers is called a server. Your server must be at least 18 years old, not protected by the restraining order, and not involved in your case. **You are not allowed to serve your own court papers.**

Some situations may be dangerous. Think about people's safety when deciding who you choose to serve your court papers.

A sheriff or marshal will serve your court papers for free. Another option is a process server.

A process server is a business you pay to deliver court papers. To hire a process server, look for "process server" on the internet or in the yellow pages.

◯ Step 4: Have your server give your court papers to all parties

For personal service, give your server your court papers as well as form CH-200.

For service by mail, give your server your court papers as well as form PS-030.

◯ Step 5: File proof with the court.

The court needs proof that your papers were served. After your server completes form CH-200 or form POS-030, take it to the court to file in your case.

If the sheriff or marshal served your papers, they may use another form for proof instead of form CH-200. Make sure a copy is filed with the court and that you get a copy.

For more information, read form CH-200-INFO or ask your local court's self-help center for help.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

CH-165 Order on Request to Keep Minor's Information Confidential

☐ CONFIDENTIAL ☐ PUBLIC VERSION (REDACTED)

Clerk stamps date here when form is filed.

DRAFT

04-02-2020

Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 Parties in This Case

a. Person who requested restraining order (form CH-100, item 1):
Full Name: _____

b. Person to be restrained (form CH-100, item 2):
Full Name: _____

2 Person Making Request for Confidentiality

Full Name: _____

(Court will complete item 3 if request is denied or items 4–13 if request is granted or partially granted.)

Instructions to Clerk: If item 3 is checked, file page 1 in a public file and discard pages 2–6.

3 ☐ Court Denied Request or More Information Needed

a. ☐ **Denied.** The request to keep information of a minor or minors confidential is denied.

(1) ☐ **The court will NOT make a decision on the *Request for Civil Harassment Restraining Order* (form CH-100).** The request for restraining order and proposed order forms must be returned to the requester personally, destroyed, or deleted from electronic files and not filed with the court unless the person requesting the restraining order agrees to file them without any changes.

(2) ☐ **The court will make a decision on the *Request for Civil Harassment Restraining Order* (form CH-100).** The request for restraining order and any accompanying orders will be filed in the public file.

b. ☐ **More information is needed for court decision.** You must go to court on the date and time below. At the court date, you must provide more information on why you need the court to make information confidential.

Name and address of court if different from above:

Hearing Date → Date: _____ Time: _____
Dept.: _____ Room: _____

c. If item 3 is checked, only this page of this order form will be issued. All other pages may be discarded.

Date: _____

_____
Judge (or Judicial Officer)

This is a Court Order.

Case Number:

Court will complete the rest of this form if the request is partially or fully granted.

4 ☐ Court Granted Request

a. ☐ **Granted in full.** The request to keep the information of a minor or minors confidential is granted in full. Details of the order are stated below in items 5–12.

b. ☐ **Partially granted**. The request to keep the information of a minor or minors confidential is granted only in part. Details of the order are stated below in items 5–12.

5 Findings

☐ The court finds all of the following *(all of these findings are required if granting in full or in part)*:

a. The right to privacy of the minors listed in item 6 overcomes the public's right of access to the information;

b. There is a substantial probability that the interests of the minors listed in item 6 will be prejudiced if the information is not kept confidential;

c. The order is narrowly tailored; and

d. No less restrictive means exist to protect the privacy of the minors in item 6.

6 ☐ Minors Subject to This Order

This order protects the information listed in item 7 for the following minors:

a. Name: _____

b. Name: _____

c. Name: _____

d. Name: _____

☐ *Check here if there are additional minors. Attach a sheet of paper and write "Attachment 6—Additional Minors" for a title.*

References in this order to "the minor" refer to all minors listed here.

7 Information to Be Kept Confidential From Public

WARNING: Unless authorized by the court or by law, if the information listed below is misused or disclosed to anyone other than law enforcement you may be sanctioned up to $1,000 or face other court penalties. See Code of Civil Procedure section 527.6(v)(3) for the limited situations in which disclosures can be made without a court order.

The following information must be kept confidential and not viewable by the public. *(Check all that apply.)*

a. ☐ **Name of minor**

True name of minor in item 6 *(to be kept confidential)*	**Initials viewable by the public** *(to be used in redacted version)*

This is a Court Order.

b. ☐ **Address of minor**

The following addresses of the minors listed in item (6) must be redacted and must not be viewable by the public: _____

_____

c. ☐ **Information relating to minor** *(check one):*

(1) ☐ The information CIRCLED in the attached copy of form CH-100 or other document or form is made confidential by this order.

(2) ☐ The information below is made confidential by this order:

Location of Information *(for example, form #, page #, paragraph #, line #, attachment #, or exhibit #)*	**Information to Be Redacted** *(not viewable by the public)*
(a)	
(b)	
(c)	
(d)	

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 7c(2)" for a title.*

d. ☐ **Other:**

_____

_____

_____

This is a Court Order.

8 Information to Be Kept Confidential From the Restrained Person

The restrained person *(full name),* _____ , will have access to the following information checked in item 7 to comply with the protective order and prepare a response:

a. ☐ All the information, unredacted.

b. ☐ All the information except for the following:

_____

_____

_____

_____

_____

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper, and write "Attachment 8b" for a title.*

9 People Who May Have Access to Unredacted Court Documents

a. The minor's *(check all that apply)*:

(1) ☐ School and after-school program

(2) ☐ Minor's childcare provider

(3) ☐ Supervised visitation provider

(4) ☐ Other *(name)*: _____

b. may be given copies of unredacted documents from this case with the following information:

(1) ☐ Minor's name

(2) ☐ Minor's address

(3) ☐ Minor's information listed in item 7c.

c. Law enforcement may have access to any information in this case that is necessary to enforce the restraining order.

This is a Court Order.

10 Responsibility for Redacting All Forms and Documents

a. All forms and documents submitted with the request for confidentiality **must be redacted and filed with the court** no later than *(number of court days or date)* _____ by the:

(1) ☐ Court

(2) ☐ Person making the request

(3) ☐ Other _____

b. The redacted documents must be filed in a public file and the unredacted documents must be filed in a confidential file.

11 Court Records and Hearings

The information listed in item 7 must NOT be disclosed by the court in any:

a. Registers of actions, indexes, court calendars, court transcripts, or minute orders in this case, or any civil case with the same parties, in the State of California.

b. Future court hearings, including any documents introduced during a hearing in this case, or any civil case with the same parties, in the State of California.

12 To All Parties

a. The information made confidential by this order must NOT be made public in this case, or any other civil case with the same parties in the State of California.

b. If you file a document in this case or any case noted above in 12a that includes information listed in item 7, you must attach *Cover Sheet for Confidential Information* (form CH-175) to the front, and include a copy of this order if there is not already one in the case.

This is a Court Order.

Case Number:

13 To the Person Making the Request for Confidentiality

You must do the following:

a. ☐ Have a copy of each form listed in item c below **personally served** on (given to) the restrained person.

(*See form CH-200-INFO to find out how to meet this requirement. Personal service is required when the protected person is making this request and when forms CH-100, CH-109, and CH-110 have NOT been served on the restrained person.)*

b. ☐ Have a copy of each form listed in item c mailed to the:

(1) ☐ Restrained person

(2) ☐ Protected person

(3) ☐ Other: _____

(See form POS-030, Proof of Service by First-Class Mail - Civil, to find out how to meet this requirement.)

c. Forms to serve:

(1) Form CH-170, *Notice of Order Protecting Information of Minor*
(Form CH-170 should be the first page with all other forms stapled behind it.)

(2) ☐ Form CH-100, *Request for Domestic Violence Restraining Order*

(3) ☐ Form CH-109, *Notice of Court Hearing*

(4) ☐ Form CH-110, *Temporary Restraining Order*

(5) ☐ Form CH-160, *Request to Keep Minor's Information Confidential*
☐ Unredacted ☐ Redacted (if item 8b on CH-165 is checked)

(6) Form CH-165, *Order on Request to Keep Minor's Information Confidential*
☐ Unredacted ☐ Redacted (if item 8b on CH-165 is checked)

(7) Form CH-175, *Cover Sheet for Confidential Information* (leave blank)

(8) ☐ Other: _____

Date: _____

_____
Judge (or Judicial Officer)

Instructions to Clerk

1. The originals of all unredacted documents containing the information checked in item 7 must be kept in a confidential file and must NOT appear in any **register of action, calendar, index, minute order, or transcript** in this case, or any civil case with the same parties, in the State of California.
2. For any copies provided that include confidential information, use *Notice of Order Protecting Information of Minor* (form CH-170) as a cover sheet for each set of forms.
3. Any information listed in item 8b must not be available to the restrained person and must be filed in a confidential file.

This is a Court Order.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

CH-170 Notice of Order Protecting Information of Minor

Clerk stamps date here when form is filed.

Fill in court name and street address:

Superior Court of California, County of

(Court fills in this case number when form is filed.)

Case Number:

Instructions to Clerk

When providing copies of unredacted filed documents to any party, you must attach this cover sheet on top of the document or set of documents. Complete item (2) to indicate the forms that are attached.

(1) Confidential Information

The court has made some information in this case confidential. Details of the order for confidentiality are in form CH-165, *Order on Request to Keep Minor's Information Confidential*. Confidential information may be given **only** to law enforcement to enforce the restraining order.

(2) Documents Attached to This Notice

The following documents contain confidential information:

a. ☐ Form CH-100, *Request for Civil Harassment Restraining Orders*
b. ☐ Form CH-109, *Notice of Court Hearing*
c. ☐ Form CH-110, *Temporary Restraining Order*
d. ☐ Form CH-130, *Civil Harassment Restraining Order After Hearing*
e. ☐ Form CH-160, *Request to Keep Minor's Information Confidential*
f. ☐ Form CH-165, *Order on Request to Keep Minor's Information Confidential*
g. ☐ Form CH-175, *Cover Sheet for Confidential Information* (leave blank)
h. ☐ Other: _____

(3) Filing Documents

If you file any document that contains any confidential information in this case or other civil case with the same parties, **you MUST also use form CH-175 as a cover sheet**. See form CH-165, item (7), for all information made confidential by the court.

(4) To person receiving this notice:

Unless authorized by the court or by law, **you may be sanctioned up to $1,000 or face other court penalties** if you misuse or disclose the information that is confidential in this case to anyone other than law enforcement. See Code of Civil Procedure section 527.6(v)(3) for the limited situations in which disclosures can be made without the court's permission.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

CH-175 Cover Sheet for Confidential Information

CONFIDENTIAL

Clerk stamps date here when form is filed.

Instructions

Use this cover sheet:

When information about a minor has been made confidential (granted on form CH-165, *Order on Request to Keep Minor's Information Confidential*, **and** you want to file a document or form that includes confidential information *(see form CH-165, item 7)*.

How to use this cover sheet

- ◯ Make **two copies** of the documents you want to file.
- ◯ Complete this form, place it on top of the documents (both copies) you want to file, and file them with the court.

Fill in court name and street address:

Superior Court of California, County of

Fill in the case number:

Case Number:

Instructions to Clerk

1. The court must review and approve a redacted version of documents attached to this cover sheet **before filing**.
2. Once approved by the court, file the redacted version in a public file.
3. File the unredacted version and this cover sheet in a confidential file.

1 Parties in This Case

a. Person who filed the case:
(Name): _____

b. Other party or parties:
(Name): _____

2 Information About the Order for Confidentiality

a. The order was made in *(check one):*
(1) ☐ This case.
(2) ☐ Another civil case:
(a) Case number: _____
(b) County it was filed in: _____
Attach a copy of the order (form CH-165) if you have one.

b. Minor protected by confidentiality order:
(1) Name: _____
(2) Name: _____
☐ *Check here if you need more space. Include the information on a separate piece of paper, write "Attachment 2" on the top, and attach it to this form.*

3 I have attached two copies of the following documents:

☐ Form CH-_____

☐ Other form or document *(describe):* _____

4 Signature

Date: _____

_____ ▶ _____

Type or print your name — Sign your name

☐ Check here if you are a lawyer.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

CH-176 Request for Release of Minor's Confidential Information

Clerk stamps date here when form is filed.

DRAFT

2020

Not approved by the Judicial Council

Instructions

Who should complete this form?

Use this form if you want to ask the court to give you information about a minor that has been made confidential in a civil harassment restraining order case. After you file this form with the court, the court will provide a copy of this request to the person who made the request to keep the minor's information confidential. That person will have an opportunity to disagree with your request before the court makes a decision on your request.

What do I do if I received a completed copy of this form?

The person in (2) is asking the court for access to information that has been made confidential (see item (3) on page 2 of this form). If you do NOT agree with this request, complete and file *Response to Request for Release of Minor's Confidential Information* (form CH-178), by the deadline listed on form CH-177, item (4).

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

(1) Parties in This Case

a. **Protected party** *(check one)*

☐ Name of protected party is: _____

☐ Name of protected party is confidential in this case.

b. **Restrained party** *(check one)*

☐ Name of restrained party is: _____

☐ Name of restrained party is confidential in this case.

(2) My Information

My full name is: _____

☐ I am applying on behalf of *(name of entity)*: _____

Address: _____

City: _____ State: ___ Zip: _____

How do you know the minor? _____

My contact information *(optional)*:

Telephone: _____ Fax: _____

E-Mail Address: _____

Lawyer's information *(skip if you do not have a lawyer)*:

Name: _____ State Bar Number: _____

This is not a Court Order.

Case Number:

3 ☐ My Request Involves One Minor

I ask the court to release the confidential information checked below *(check all that apply)*:

a. ☐ Minor's name

b. ☐ Minor's address

c. ☐ Other information about the minor

(Please describe the information that you want released to you. For example, you can describe where the information is located by providing the form #, page #, and item # of where the information is located.)

_____

_____

_____

☐ Check this box if you need more space for your answer. Attach a piece of paper to this form and write "Attachment 3c" at the top.

4 ☐ My Request Involves More Than One Minor

a. ☐ The information I ask the court to release is the **same for all minors.**

(1) ☐ Minors' names

(2) ☐ Minors' address(es)

(3) ☐ Other information about the minors

(Please describe the information that you want released to you. For example, you can describe where the information is located by providing the form #, page #, and item # of where the information is located.)

_____

_____

_____

b. ☐ The information I ask the court to release is **not the same for all minors**.

(Please describe the confidential information that you want released to you by the court for each minor. If the minor's name was made confidential use the initials or name used by the court to identify each minor.)

_____

_____

_____

_____

☐ Check this box if you need more space for your answer. Attach a piece of paper to this form and write "Attachment 4" at the top.

This is not a Court Order.

5 Reasons I Want Access to Minor's Confidential Information

To approve your request, the court must find that giving you the minor's confidential information is necessary to prevent harassment or is in the best interest of the minor.

With that in mind, why should the court give you the minor's confidential information you asked for on page 2?

6 Number of pages attached to this form, if any: _____

7 Signature

I declare under penalty of perjury under the laws of the State of California that the information above and in all attached papers is true and correct.

Date: _____

_____
Type or print your name

▶ _____
Sign your name

8 Lawyer's Signature *(skip if you do not have one)*

Date: _____

▶ _____
Lawyer's signature

This is not a Court Order.

CH-177 Notice of Request for Release of Minor's Confidential Information

Clerk stamps date here when form is filed.

DRAFT

2020

Not approved by the Judicial Council

The court sent you this notice because someone has asked the court to release confidential information about a minor.

You have the right to tell the court if you disagree with the request to release confidential information. You have until the deadline listed below in item (4) . For next steps, see the instructions on page 2.

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(1) Parties in this case

a. Protected Party (*check one*):

☐ Name of protected party is: _____

☐ Name of protected party is confidential in this case

b. Restrained Party (*check one*):

☐ Name of restrained party is: _____

☐ Name of restrained party is confidential in this case

(2) Person asking for minor's confidential information

Full Name: _____ wants access to information that has been made confidential in this case. To see what information the person wants access to, see *Request for Release of Minor's Confidential Information* (form CH-176), which is included with this notice.

(3) You are receiving this notice because:

☐ You are the minor who made the request to keep information confidential.

☐ You are the parent or legal guardian who made the request to keep minor's information confidential.

(4) Deadline to disagree with request

The person in (3) has until *(date)* _____ to file a completed *Response to Request for Release of Minor's Confidential Information* (form CH-178) with the court clerk. Form CH-178 is included with this notice.

Case Number:

—Clerk's Certificate—

[seal]

I certify that I am not a party to this case and that a true copy of the *Notice of Request for Release of Information* (form CH-177), blank copy of the *Response to Request for Release of Minor's Confidential Information* (form CH-178), *Cover Sheet for Confidential Information* (form CH-175), and a true copy of the *Request for Release of Minor's Confidential Information* (form CH-176) were mailed first class, postage fully prepaid, in a sealed envelope to the person in (3).

a. Date of mailing: _____

(Instructions to clerk for item 4: The deadline is the first court business day after 20 days from the date of mailing.)

b. Mailed from the courthouse listed on page 1.

c. Mailed to the address of person in (3), provided to the court on Request to Keep Minor's Information Confidential (form CH-160), filed on *(date)* _____.

Date: _____ Clerk, by _____, Deputy

Next Steps for person in (3)

◯ **Form CH-176**, *Request for Release of Minor's Confidential Information*, is included with this notice. Take a close look at it to see who made the request (item (2)) and what confidential information the person is asking the court to release (page 2).

◯ **A blank copy of form CH-178**, *Response to Request for Release of Minor's Confidential Information*, is also included with this notice. If you do not agree with the request to release confidential information, you must complete form CH-177 and file it with the court clerk by the deadline listed in item (4) on page 1 of this form CH-177. You can also find form CH-178 at *www.courts.ca.gov/ch-178.pdf.*

◯ After the judge makes a decision, you should receive a copy of the judge's order *Order on Request for Release of Minor's Confidential Information* (form CH-179). If you do not receive a copy of the judge's order, you can contact the court to get a copy.

CH-178 Response to Request for Release of Minor's Confidential Information

Clerk stamps date here when form is filed.

DRAFT

2020

Not approved by the Judicial Council

☐ **CONFIDENTIAL** ☐ **PUBLIC VERSION (REDACTED)**

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

Instructions

When to use this form?

If someone is asking the court for information about a minor that has been made confidential, you can use this form to let the court know if you agree or disagree with the request.

Who should use this form?

You should use this form if you are a minor, parent, or legal guardian who made a request to keep information confidential.

What do I need to complete and file this form?

◯ You will need three documents that you should have received with this form:

- ►Form CH-176, *Request for Release of Minor's Confidential Information*;
- ►Form CH-177, *Notice of Request for Release of Minor's Confidential Information*; and
- ►Form CH-175, *Cover Sheet for Confidential Information.*

◯ You will need to give the court form CH-175 and two copies of your completed form CH-178. Make sure you take these forms to the court for filing by the deadline listed on form CH-177.

(1) Parties in This Case

a. **Protected party**

Name: _____

b. **Restrained party**

Name: _____

(2) Information About the Request to Release Confidential Information

Name of person requesting minor's confidential information _____
(person listed on form CH-176, item (2)):

This is not a Court Order.

Case Number:

3 My Information

a. Your name: _____

b. My contact information

Address where I can receive mail:
This address will be used by the court and other parties in this case to send you notices of court dates and documents. If you want to keep your home address private, you can use another address like a post office box or another person's address if you have their permission. If you have a lawyer, give your lawyer's address and contact information.

Address: _____

City: _____ State: _____ Zip: _____

Lawyer's information *(skip if you do not have one):*

Name: _____

State Bar No.: _____

4 Do You Agree to the Request to Release Minor's Confidential Information?

a. ☐ **No**, **I do NOT agree to the request** and do not want the court to give any confidential information to the person listed in item 2 because: _____

This is not a Court Order.

b. ☐ **No, to some of the request**. I agree to the person listed in item (2) having some information but do NOT want the person to have access to *(check everything that you do NOT want the person in (2) to have)*:

- ☐ Minor's name
- ☐ Minor's address
- ☐ Other information about the minor

I do not want the person to have the information checked above because: _____

c. ☐ **Yes, I agree to the request** and want the court to give the person listed in (2) all the confidential information they requested on form CH-176.

(5) Serve the Person Making the Request

You must have your server mail a redacted copy of this form (with no confidential information) to the person listed in (2). Have your server complete form POS-030, *Proof of Service by First-Class Mail--Civil,* after this form is mailed and file the completed form POS-030 with the court.

(6) Signature

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____ ▶ _____

Type or print your name | Sign your name

(7) Lawyer's Signature *(skip if you do not have one)*

Date: _____

▶ _____

Lawyer's signature

This is not a Court Order.

CH-179 Order on Request for Release of Minor's Confidential Information

Clerk stamps date here when form is filed.

DRAFT

4.2.2020

Not approved by the Judicial Council

☐ **CONFIDENTIAL** ☐ **PUBLIC VERSION (REDACTED)**

1 Parties in This Case

a. **Protected party** *(check one)*:

☐ Name: _____

☐ Name is confidential in this case.

b. **Restrained party** *(check one)*:

☐ Name: _____

☐ Name is confidential in this case.

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

2 Person Asking for Release of Minor's Confidential Information

Full Name: _____

On behalf of *(name of entity)*: _____

(The court will complete item 3 if request is denied or items 4 – 9 if request is granted or partially granted.)

3 ☐ Court Denied Request or More Information Is Needed

a. ☐ **The court denies the request by the person in 2** to release minor's confidential information.

b. ☐ **The court needs more information before making a decision.**
The person in 2 must go to court on the date and time below to give more information why the court should release minor's confidential information.

Court Date →

Date: _____ Time: _____

Dept.: _____ Room: _____

Name and address of court, if different from above:

_____

_____

c. ☐ The court will mail a copy of this order to the person who made the request to keep minor's information confidential.

d. If 3 is checked, only page 1 of this order will be issued. All other pages may be discarded.

Instructions to Clerk

If item 3 is checked, file page 1 in a public file with all confidential information redacted, and discard pages 2 – 4. If item 4 is checked, file the original in a confidential file and a redacted copy in a public file.

Date: _____

_____

Judicial Officer

This is a Court Order.

4 ☐ Court Granted Request

a. ☐ The request made by the person in 2 is:

(1) ☐ Completely granted.

(2) ☐ Partially granted.

b. ☐ The court, on its own motion, releases minor's confidential information as described in 6.

c. **Details of the order are stated below in items 5 – 9 .**

5 Court's Findings

a. ☐ In granting the request made by the person in 2 the court finds that the:

(1) person who made the request to keep minor's information confidential has been properly served and has had sufficient time to respond; and

(2) release of the minor's confidential information is *(check at least one)*:

(A) ☐ necessary to prevent harassment.

(B) ☐ in the minor's best interest.

b. ☐ The court, on its own motion, releases the minor's confidential information as described in 6 because it is *(check at least one)*:

(A) ☐ necessary to prevent harassment.

(B) ☐ in the minor's best interest.

6 Release of Confidential Information

a. The following persons/entities may have access to the information listed in 6 b *(check all that apply)*:

(1) ☐ The person listed in 2.

(2) ☐ Minor's school *(name)*: _____.

(3) ☐ Minor's after-school program *(name)*: _____.

(4) ☐ Minor's childcare provider *(name)*: _____ .

(5) ☐ Supervised visitation provider *(name)*: _____ .

(6) ☐ Other *(name of person or entity)*: _____.

This is a Court Order.

b. This order releases minor's confidential information as follows:

Minor 1: _____

(use fictitious name if not releasing confidential name)

(1) ☐ Minor's name: _____

(2) ☐ Minor's address: _____

(3) ☐ Other information about the minor:

_____

_____

_____

Minor 2: _____

(use fictitious name if not releasing confidential name)

(1) ☐ Minor's name: _____

(2) ☐ Minor's address: _____

(3) ☐ Other information about the minor:

_____

_____

_____

Minor 3: _____

(use fictitious name if not releasing confidential name)

(1) ☐ Minor's name: _____

(2) ☐ Minor's address: _____

(3) ☐ Other information about the minor:

_____

_____

_____

☐ *Check this box if you need more space to include more minors or more information. Attach a sheet of paper and write "Attachment 6b" for a title.*

This is a Court Order.

7 All other information made confidential by the court and not released with the court's permission must be kept confidential. Any person who misuses or discloses the minor's confidential information to anyone other than law enforcement **may be sanctioned up to $1,000 or face other court penalties**. See Code of Civil Procedure section 527.6(v) for the limited situations when confidential information can be disclosed without the court's permission.

8 ☐ Service

a. ☐ The court will send a copy of this order to the person listed in 2 and the minor or legal guardian who made the request to keep minor's information confidential.

b. ☐ The person in 2 must have a server mail a copy of this order to the minor or legal guardian who made the request for confidential information. Have the server complete and file *Proof of Service by First-Class Mail — Civil* (form POS-030) after the copy has been mailed.

9 ☐ Other Orders:

_____

_____

_____

_____

_____

Date: _____ _____

Judge (or Judicial Officer)

Request for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the hearing. Contact the clerk's office or go to www.courts.ca.gov/forms.htm for *Request for Accommodations by Persons With Disabilities and Response* (form MC-410). (Civ. Code, § 54.8.)

—Clerk's Certificate—

Clerk's Certificate

[seal]

I certify that this *Order on Request for Release of Minor's Confidential Information (Civil Harassment Prevention)* (form CH-179) is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____, Deputy

This is a Court Order.

DV-109 Notice of Court Hearing

Clerk stamps date here when form is filed.

Draft- Not approved by Judicial Council 3.19.20

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 Name of Person Asking for Order:

Your lawyer in this case *(if you have one):*
Name: _____ State Bar No.: _____
Firm Name: _____
Address *(If you have a lawyer for this case, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, give a different mailing address instead. You do not have to give your telephone, fax, or e-mail.)*
Address: _____
City: _____ State: _____ Zip: _____
Telephone: _____ Fax: _____
E-Mail Address: _____

2 Name of Person to Be Restrained:

The court will fill out the rest of this form.

3 Notice of Hearing

A court hearing is scheduled on the request for restraining orders against the person in 2:

Hearing Date → Date: _____ Time: _____
Dept.: _____ Room: _____

Name and address of court if different from above:
_____
_____
_____

4 Temporary Restraining Orders (Any orders granted are attached on form DV-110.)

a. Temporary Restraining Orders for personal conduct and stay-away orders as requested in form DV-100, *Request for Domestic Violence Restraining Order,* are *(check only one box below):*
   (1) ☐ All **GRANTED** until the court hearing.
   (2) ☐ All **DENIED** until the court hearing. *(Specify reasons for denial in b, below.)*
   (3) ☐ Partly **GRANTED** and partly **DENIED** until the court hearing. *(Specify reasons for denial in b, below.)*

b. Reasons for denial of some or all of those personal conduct and stay-away orders as requested in form DV-100, *Request for Domestic Violence Restraining Order,* are:
   (1) ☐ The facts as stated in form DV-100 do not show reasonable proof of a past act or acts of abuse. (Family Code, §§ 6320 and 6320.5.)
   (2) ☐ The facts do not describe in sufficient detail the most recent incidents of abuse, such as what happened, the dates, who did what to whom, or any injuries or history of abuse.
   (3) ☐ Further explanation of reason for denial, or reason not listed above:
   _____
   _____

Case Number:

5 Confidential Information Regarding Minor

a. ☐ A *Request to Keep Minor's Information Confidential* (form DV-160) was made and **GRANTED** *(see form DV-165, Order on Request to Keep Minor's Information Confidential, served with this form.)*

b. **If the request was granted, the information described on the order (form DV-165, item 7) must be kept CONFIDENTIAL. The disclosure or misuse of the information is punishable as a sanction, with a fine of up to $1,000 or other court penalties.**

6 Service of Documents by the Person in 1

At least ☐ **five** ☐ _____ **days before the hearing**, someone age 18 or older—**not you or anyone to be protected—**must personally give (serve) a court file-stamped copy of this form (DV-109, *Notice of Court Hearing)* to the person in 2 along with a copy of all the forms indicated below:

a. DV-100, *Request for Domestic Violence Restraining Order* (file-stamped)

b. ☐ DV-110, *Temporary Restraining Order* (file-stamped) **IF GRANTED**

c. DV-120, *Response to Request for Domestic Violence Restraining Order* (blank form)

d. DV-120-INFO, *How Can I Respond to a Request for Domestic Violence Restraining Order?*

e. DV-250, *Proof of Service by Mail* (blank form)

f. ☐ DV-170, *Notice of Order Protecting Information of a Minor,* and DV-165*, Order on Request to Keep Minor's Information Confidential* (file-stamped), **IF GRANTED**

g. ☐ Other *(specify):* _____

Date: _____ _____

Judicial Officer

Right to Cancel Hearing: Information for the Person in 1

- If item 4 a(2) or 4 a(3) is checked, the judge has denied some or all of the temporary orders you requested until the court hearing. The judge may make the orders you want after the court hearing. You can keep the hearing date, or you can cancel your request for orders so there is no court hearing.
- If you want to cancel the hearing, use form DV-112, *Waiver of Hearing on Denied Request for Temporary Restraining Order*. Fill it out and file it with the court as soon as possible. You may file a new request for orders, on the same or different facts, at a later time.
- If you cancel the hearing, do not serve the documents listed in item 6 on the other person.
- If you want to keep the hearing date, you must have all of the documents listed in item 6 served on the other person within the time listed in item 6.
- At the hearing, the judge will consider whether denial of any requested orders will jeopardize your safety and the safety of children for whom you are requesting custody or visitation.
- You must come to the hearing if you want the judge to make restraining orders or continue any orders already made. If you cancel the hearing or do not come to the hearing, any restraining orders made on form DV-110 will end on the date of the hearing.

Case Number:

To the Person in 1 :

- The court cannot make the restraining orders after the court hearing unless the person in 2 has been personally given (served) a copy of your request and any temporary orders. To show that the person in 2 has been served, the person who served the forms must fill out a proof of service form. form DV-200, *Proof of Personal Service,* may be used.
- For information about service, read form DV-200-INFO, *What Is "Proof of Personal Service"?*
- If you are unable to serve the person in 2 in time, you may ask for more time to serve the documents. Read form DV-115-INFO, *How to Ask for a New Hearing Date*.

To the Person in 2 :

- If you want to respond in writing, mail a copy of your completed form DV-120, *Response to Request for Domestic Violence Restraining Order,* to the person in 1 and file it with the court. You cannot mail form DV-120 yourself. Someone age 18 or older — **not you** — must do it.
- To show that the person in 1 has been served by mail, the person who mailed the form must fill out a proof of service form. Form DV-250, *Proof of Service by Mail,* may be used. File the completed form with the court before the hearing and bring a copy with you to the hearing.
- For information about responding to a restraining order and filing your answer, read form DV-120-INFO, *How Can I Respond to a Request for Domestic Violence Restraining Order?*
- Whether or not you respond in writing, go to the hearing if you want the judge to hear from you before making an order. You may tell the judge why you agree or disagree with the orders requested. You may bring witnesses and other evidence.
- **At the hearing, the judge may make restraining orders against you that could last up to five years.**
- **The judge may also make other orders about your children, child support, spousal support, money, and property and may order you to turn in or sell any firearms that you own or possess.**

Request for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the hearing. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons with Disabilities and Response* (form MC-410). (Civ. Code, § 54.8.)

(Clerk will fill out this part.)

—Clerk's Certificate—

Clerk's Certificate [seal]

I certify that this *Notice of Court Hearing* is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____, Deputy

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

DV-160 Request to Keep Minor's Information Confidential

CONFIDENTIAL

Clerk stamps date here when form is filed.

Draft- Not approved by Judicial Council 03.26.20

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

When do I use this form?
Complete this form if you want the court to keep information about a minor in a domestic violence restraining order proceeding confidential and not available to the public or the restrained person. If you only want to keep your home address confidential, you may use a mailing address on your other forms rather than using this form.

What if there is information I don't want the restrained person to have?
You can make this request at item (8) if you want to ask the court to keep information confidential from the restrained person. If the court grants your request to keep certain information confidential from the restrained person, the information will have to be redacted (whited or blacked out) from all forms before the restrained person gets a copy. But be aware that if the court denies your request, the information may be provided to the restrained person.

Who will see this form?
The public will NOT have access to this form.
The restrained person will have access to the entire form unless the court grants item (8) on this form.

(1) Parties in This Case

a. Person who requested restraining order (form DV-100, item (1)):
Full Name: _____

b. Person to be restrained (form DV-100, item (2)):
Full Name: _____

(2) Person Making Request for Confidentiality

a. Full Name: _____

b. I am:

(1) ☐ The minor requesting confidentiality.

(2) ☐ The ☐ parent ☐ legal guardian of the minor or minors listed below.

List all the minors that you are making the request for:

Name: _____

Name: _____

Name: _____

Name: _____

☐ *Check here if there are additional minors. Attach a sheet of paper and write "Attachment 2b(2)—Additional Minors" for a title.*

This is not a Court Order.

Case Number:

3 Contact Information

Address where you can receive mail

This address will be used by the court and the person in 2 to notify you in this case. If you want to keep your home address private, you can use another address like a post office box or another person's address, if you have their permission. If you have a lawyer, give your lawyer's address and contact information.

Address: _____

City: _____ State: _____ Zip: _____

Your contact information (*optional*)

Telephone: _____ Fax: _____

E-mail address: _____

Lawyer's information (*skip if you do not have one*)

Name: _____ State Bar No.: _____

4 ☐ Requests for More Than One Minor *(only for parents or legal guardians)*

I am making this request for two or more minors.

a. ☐ The information I want confidential (as checked in item 5) is the SAME for all minors.

b. ☐ The information I want confidential (as checked in item 5) is NOT the same for all minors.

(If you checked 4b, make sure you list all the information you want confidential for each minor in 5. If you need more space in 5, attach a separate piece of paper.)

5 Information to Be Kept Confidential from the Public

I want the information checked below to be made confidential and NOT available to the public.

(Check all that apply)

a. ☐ **Minor's name**
(Note: If your request is granted, the public will not have access to the minor's name in this case, but law enforcement must be given this information.)

b. ☐ **Minor's address**

(Note: You do NOT have to make this request if you use a mailing address that does not need to be kept confidential. Use that mailing address on all forms in this case and any other civil case.)

The address I want kept confidential is: _____

_____

This is not a Court Order.

c. ☐ **Information relating to the minor**

(Note: If information relating to the minor is made confidential by the court, the public will not have access to this information but the restrained person must be given the information that is necessary to comply with the restraining order and to respond to the restraining order request. Also, the court may give permission to release confidential information in this case to other people like the minor's childcare provider or school, or anyone who needs the information to protect the minor's best interest or to prevent abuse.)

Describe all information in the documents that will be filed that you want kept confidential.

You may either *(check one)*:

(1) ☐ Attach a copy of form DV-100 or other document that you are filing. Circle all the information you want kept confidential.

(2) ☐ List the information below, identifying the location of the statements in form DV-100 or other document that you are filing.

Location of Information *(for example, form #, page #, paragraph #, line #, attachment #, or exhibit #)*	**Information to Be Redacted** *(not viewable by the public)*
(a)	
(b)	
(c)	
(d)	

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper, and write "Attachment 5c(2)" for a title.*

This is not a Court Order.

6 Reasons for Request

To approve your request in 5, the court must expressly find all of the following:

- The minor's right to privacy overcomes the public's right to access the information;
- There is a substantial probability that the minor's interest will be prejudiced if the information is not kept confidential;
- The order to keep the information confidential is narrowly tailored; and
- No less restrictive means exist to protect the minor's privacy.

Use these four requirements to help you answer the questions below.

a. Why should the information about the minor provided in item 5 be kept private or confidential from the public?

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper, and write "Attachment 6a" for a title.*

b. What do you think would happen if the information was NOT made private or confidential?

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper, and write "Attachment 6b" for a title.*

This is not a Court Order.

Case Number:

*(Skip item 7 and 8d if you are **not** requesting a restraining order at the same time as this request.)*

7 If any portion of the request for confidentiality from the public (item 5) is denied, I want to *(check one):*

a. ☐ **Cancel my request for restraining order**
I ask the court NOT to make a decision on my *Request for Domestic Violence Restraining Order* (form DV-100). I understand that cancelling my request means that I will not receive a restraining order at this time. *(Note: You may file a request on the same or different facts at a later date.)*

b. ☐ **Move forward with my request for restraining order**
I ask the court to make a decision on my *Request for Domestic Violence Restraining Order* (form DV-100). *(Note: Choosing this option means that all of the information in your completed form DV-100 and other court papers in this case will be available to the public and must be seen by the restrained person.)*

8 ☐ Information to Be Kept Confidential from the Restrained Person

(Note: The restrained person must be given information necessary to comply with the restraining order and to respond to the restraining order request.)

I do not want the restrained person to have access to some of the information checked in item 5.

a. What information do you want to be confidential and not given to the restrained person?

(1) ☐ Minor's name

(2) ☐ Minor's address

(3) ☐ Other information relating to the minor from item 5 *(specify):*

_____

_____

_____

b. Why should the information listed in 8a be kept confidential and not given to the restrained person?

_____

_____

_____

_____

c. What do you think would happen if the information listed in 8a is given to the restrained person?

_____

_____

_____

_____

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper, and write "Attachment 8" for a title.*

This is not a Court Order.

d. ☐ If any portion of the request for confidentiality from the restrained person (item 8) is denied, I want to:

(1) ☐ **Cancel my request for restraining order**
I ask the court NOT to make a decision on my *Request for Domestic Violence Restraining Order* (form DV-100). I understand that canceling my request means that I will not receive a restraining order at this time. *(Note: You may file a request on the same or different facts at a later date.)*

(2) ☐ **Move forward with my request for restraining order**
I ask the court to make a decision on my *Request for Domestic Violence Restraining Order* (form DV-100). (*Note: Choosing this option means that all of the information in your completed form DV-100 and other court papers in this case must be seen by the restrained person.)*

9 People I Want To Have Access To Confidential Information

(Note: If you want other people to have unredacted copies of restraining order forms in this case, you should complete this item.)

a. If my request in item 5 is granted, I want to be allowed to give the following people or entities *(check all that apply)*:

(1) ☐ Minor's school and after-school program
(2) ☐ Minor's childcare provider
(3) ☐ Supervised visitation provider
(4) ☐ Other (*name of person or entity*): _____

b. copies of documents from this case with the following information *(check all that apply)*:

(1) ☐ Minor's name
(2) ☐ Minor's address
(3) ☐ Information listed in item 5c.

10 Number of pages attached to this form, if any: _____

11 Signature

I declare under penalty of perjury under the laws of the State of California that the information above and all attached papers are true and correct.

Date: _____

_____ ▶ _____
Type or print your name | Sign your name

12 Lawyer's Signature (*skip if you do not have one*)

Date: _____ ▶ _____
Lawyer's signature

This is not a Court Order.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

DV-160-INFO Privacy Protection for a Minor (Person Under 18 Years Old) Domestic Violence Prevention

Can I keep information about a minor confidential?

Yes. In a domestic violence restraining order case, you can ask a judge to make information about a minor confidential. Confidential means that the public is unable to see the information, because the information is kept private. This is important because most papers in your court case are available for the public to see. This means anyone can view information on your papers, including information about a minor. If the judge grants your request, the public will not be able to see the minor's information on your paperwork.

Who can make this request?

Several people can make this request, including a minor's parent or legal guardian. Any minor protected by a restraining order can make this request, as well. Also, any person, including a minor, who is the accused person in a case may make this request.

A minor can make this request without the help of an adult. This depends on the minor's age, though. If the minor is 12 years old or younger, the judge may want an adult to help the minor make this request.

For more information on who can make this request, contact your local self-help center or a lawyer.

What information can I ask the judge to make confidential?

A judge can make any information about a minor confidential. That means that you can ask to make confidential the minor's name, address, any statements about the minor's abuse, or any abuse the minor witnessed.

If you want to protect the minor's address only, you do not have to make this request. Instead, you can use a different address on your restraining order request, such as a mailing address that is not where the minor lives, a P.O. box, or someone else's address. If you use someone else's address, be sure to get their permission first.

Whatever address you use, make sure you will get your mail regularly. This is important, because the address you use is the address the court and other party will use to send you papers for your case.

Does this request cost money?

No, this request is free.

I need an interpreter. How can I get help?

You may use form INT-300 to request an interpreter. Ask court staff for information.

I have a disability. How can I get help?

You may use form MC-410 to request assistance. Contact the disability/ADA coordinator at your local court for more information.

Do I need a lawyer to make this request?

No, but this type of request can be hard to get through on your own. Free help may be available at your local court's self-help center. (See below.)

Where can I find a self-help center?

Find your local court's self-help center at www.courts.ca.gov/selfhelp. Self-help center staff will not act as your lawyer but may be able to give you information to help you decide what to do in your case.

Where can I find other help?

The National Domestic Violence Hotline provides free and private safety tips and help in over 100 languages. Call them at 1-800-799-7233; 1-800-787-3224 (TTY); or visit online at www.thehotline.org.

What do I have to do to make information about a minor confidential?

If you're ready to start the process for this request, go to page 2 to see a checklist of steps you need to complete in order to ask the judge to make information about a minor confidential.

DV-160-INFO Privacy Protection for a Minor (Person Under 18 Years Old) Domestic Violence Prevention

What do I have to do to make information about a minor confidential?

You can use these steps as a checklist.

Step 1: Complete the forms.
You will need to complete these forms to make your request:

- ◯ Form DV-160
- ◯ Form DV-165 (complete items 1 and 2 only)

You can find these forms online at www.courts.ca.gov/forms.

► See tips to complete the forms.

To request a restraining order, you need to complete different forms. See form DV-505-INFO for a list of forms you need to complete to request a restraining order.

Step 2: Take the forms to your court clerk to file.
Find out which courthouse to take your forms to by calling your local court or searching online at *www.courts.ca.gov/find-my-court.htm*.

Step 3: Understand the judge's order.
The judge will write your orders on form DV-165. The judge will **grant** or **deny** your request.
► See page 3 for what this means.

Step 4: Give court papers to other parties.
In some cases, you will need to have your server give court papers to the other parties in your case. This process is called service.
► See page 4 for tips to complete service.

Tips for Step 1: Complete the forms

I only want to protect the minor's address. If you only want to protect the minor's address, you do not have to make this request. See "What information can I ask the judge to make confidential?" on page 1 for more information.

I want to protect more than one minor. Only an adult who is the minors' parent or legal guardian may make a request to protect more than one minors' information.

I want to give the minor's school or other people copies of court orders from this case.
If the court grants your request to make information regarding a minor confidential, you may want to ask the court for permission to give other people copies of certain documents in your case. For example, if the minor's name was made confidential and the restraining order protects the minor, you may want the minor's school to have a copy that is unredacted (shows the minor's name). You can make this request at item 9 on form DV-160.

My right to cancel my restraining order request.

You have the right to cancel your request for a restraining order if the judge does not grant your request to make information confidential. This right only applies if you are asking for a restraining order at the same time as your request to make information confidential. To cancel your request for a restraining order, check the box on form DV-160, item 7a, and item 8d(1), if it applies.

If you cancel your request for a restraining order, you will **not** receive a domestic violence restraining order at this time.

If, **after** canceling your request for a restraining order, you want to ask for a restraining order based on the same facts, you must start the process over. See form DV-505-INFO for more information.

▶Tips for Step 3: Understand the judge's order.

Look at form DV-165 to see what the judge decided.

What if the judge granted my request?

Look closely at form DV-165, items 7 and 8, to see what information the judge made confidential in your case. If the judge granted your request to keep information confidential, the information the judge decided to keep confidential will not be available to the public. The information will be available only to the parties in the case.

At times, the judge may make information confidential from the other party in your case. If this happens, the judge will complete box 8b on form DV-165.

Now, take a close look at item 9 on form DV-165. This tells you who is responsible for redacting the information on your paperwork and deadline for filing it with the court.

Redacting means to hide (blacken or whiten out) information so it cannot be seen. If the judge makes you responsible for redacting the information, your local self-help center may be able to help you.

What if the judge did not grant (denied) my request?

This means that if you move forward with your case, the minor's information will not be confidential on your paperwork. This is important because anyone can go to your local courthouse and ask to see the documents you filed in this case.

If the judge does not grant your request, you may have other legal options available to you. Visit your local court's self-help center or talk with a lawyer.

▷ **What if I asked to cancel my restraining order request?**

If you checked box 7a or 8d(1) on form DV-160 and the judge denied your request, the paperwork you turned in with this request will not be available to the public, except for page 1 of form DV-165. This includes form DV-100 and any proposed order forms. The court will either return these forms to you, destroy them, or delete them from its records unless you give the court permission to file the forms.

▷ **What if I file documents with the court in the future?**

If you file documents with the court in the future, be sure to use form DV-175 as a cover sheet and follow the instructions at the top of the form.

Is there a penalty for disclosing confidential information?

Misusing or giving out confidential information can result in the court ordering you to pay up to $1,000 or other court penalties. You will not be penalized if you:

- Give information to police to help them enforce the judge's orders, or
- If you are the minor who has claimed abuse.

DV-160-INFO Privacy Protection for a Minor (Person Under 18 Years Old) Domestic Violence Prevention

▶Tips for Step 4: Give court papers to all parties in your case.

In some cases, the judge will order you to serve your court papers. Look at form DV-165 to see what the judge decided.

What did the judge decide in your case?

The judge **granted** my request to keep some of the minor's information confidential.

Your papers must be served. Follow steps 1–5 below.

The judge **denied** (did not grant) my request to keep some information confidential. I **canceled** my request for a restraining order and there is **no other issue** in this case for a judge to decide on.

Your papers do not need to be served. You may stop here.

The judge **denied** (did not grant) my request to keep some information confidential. The **case is still open** because there are other issues for a judge to decide on, like divorce or custody.

If this is your situation, forms DV-160 and DV-165 must be served by mail or in person. Follow steps 3–5 below.

◯ Step 1: Find out which papers you need to serve.

The judge will check which papers you need to serve to the other parties in your case on form DV-165, item 13.

◯ Step 2: Find out whether you need to serve the other parties personally or by mail.

The judge will check how you need to serve your court papers to the other parties in your case on form DV-165, item 13.

If the judge checks item 13a, you will need to have your server personally serve (give) your court papers to the other parties in your case.

If the judge checks item 13b, you will need to have your server mail your court papers.

◯ Step 3: Choose a server.

The person who serves your papers is called a server. Your server must be at least 18 years old, not protected by the restraining order, and not involved in your case. **You are not allowed to serve your own court papers.**

Some situations may be dangerous. Think about people's safety when deciding who you choose to serve your court papers.

A sheriff or marshal will serve your court papers for free. Another option is a process server.

A process server is a business you pay to deliver court papers. To hire a process server, look for "process server" on the internet or in the yellow pages.

◯ Step 4: Have your server give your court papers to all parties.

For personal service, give your server your court papers as well as form DV-200.

For service by mail, give your server your court papers as well as form DV-250.

◯ Step 5: File proof with the court.

The court needs proof that your papers were served. After your server completes form DV-200 or form DV-250, take it to the court to file in your case.

If the sheriff or marshal served your papers, they may use another form for proof instead of form DV-200. Make sure a copy is filed with the court and that you get a copy.

For more information, read form DV-200-INFO or ask your local court's self-help center for help.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

DV-165 Order on Request to Keep Minor's Information Confidential

☐ **CONFIDENTIAL** ☐ **PUBLIC VERSION (REDACTED)**

Clerk stamps date here when form is filed.

Draft- Not approved by Judicial Council

03.26.20

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

Instructions to Clerk: If item (3) is checked, file page 1 in a public file and discard pages 2–6.

(1) Parties in This Case

a. Person who requested restraining order (form DV-100, item (1)):
Full Name: _____

b. Person to be restrained (form DV-100, item (2)):
Full Name: _____

(2) Person Making Request for Confidentiality

Full Name: _____

(Court will complete item (3) if request is denied or items (4)–(13) if request is granted or partially granted.)

(3) ☐ Court Denied Request or More Information Needed

a. ☐ **Denied.** The request to keep information of a minor or minors confidential is denied.

(1) ☐ **The court will NOT make a decision on the Request for Domestic Violence Restraining Order (form DV-100).** The request for restraining order and proposed order forms must be returned to the requester personally, destroyed, or deleted from electronic files and not filed with the court unless the person requesting the restraining order agrees to file them without any changes.

(2) ☐ **The court will make a decision on the Request for Domestic Violence Restraining Order (form DV-100).** The request for restraining order and any accompanying orders will be filed in the public file.

b. ☐ **More information is needed for court decision.** You must go to court on the date and time below. At the court date, you must give more information on why you need the court to make information confidential.

Hearing Date → Date: _____ Time: _____
Dept.: _____ Room: _____

Name and address of court if different from above:
_____
_____
_____

c. If (3) is checked, only this page of this order form will be issued. All other pages may be discarded.

Date: _____

_____
Judge (or Judicial Officer)

This is a Court Order.

Case Number:

Court will complete the rest of this form if the request is partially or fully granted

4 ☐ Court Granted Request

a. ☐ **Granted in full.** The request to keep the information of a minor or minors confidential is granted in full. Details of the order are stated below in items 5–12.

b. ☐ **Partially granted**. The request to keep the information of a minor or minors confidential is granted only in part. Details of the order are stated below in items 5–12.

5 Findings

☐ The court finds all of the following *(all of these findings are required if granting in full or in part)*:

a. The right to privacy of the minors listed in item 6 overcomes the public's right of access to the information;

b. There is a substantial probability that the interests of the minors listed in item 6 will be prejudiced if the information is not kept confidential;

c. The order is narrowly tailored; and

d. No less restrictive means exist to protect the privacy of the minors in item 6.

6 ☐ Minors Subject to This Order

This order protects the information listed in item 7 for the following minors:

a. Name: _____

b. Name: _____

c. Name: _____

d. Name: _____

☐ *Check here if there are additional minors. Attach a sheet of paper and write "Attachment 6—Additional Minors" for a title.*

References in this order to "the minor" refer to all minors listed here.

7 Information to Be Kept Confidential from the Public

WARNING: Unless authorized by the court or by law, if the information listed below is misused or disclosed to anyone other than law enforcement, you may be sanctioned up to $1,000 or face other court penalties. See Family Code section 6301.5 for the limited situations in which disclosures can be made without a court order.

The following information must be kept confidential and not viewable by the public. *(Check all that apply.)*

a. ☐ **Name of minor**

True name of minor in item 6 *(to be kept confidential)*	**Initials viewable by the public** *(to be used in redacted version)*

This is a Court Order.

b. ☐ **Address of minor**

The following addresses of the minors listed in item (6) must be redacted and must not be viewable by the public: _____

_____

c. ☐ **Information relating to minor** *(check one):*

(1) ☐ The information CIRCLED in the attached copy of form DV-100 or other document or form is made confidential by this order.

(2) ☐ The information below is made confidential by this order:

Location of Information *(for example, form #, page #, paragraph #, line #, attachment #, or exhibit #)*	**Information to Be Redacted** *(not viewable by the public)*
(a)	
(b)	
(c)	
(d)	

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper, and write "Attachment 7c(2)" for a title.*

d. ☐ **Other:**

_____

_____

_____

This is a Court Order.

8 Information to Be Kept Confidential from the Restrained Person

The restrained person *(full name)* _____ will have access to the following information checked in item 7 to comply with the protective order and prepare a response:

a. ☐ All the information, unredacted.

b. ☐ All the information except for the following:

_____

_____

_____

_____

_____

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper, and write "Attachment 8b" for a title.*

9 People Who May Have Access to Unredacted Court Documents

a. The minor's *(check all that apply)*

(1) ☐ School and after-school program

(2) ☐ Minor's childcare provider

(3) ☐ Supervised visitation provider

☐ Other (*name*): _____ .

b. may be given copies of unredacted documents from this case with the following information *(check all that apply)*:

(1) ☐ Minor's name

(2) ☐ Minor's address

(3) ☐ Minor's information listed in item 7c.

c. Law enforcement may have access to any information in this case that is necessary to enforce the restraining order.

This is a Court Order.

10 Responsibility for Redacting All Forms and Documents

a. All forms and documents submitted with the request for confidentiality **must be redacted and filed with the court** no later than *(number of court days or date)* _____, by the:

(1) ☐ Court

(2) ☐ Person making the request

(3) ☐ Other: _____

b. The redacted documents must be filed in a public file, and the unredacted documents must be filed in a confidential file.

11 Court Records and Hearings

The information listed in item 7 must NOT be disclosed by the court in any:

a. Registers of actions, indexes, court calendars, court transcripts, or minute orders in this case, any family law case, or any civil case with the same parties, in the State of California.

b. Future court hearings, including any documents introduced during a hearing in this case, any family law case, or any civil case with the same parties, in the State of California.

12 To All Parties

a. The information made confidential by this order must NOT be made public in this case, any family law case, or or any other civil case with the same parties, in the State of California.

b. If you file a document in this case or any case noted above in 12a that includes information listed in item 7, you must attach form DV-175, *Cover Sheet for Confidential Information*, to the front, and include a copy of this order if there is not already one in the case.

This is a Court Order.

Case Number:

13 To the Person Making the Request for Confidentiality

You must do the following:

a. ☐ Have a copy of each form listed in item (c) below **personally served** on (given to) the restrained person.
(See form DV-200-INFO to find out how to meet this requirement. Personal service is required when the protected person is making this request and when forms DV-100, DV-109 and DV-110 have NOT been served on the restrained person.)

b. ☐ Have a copy of each form listed in item (c) mailed to the:
(1) ☐ Restrained person
(2) ☐ Protected person
(3) ☐ Other: _____
(See form DV-250 to find out how to meet this requirement.)

c. Forms to serve:
(1) Form DV-170, *Notice of Order Protecting Information of Minor*
(Form DV-170 should be the first page with all other forms stapled behind it.)
(2) ☐ Form DV-100, *Request for Domestic Violence Restraining Order*
(3) ☐ Form DV-109, *Notice of Court Hearing*
(4) ☐ Form DV-110, *Temporary Restraining Order*
(5) ☐ Form DV-160, *Request to Keep Minor's Information Confidential*
☐ Unredacted ☐ Redacted (if item 8b on DV-165 is checked)
(6) Form DV-165, *Order on Request to Keep Minor's Information Confidential*
☐ Unredacted ☐ Redacted (if item 8b on DV-165 is checked)
(7) Form DV-175, *Cover Sheet for Confidential Information* (leave blank)
(8) ☐ Other: _____

Date: _____

_____
Judge (or Judicial Officer)

Instructions to Clerk

(1) The originals of all unredacted documents containing the information checked in item 7 must be kept in a confidential file and must NOT appear in any **register of action, calendar, index, minute order, or transcript** in this case, any family law case, or any civil case with the same parties, in the State of California**.**

(2) If item 8b is checked, provide the person making this request with no more than three certified copies of forms DV-100, DV-109, and DV-110, which must include any information in item 7 but must NOT include any information listed in item 8b. Use form DV-170, *Notice of Order Protecting Information of Minor*, as a cover sheet for each set of forms.

(3) Any information listed in item 8b must not be available to the restrained person and must be filed in a confidential file.

This is a Court Order.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

DV-170 Notice of Order Protecting Information of Minor

Clerk stamps date here when form is filed.

Draft- Not approved by Judicial Council 03.18.20

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

Instructions to Clerk
When providing copies of unredacted filed documents to any party, you must attach this cover sheet on top of the document or set of documents. Complete item (2) to indicate the forms that are attached.

(1) Confidential Information

The court has made some information in this case confidential. Details of the order for confidentiality are in form DV-165, *Order on Request to Keep Minor's Information Confidential*. Confidential information may be given **only** to law enforcement to enforce the restraining order.

(2) Documents Attached to This Notice

The following documents contain confidential information:

a. ☐ Form DV-100, *Request for Domestic Violence Restraining Order*
b. ☐ Form DV-109, *Notice of Court Hearing*
c. ☐ Form DV-110, *Temporary Restraining Order*
d. ☐ Form DV-130, *Restraining Order After Hearing*
e. ☐ Form DV-160, *Request to Keep Minor's Information Confidential*
f. ☐ Form DV-165, *Order on Request to Keep Minor's Information Confidential*
g. ☐ Form DV-175, *Cover Sheet for Confidential Information* (leave blank)
h. ☐ Other: _____

(3) Filing Documents

If you file any document that contains any confidential information in this case, other family law case, or other civil case with the same parties, **you must also use form DV-175 as a cover sheet**. See form DV-165, item (7) for all information made confidential by the court.

(4) To person receiving this notice:

Unless authorized by the court or by law, **you may be sanctioned up to $1,000 or face other court penalties** if you misuse or disclose the information that is confidential in this case to anyone other than law enforcement. See Family Code section 6301.5(c)(2) for the limited situations in which disclosures can be made without the court's permission.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

DV-175 Cover Sheet for Confidential Information

CONFIDENTIAL

Clerk stamps date here when form is filed.

Draft- Not approved by the Judicial Council
03.18.20

Fill in court name and street address:

Superior Court of California, County of

Fill in the case number:

Case Number:

Instructions

Use this cover sheet:

When information about a minor has been made confidential (granted on form DV-165, *Order on Request to Keep Minor's Information Confidential*), **and** you want to file a document or form that includes confidential information *(see form DV-165, item 7).*

How to use this cover sheet

- ◯ Make **two copies** of the documents you want to file.
- ◯ Complete this form, place it on top of the documents (both copies) you want to file, and file them with the court.

1 Parties in This Case

a. Person who filed the case:
(Name): _____

b. Other party or parties:
(Name): _____

2 Information About the Order for Confidentiality

a. The order was made in *(check one):*
(1) ☐ This case.
(2) ☐ Another civil or family law case:
(a) Case number: _____
(b) County it was filed in: _____
Attach a copy of the order (form DV-165) if you have one.

b. Minor protected by confidentiality order:
(1) Name: _____
(2) Name: _____
☐ *Check here if you need more space. Include the information on a separate piece of paper, write "Attachment 2" on the top, and attach it to this form.*

Instructions to Clerk

1. The court must review and approve a redacted version of documents attached to this cover sheet **before filing**.
2. Once approved by the court, file the redacted version in a public file.
3. File the unredacted version and this cover sheet in a confidential file.

3 I have attached two copies of the following documents:

☐ Form DV-_____
☐ Other form or document *(describe):* _____

4 Signature

Date: _____

_____
Type or print your name

▶ _____
Sign your name

☐ Check here if you are a lawyer.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

DV-176 Request for Release of Minor's Confidential Information

Clerk stamps date here when form is filed.

DRAFT

3.26.20

Not approved by the Judicial Council

Instructions

Who should complete this form?

Use this form if you want to ask the court to give you information about a minor that has been made confidential in a domestic violence restraining order case. After you file this form with the court, the court will provide a copy of this request to the person who made the request to keep the minor's information confidential. That person will have an opportunity to disagree with your request before the court makes a decision on your request.

What do I do if I received a completed copy of this form?

The person in (2) is asking the court for access to information that has been made confidential (see item (3) on page 2 of this form). If you do NOT agree with this request, complete and file form DV-178, *Response to Request for Release of Minor's Confidential Information*, by the deadline listed on item (4) on form DV-177, *Notice of Request for Release of Minor's Confidential Information*.

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(1) Parties in This Case

a. **Protected party** *(check one)*:

☐ Name of protected party is: _____

☐ Name of protected party is confidential in this case.

b. **Restrained party** *(check one)*:

☐ Name of restrained party is: _____

☐ Name of restrained party is confidential in this case.

(2) My Information

My full name is: _____

☐ I am applying on behalf of (*name of entity*): _____

Address: _____

City: _____ State: ___ Zip: _____

How do you know the minor? _____

My contact information *(optional)*:

Telephone: _____ Fax: _____

E-Mail Address: _____

Lawyer's information *(skip if you do not have a lawyer)*:

Name: _____ State Bar Number: _____

This is not a Court Order.

Case Number:

3 ☐ My Request Involves One Minor

I ask the court to release the confidential information below (*check all that apply*):

a. ☐ Minor's name

b. ☐ Minor's address

c. ☐ Other information about the minor

(Please describe the information that you want released to you. For example, you can describe where the information is located by providing the form #, page #, and item # of where the information is located.)

☐ Check this box if you need more space for your answer. Attach a piece of paper to this form and write "Attachment 3c" at the top.

4 ☐ My Request Involves More Than One Minor

a. ☐ The information I ask the court to release is the **same for all minors.**

(1) ☐ Minors' names

(2) ☐ Minors' address(es)

(3) ☐ Other information about the minors

(Please describe the information that you want released to you. For example, you can describe where the information is located by providing the form #, page #, and item # of where the information is located.)

b. ☐ The information I ask the court to release is **not the same for all minors**.

(Please describe the confidential information that you want released to you by the court for each minor. If the minor's name was made confidential use the initials or name used by the court to identify each minor.)

☐ Check this box if you need more space for your answer. Attach a piece of paper to this form and write "Attachment 4" at the top.

This is not a Court Order.

5 Reasons I Want Access to Minor's Confidential Information

To grant your request, the court must find that giving you the minor's confidential information is needed to prevent abuse or is in the best interest of the minor.

With that in mind, why should the court give you the minor's confidential information you asked for on page 2?

6 Number of pages attached to this form, if any: _____

7 Signature

I declare under penalty of perjury under the laws of the State of California that the information above and in all attached papers is true and correct.

Date: _____

_____
Type or print your name

▶ _____
Sign your name

8 Lawyer's Signature (*skip if you do not have one*)

Date: _____

▶ _____
Lawyer's signature

This is not a Court Order.

DV-177 Notice of Request for Release of Minor's Confidential Information

Clerk stamps date here when form is filed.

DRAFT

03.26.20

Not approved by the Judicial Council

The court sent you this notice because someone has asked the court to release confidential information about a minor.

You have the right to tell the court if you disagree with the request to release confidential information. You have until the deadline listed below in item (4). For instructions on next steps, go to page 2.

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(1) Parties in this case

a. Protected Party *(check one)*:

☐ Name of protected party is: _____

☐ Name of protected party is confidential in this case

b. Restrained Party *(check one)*:

☐ Name of restrained party is: _____

☐ Name of restrained party is confidential in this case

(2) Person asking for minor's confidential information

Full Name: _____ wants access to information that has been made confidential in this case. To see what information the person wants access to, see form DV-176, *Request for Release of Minor's Confidential Information*, which is included with this notice.

(3) You are receiving this notice because:

☐ You are the minor who asked to keep your information confidential.

☐ You are the parent or legal guardian who asked to keep minor's information confidential

(4) Deadline to disagree with request

The person in (3) has until *(date)* _____ to file a completed form DV-178, *Response to Request for Release of Minor's Confidential Information*, with the court clerk. Form DV-178 is included with this notice.

Case Number:

—Clerk's Certificate—

[seal]

I certify that I am not a party to this case and that a true copy of the *Notice of Request for Release of Information* (form DV-177), blank copy of the *Response to Request for Release of Minor's Confidential Information* (form DV-178) and *Cover Sheet for Confidential Information* (form DV-175), and a true copy of the *Request for Release of Minor's Confidential Information* (form DV-176) were mailed first class, postage fully prepaid, in a sealed envelope to the person in (3) .

a. Date of mailing: _____
(*Instructions to clerk for item 4: The deadline is the first court day after 20 days from the date of mailing*)

b. Mailed from the courthouse listed on page 1.

c. Mailed to the address of person in (3), provided to the court on form DV-160, *Request to Keep Minor's Information Confidential*, filed on
(*date*) _____

Date: _____ Clerk, by _____, Deputy

Next Steps for Person in (3)

◯ **Form DV-176**, *Request for Release of Minor's Confidential Information*, is included with this notice. Take a close look at form DV-176 to see who made the request (item (2)) and what confidential information the person is asking the court to release (page 2).

◯ **A blank copy of form DV-178**, *Response to Request for Release of Minor's Confidential Information*, is also included with this notice. If you do not agree with the request to release confidential information, you must complete form DV-177 and file it with the court clerk by the deadline listed in item (4) on page 1 of this form DV-177. You can also find form DV-178 at *www.courts.ca.gov/dv-178.pdf.*

◯ After the judge makes a decision, you should receive a copy of the judge's order on form DV-179, *Order on Request for Release of Minor's Confidential Information*. If you do not receive a copy of the judge's order, you can contact the court to get a copy.

DV-178 Response to Request for Release of Minor's Confidential Information

Clerk stamps date here when form is filed.

DRAFT
03.25.20

Not approved by the Judicial Council

☐ **CONFIDENTIAL** ☐ **PUBLIC VERSION (REDACTED)**

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

Instructions

When should this form be used?

If someone is asking the court for information about a minor that has been made confidential, you can use this form to let the court know if you agree or disagree with the request.

Who should use this form?

You should use this form if you are a minor, parent, or legal guardian who made a request to keep information confidential.

What do I need to complete and file this form?

◯ You will need three documents that you should have received with this form:

- ► Form DV-176, *Request for Release of Minor's Confidential Information*;
- ► Form DV-177, *Notice of Request for Release of Minor's Confidential Information*; and
- ► Form DV-175, *Cover Sheet for Confidential Information.*

◯ You will need to give the court form DV-175 and two copies of your completed form DV-178. Make sure you take these forms to the court for filing by the deadline listed on form DV-177.

(1) Parties in This Case

a. **Protected party**

Name: _____

b. **Restrained party**

Name: _____

(2) Information About the Request to Release Confidential Information

Name of person requesting minor's confidential information *(This is the person listed on form DV-176, item (2))*: _____

This is not a Court Order.

Case Number:

3 My Information

a. Your name: _____

b. My contact information

Address where I can receive mail:
This address will be used by the court and other parties in this case to send you notices of court dates and documents. If you want to keep your home address private, you can use another address like a post office box or another person's address if you have their permission. If you have a lawyer, give your lawyer's address and contact information.

Address: _____

City: _____ State: _____ Zip: _____

Lawyer's information *(skip if you do not have one):*

Name: _____

State Bar No.: _____

4 Do You Agree to the Request to Release Minor's Confidential Information?

a. ☐ **No**, **I do NOT agree to the request** and do not want the court to give any confidential information to the person listed in 2 because: _____

This is not a Court Order.

b. ☐ **No, to some of the request**. I agree to the person listed in item (2) having some information but do NOT want the person to have access to *(check everything that you do NOT want the person in (2) to have)*:

- ☐ Minor's name
- ☐ Minor's address
- ☐ Other information about the minor

I do not want the person to have the information checked above because: _____

c. ☐ **Yes, I agree to the request** and want the court to give the person listed in (2) all the confidential information they requested on form DV-176.

(5) Serve the Person Making the Request

You must have your server mail a redacted copy of this form (with no confidential information) to the person listed in (2). Have your server complete form DV-250, *Proof of Service by Mail*, after this form is mailed and file the completed form DV-250 with the court.

(6) Signature

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____ ▶ _____

Type or print your name | Sign your name

(7) Lawyer's Signature (*skip if you do not have one*)

Date: _____

▶ _____

Lawyer's signature

This is not a Court Order.

DV-179 Order on Request for Release of Minor's Confidential Information

☐ CONFIDENTIAL ☐ PUBLIC VERSION (REDACTED)

Clerk stamps date here when form is filed.

DRAFT

03.30.20

Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 Parties in This Case

a. **Protected party** *(check one)*:
- ☐ Name of protected party is: _____
- ☐ Name of protected party is confidential in this case.

b. **Restrained party** *(check one)*:
- ☐ Name of restrained party is: _____
- ☐ Name of restrained party is confidential in this case.

2 Person Asking for Release of Minor's Confidential Information

Full Name: _____

☐ On behalf of (*name of entity*): _____

(The court will complete item 3 if request is denied or items 4 – 9 if request is granted or partially granted.)

3 ☐ Court Denied Request or More Information Is Needed

a. ☐ **The court denied the request by the person in 2** to release minor's confidential information.

b. ☐ **The court needs more information before making a decision.**
The person in 2 must go to court on the date and time below to give more information why the court should release minor's confidential information.

Court Date → Date: _____ Time: _____ Name and address of court, if different from above: _____
Dept.: _____ Room: _____ _____

c. ☐ The court will mail a copy of this order to the person who made the request to keep minor's information confidential.

d. If 3 is checked, only page 1 of this order will be issued. All other pages may be discarded.

Instructions to Clerk
If item 3 is checked, file page 1 in a public file with all confidential information redacted, and discard pages 2–4. If item 4 is checked, file the original in a confidential file and a redacted copy in a public file.

Date: _____

_____
Judge (or Judicial Officer)

This is a Court Order.

4 ☐ Court Granted Request

a. ☐ The request made by the person in 2 is:

(1) ☐ Completely granted.

(2) ☐ Partially granted.

b. ☐ The court, on its own motion, releases minor's confidential information as described in item 6.

c. Details of the order are stated below in items 5 – 9.

5 Court's Findings

a. ☐ In granting the request made by the person in 2 the court finds that the:

(1) person who made the request to keep the minor's information confidential has been properly served and has had sufficient time to respond; and

(2) release of the minor's confidential information is *(check at least one)*:

(A) ☐ necessary to prevent abuse.

(B) ☐ in the minor's best interest.

b. ☐ The court, on its own motion, releases minor's confidential information as described in item 6 because it is *(check at least one)*:

(A) ☐ necessary to prevent abuse.

(B) ☐ in the minor's best interest.

6 Release of Confidential Information

a. The following persons/entities may have access to the information listed in 6 b *(check all that apply)*:

(1) ☐ The person listed in 2.

(2) ☐ Minor's school *(name)*: _____.

(3) ☐ Minor's after-school program *(name)*: _____.

(4) ☐ Minor's childcare provider *(name)*: _____.

(5) ☐ Supervised visitation provider *(name)*: _____.

(6) ☐ Other *(name of person or entity)*: _____.

This is a Court Order.

b. This order releases minor's confidential information as follows:

Minor 1: _____

(use fictitious name if not releasing confidential name)

(1) ☐ Minor's name: _____

(2) ☐ Minor's address: _____

(3) ☐ Other information about the minor:

_____

_____

_____

Minor 2: _____

(use fictitious name if not releasing confidential name)

(1) ☐ Minor's name: _____

(2) ☐ Minor's address: _____

(3) ☐ Other information about the minor:

_____

_____

_____

Minor 3: _____

(use fictitious name if not releasing confidential name)

(1) ☐ Minor's name: _____

(2) ☐ Minor's address: _____

(3) ☐ Other information about the minor:

_____

_____

_____

☐ Check this box if you need more space to include more minors or more information. Attach a sheet of paper and write "Attachment 6b" for a title.

This is a Court Order.

7 All other information made confidential by the court and not released with the court's permission must be kept confidential. Any person who misuses or discloses the minor's confidential information to anyone other than law enforcement **may be sanctioned up to $1,000 or face other court penalties**. See Family Code section 6301.5 for the limited situations when confidential information can be disclosed without the court's permission.

8 ☐ Service

a. ☐ The court will send a copy of this order to the person listed in 2 and the minor or legal guardian who made the request to keep the minor's information confidential.

b. ☐ The person in 2 must have a server mail a copy of this order to the minor or legal guardian who made the request for confidential information. Have the server complete and file form DV-250, *Proof of Service by Mail*, after the copy has been mailed.

9 ☐ Other Orders

_____

_____

_____

_____

_____

Date: _____

_____
Judge (or Judicial Officer)

Request for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the hearing. Contact the clerk's office or go to www.courts.ca.gov/forms.htm for *Request for Accommodations by Persons With Disabilities and Response* (form MC-410). (Civ. Code, § 54.8.)

—Clerk's Certificate—

Clerk's Certificate

[seal]

I certify that this *Order on Request for Release of Minor's Confidential Information* (form DV-179) is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____, Deputy

This is a Court Order.

W20-09
Protective Orders – Minors Confidentiality

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	California Lawyers Assocation. Executive Committee of the Family Law Section (FLEXCOM) By Saul Bercovitch, Director of Governmental Affairs	A	FLEXCOM agrees with this proposal. FLEXCOM also responds as follows to the Request for Specific Comments: Does the proposal appropriately address the stated purpose? Yes. Should a personal asking that the information of a minor be kept confidential be precluded from asking that the name of the minor not be provided to the restrained party? (That is, should item 8a(1) on form DV-160 be removed)? Item 8a(1) is acceptable and should not be removed. Are the forms easy for users to understand? Yes. Do you have any suggestions for improving their usability and readability? No.	The committees thank you for your comments. No response required. The committees agree and recommend keeping this item on CH-160 and DV-160. No response required. No response required.
2.	FAMILY VIOLENCE APPELLATE PROJECT By Shuray Ghorishi, Senior Managing Attorney 449 15th Street, Suite 104 Oakland, CA 94612 Tel: 510-858-7358 Fax: 866-920-3889 www.fvaplaw.org	A	Family Violence Appellate Project ("FVAP") greatly appreciates the opportunity to comment on the above-listed Invitation to Comment. FVAP was founded in 2012 to ensure the safety and well-being of domestic abuse survivors and their children by helping them obtain effective appellate representation. FVAP is the only organization in California dedicated to appealing cases on behalf of low-and moderate-income domestic abuse survivors and their children. Since its inception, FVAP has screened over 2,000 requests for assistance, has represented appellants and respondents in 48 appeals and writs, and has filed amicus curiae briefs in 16	

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

	Commenter	Position	Comment	Committee Response
			cases that raised significant issues of statewide concern for domestic abuse survivors. Our work has, to date, resulted in over 38 published appellate decisions interpreting the Domestic Violence Prevention Act and other California Family Code sections designed to protect survivors of domestic abuse and their children. We also engage in legislative advocacy and were proud to sponsor AB 925, which is implemented by these rule and form proposals. Proposal: Amend Cal. Rules of Court, rules 3.1161 and 5.382; adopt forms CH-176, CH-177, CH-178, CH-179, DV-176, DV-177, DV-178, and DV-179; revise forms CH-160, CH-160-INFO, CH-165, CH-170, CH-175, DV-160, DV-160-INFO, DV-165, DV-170, and DV-175. Purpose: This proposal is needed to implement AB 925,1 which took effect on January 1, 2020. As most litigants in domestic violence and civil harassment restraining order proceedings are self-represented, the forms proposed would eliminate the need for parties to create their own pleadings and draft orders. Additionally, the proposed amendments to rules are needed to provide consistency in how these requests and orders are processed. 1. Does the proposal appropriately address the stated purpose? Yes, the proposal appropriately addresses the stated purpose. The purpose of AB 925 is to ensure sensitive information about a minor in restraining order matters be kept confidential, while also	1. The committees thank you for your comments.

	Commenter	Position	Comment	Committee Response
			allowing persons necessary to the safety and well-being of abuse survivors access to that information. As the sponsor of the AB 925, FVAP believes the proposal, including the revisions and additions to the court rules and existing forms, as well as the adoption of new forms, meets the statutory purpose and intent of AB 925. Like any new procedure, the process for requesting information be made confidential and for requesting the release of confidential information is complex. However, CH-160-INFO and DV-160-INFO explain the process in a way that self-represented litigants should understand. 2. Should a person asking that the information of a minor be kept confidential be precluded from asking that the name of the minor not be provided to the restrained party? (That is, should item 8a(1) on forms CH-160 and DV-160 be removed? See the discussion in "Alternatives considered," above.) Although rare to occur in practice, it is true that a restrained party may be able to respond to and enforce the civil harassment or domestic violence restraining order without knowing the minor's legal name. This may occur when the restrained party knew the minor only by an alias or assumed name. For this reason, item 8a(1) on forms CH-160 and DV-160 should not be removed. [Fn. 1 925 amends section 6301.5 of the Family Code and section 527.6(v) of the Code of Civil Procedure.]	2. The committees agree that there may be situations where it would be appropriate to make the minor's name confidential from the restrained party. Courts can make this determination on a case-by-case basis. This item will remain on the forms.

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	Commenter	Position	Comment	Committee Response
			3. Are the forms easy for users to understand? Without information sheets, the forms will be difficult for self-represented litigants to navigate, but when the forms are used in tandem with CH-160-INFO and DV-160-INFO, the process of seeking and opposing the confidentiality and release requests will be easier for self-represented litigants to understand.	3. The committees acknowledge that the law and the processes for this type of request will be especially difficult for self-represented litigants to navigate on their own. The committees hope that the information forms will help self-represented litigants navigate the process and know when and where to get help.
			4. Do you have any suggestions for improving their usability and readability? FVAP encourages the Judicial Council Members to include a line next to 3.a. on forms CH-179 and DV-179, to allow a space for the trial court to state its reasons for denying the release of the minor's confidential information. As proposed, the rules would allow the trial court to make a decision on a request to release the minor's confidential information without a court hearing. If this occurs, the person making the request to release confidential information will not know why their request was denied, thus hindering their ability to obtain a successful outcome with additional release requests in other court proceedings.	4. The committees will consider this suggestion in the future when revisions to these forms are required again. While the committees understand the value of the court stating its reasons for denial, this change was not included in the proposal that went out for public comment. This change would impact the workload of courts and should go out for public comment.
3.	Orange County Bar Association By Scott B. Garner, President P.O. Box 6130 Newport Beach, CA 92658	AM	1) Rule 3.1161 (revision): Small changes that make the form more readable; adds capitalization for increased clarity. Adds section for others seeking confidential information. Suggested edits: see seperatly attached PDF including suggested edits on p. 9, lines 3, 42 and 43; p. JO, lines 11, 12 and 31; p. 11, lines 5 and 16.	1) Thank you for your comments. See below for the committees' response.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

	Commenter	Position	Comment	Committee Response
			Rule 5.382 (revision): Small changes to rule, adding sections relevant to new law. Suggested edits: p. 13, line 15; p. 14, line 26; p. 15, lines I, 17, and 28. *Listed below are the suggested revisions received by commenter for both rules: • to subdivision h(3)," If the court finds it is necessary to prevent abuse within the meaning of Family Code section 6220, or **it** is in the best interest…" • to subdivision h(3)(B)(ii), "The person filing a response must serve a copy of the response (form DV-178) on the person requesting release of confidential information~~.~~ **Service must occur** before filing the response form with the court**,** unless the response form contains confidential information. • to subdivision (h)(3) "The request may be granted or denied in whole or in part without a hearing**.** ~~or~~ **Alternatively,** the court may set the matter for hearing on at least 10 days' notice to the person who made the request…" • to subdivision h(3)(C)(i)(c), "If the court grants the request for release of information based on the pleadings, the court must mail a copy of form DV-179 to the person who filed form DV-176 and **to** the person who made the request…" to subdivision h(3)(C)(ii)(c), "If the court denies the request for release of information based on the pleadings, the court must mail a copy of	The committees believe that the existing language is grammatically correct and did not incorporate this change. The committees agree that separating the information into two sentences makes it easier to read. The committees agree that separating the information into two sentences makes it easier to read. The committees believe that the existing language is grammatically correct and did not incorporate these changes.

	Commenter	Position	Comment	Committee Response
			form DV-179 to the person who filed form DV-176 and **to** the person who made the request.	
			3) CH-160 (revision): Allows for listing of people to have access to confidential info. No suggested edits.	3. No response required.
			4) CH-160-INFO (revision): Adds info on asking court for permission to give confidential info and for disclosing confidential info. No suggested edits.	4. No response required.
			5) CH-165 (revision): Adds warning about disclosing confidential information; adds listing of those who may have access to confidential documents. No suggested edits.	5. No response required.
			6) CH-170 (revision): Adds notice about disclosure of minor information. No suggested edits.	6. No response required.
			7) CH-175 (revision): No suggested edits.	7. No response required.
			8) CH-176 (new): Request for release of minor's confidential information. No suggested edits.	8. No response required.
			9) CH-177 (new): Suggested edit: remove comma in section 4.	9. This change has been made.
			10) CH-178 (new): No suggested edits.	10. No response required.
			11) CH-179 (new): Suggested edit: formatting, section 3.	11. This change has been made.
			12) DV-160 (revision): Adds info on release of confidential information where it is in the minor's best interest. No suggested edits.	12. No response required.
			13) DV-160-INFO (revision): Adds info on how to disclose to interested parties where it is in the best interest of the minor and penalties for unauthorized disclosure. No suggested edits.	13. No response required.

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All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			14) DV-165 (revision): Adds disclosure warnings and section for who may have access to unredacted court documents.	14. No response required.
			15) DV-170 (revision): Adds "notice" about unauthorized disclosure. No suggested edits.	15. No response required.
			16) DV-175 (revision): Adds reference to family law. No suggested edits .	16. No response required.
			17) DV-176 (new): No suggested edits.	17. No response required.
			18) DV-177 (new): No suggested edits.	18. No response required.
			19) DV-178 (new): No suggested edits.	19. No response required.
			20) DV-179 (new): Suggested edit: formatting, page I of 4, section 3.	20. This change has been made.
			Specific Comments:	
			1) Does the proposal adequately address the stated purpose? Yes. The proposed amendments to the rules of court, the new forms and amended forms are consistent with the new law.	No response required.
			2) Should a person asking that the information of a minor be kept confidential be precluded from asking that the name of the minor not be provided to the restrained party? No. The court can still order the information be released where circumstances warrant it. The existing form is already structured this way, and the practice potentially protects minor witnesses who are not the protected parties in a protective order.	The committees agree that there may be situations where it would be appropriate to make the minor's name confidential from the restrained party. Courts can make this determination on a case-by-case basis. This item will remain on the forms.
			3) Are the forms easy for users to understand? There are lots of them and they are a little confusing; however, the info forms help to map out which forms need to beji1led out in which circumstances.	No response required.
				See responses above.

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	Commenter	Position	Comment	Committee Response
			4) Do you have suggestions for improving usability and readability? Suggestions to specific forms are attached.	
4.	Public Law Center By Leigh E Ferrin, Director of Litigation and Pro Bono Santa Ana, CA 92701 Tel: 714-541-1010 Email:	A	Public Law Center (PLC) is a 501(c)(3) not-for-profit organization that provides free civil legal services to low-income individuals and families across Orange County. The civil legal services that we provide include consumer, family, immigration, housing, veterans, community organizations, and health law. PLC appreciates the opportunity to comment on Invitation W20-09, which is proposing to amend the California Rules of Court and adopt a number of forms that would allow a minor's legal guardian to make certain information confidential in a domestic violence or civil harassment restraining order proceeding. PLC agrees with the proposed forms, and appreciates the thoughtfulness that went into them. For California Rule of Court 3.1161 and 5.382, PLC does have a question about the Court's ability to deny the request for release of minor's information. Does the Court have discretion to deny even if the person who requested confidentiality has not objected to the request?* And if so, is there a certain standard that must be met by either side? We understand that much of this will come out in case law, but it does help to provide a background to litigants when allowing a judge to deny a request based solely on the submitted papers, for instance. And this is also particularly true when one or both	The committees thank you for your comments. Yes, for domestic violence prevention cases the court may release confidential information if the court finds that disclosure is "necessary to effectuate the purpose of this division specified in Section 6220, including implementation of the protective order, or if it is in the best interest of the minor." Fam. Code section 6301.5(c)(2)(A). Similarly, in civil harassment prevention cases the court may release confidential information if "disclosure is necessary to prevent harassment or is in the best interest of the minor." Code of Civ. Proc. section 527.6(v)(i)-(ii).

	Commenter	Position	Comment	Committee Response
			sides may be self-represented, which is so common in domestic violence restraining order actions. (*This comment has been revised to reflect commenter's intended question.)	These standards are described in plain language at item 5 on forms CH-176 and DV-176, Request for Release of Minor's Confidential Information.
			PLC agrees that the name of the minor should not be provided to the restrained party. In some circumstances, the minor and/or his or her guardian may have chosen to change their name for a number of reasons. PLC has encountered clients who have specifically changed their name after leaving an abusive situation, in part for protection and in part for a clean break. PLC has also encountered restrained parties who have continued to seek out information about our clients after a restraining order is in place, and providing the current/updated name could make that an easier option for restrained parties.	The committees agree that there may be situations where it would be appropriate to make the minor's name confidential from the restrained party. Courts can make this determination on a case-by-case basis. This item will remain on the forms.
			PLC appreciates the information sheets that were created and believes they will be very useful for litigants seeking to utilize this protection. PLC believes that the forms are user friendly and does not have any suggestions to change them.	Thank you for your comment.
5.	Superior Court of California, County of Los Angeles By Bryan Borys 111 North Hill Street, Room 620 Los Angeles, CA 90012 Tel. 213-633-0115	AM	Comments on code/forms: 1. Page 8, Section (A)(i): We recommend removing "order" after proposed. 2. CH-160, 1st paragraph should read, …information about a minor in a civil harassment restraining order…	1. This change has been made. 2. This change has been made.

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All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			3. CH-160, 2nd paragraph, remove "out" after the parenthesis (whited or blacked out)	3. This change has been made.
			4. CH-160, page 1 remove "Court fills in case number when form is filed." Above case number. These cases may be filed in a dissolution/parentage case, so no new case number would issue.	4. The committees did not accept this change because there will be some instances when this form will be filed with other papers that will open a new case.
			5. CH-160, #1b. We recommend changing the line to read "Person to be restrained."	5. The committees believe that the proposed change is easier for litigants to understand and have made the revision.
			6.CH-160, page 2, #5a. Recommend that line should read "Note: If your request is granted, the public will not have access to minor's name in this case, but law enforcement must be given this information."	6. The committees did not accept this change as many of the items, including item 5, are stated in the second person.
			7. CH-160, page 5, #7, We recommend a note following (check one): as follows, "Note: Skip if you are not the person requesting the restraining order." CH-160, page 6, #8d. We recommend a note following (check one): as follows, "Note: Skip if you are not the person requesting the restraining order."	7. The committees agree and have included this instruction once, above item 7.
			8. CH-160—INFO, page 1, right column, 4th paragraph, "the order" should be moved up to the line above.	8. This change has been made.
			9. CH-160-INFO, page 3, left column, 2nd paragraph in bubble, second sentence should read "If this happens, the judge will complete item 8 on form CH-165."	9. This change has been made.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-09
Protective Orders – Minors Confidentiality

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	Commenter	Position	Comment	Committee Response
			10. CH-160-INFO, page 4, right column, Step 4, remove the "." Before For Personal service.	10. This change has been made.
			11. CH-165, page 1, page 1 remove "Court fills in case number when form is filed." Above case number. These cases may be filed in a dissolution/parentage case, so no new case number would issue.	11. The committees did not accept this change since there will be some instances when this form will be filed with other papers that will open a new case.
			12. CH-165, page 1, #1b. We recommend changing line to "Person to be restrained." CH-165, page 5, #10a(2) Remove the word "minor's"	12. The committees believe that the proposed change is easier for litigants to understand and have made the revision.
			13. CH-170, page 1, remove the words "ticket number" above the case number box.	13. This change has been made.
			14. CH-176, page 3, #5, bold sentence should read "With that in mind, why should the court give you the minor's confidential information you asked for in item 3?"	14. This change has been made.
			15. CH-178, page 3, #4b. We recommend changing the bold sentence as follows: "I do not want the person above to have this information because:"	15. The committees have revised the sentence to read "**I do not want the person to have the information listed above because**:"
			16. CH-179, page 2, #6a.(2), "afterschool" should be "after school."	16. This has been changed to "after-school."
			17. DV-160, page 1, Remove "Court fills in case number when form is filed." From above the case number box.	17. The committees did not accept this change since there will be some instances when this form will be filed with other papers that will open a new case.
			18. DV-160, page 1, #1b. We recommend changing line to "Person to be restrained."	18. The committees believe that the proposed change is easier for litigants to understand and have made the revision.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

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	Commenter	Position	Comment	Committee Response
			19. DV-160, page 2, #5a, we recommend to changing the note as follows: "Note: If your request is granted, the public will not have access to minor's name in this case, but law enforcement must be given this information."	19. The committees did not accept this change as many of the items, including item 5, are stated in the second person.
			20. DV-160, page 5, #7, We recommend a note following (check one): as follows, "Note: Skip if you are not the person requesting the restraining order." DV-160, page 6, #8d. We recommend a note following (check one): as follows, "Note: Skip if you are not the person requesting the restraining order."	20. The committees agree and have included this instruction once above item 7.
			21. DV-160-INFO, page 1, right column, under "Where can I find a self-help center?" We recommend changing the second sentence as follows: "Self-help center staff will not act as your lawyer but may be able to give you information to help you decide what to do in your case."	21. This change has been made.
			22. DV-165, page 1, #1b. We recommend changing line to "Person to be restrained."	22. The committees believe that the proposed change is easier for litigants to understand and have made the revision.
			23. DV-165, page 5, #10a.(2), remove the word "minor's"	23. This change has been made.
			24. DV-176, page 3, #5, the bold sentence should read "With that in mind, why should the court give you the minor's confidential information you asked for in item 3?"	24. This change has been made.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

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	Commenter	Position	Comment	Committee Response
			25. DV-178, page 1, line above the Case Number box should read "Fill in case number." 26. DV-178, page 3, bold sentence, we recommend it read as follows: "I do not want the person above to have this information because:"	25. This change has been made. 26. The committees have revised the sentence to read "**I do not want the person to have the information listed above because**:"
			27. DV-179, page 2, #6a(2), "afterschool" should be "after school"	27. The committees propose using "after-school."
			Request for Specific Comment In addition to comments on the proposal as a whole, the advisory committees are interested in comments on the following: • Does the proposal appropriately address the stated purpose? Yes, with the recommended changes above.	Thank you for your comments.
			• Should a person asking that the information of a minor be kept confidential be precluded from asking that the name of the minor *not* be provided to the restrained party? (That is, should item 8a(1) on forms CH-160 and DV-160 be removed? See the discussion in "Alternatives considered," above.) No, the person asking for the information to be confidential should have the option to request this.	The committees agree that there may be situations where it would be appropriate to make the minor's name confidential from the restrained party. Courts can make this determination on a case-by-case basis. This item will remain on the forms.
			• Are the forms easy for users to understand?	

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-09
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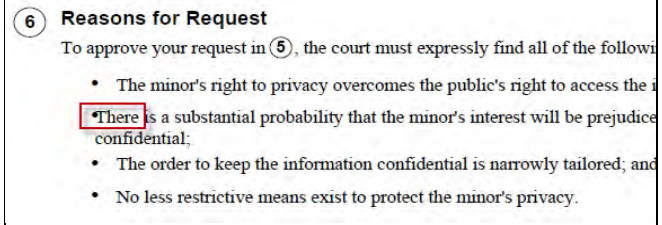
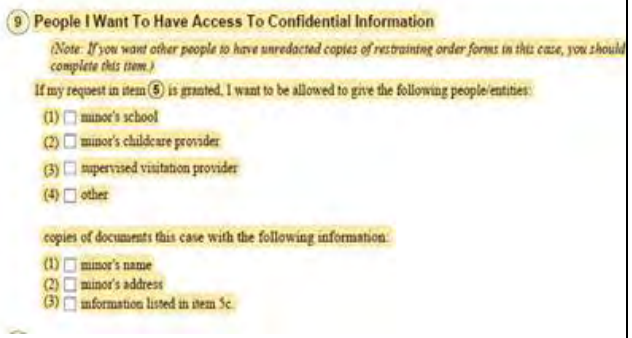
All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			Yes, with the recommended changes above. • Do you have any suggestions for improving their usability and readability? Yes, as noted in the recommended changes above. The advisory committees also seek comments from *courts* on the following cost and implementation matters: • 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? New procedure, new case management codes, staff training for clerical, supervisors, Judicial Assistants, Court Reporters, Family Court Services staff and Judicial Officers. Training would be approximately 8 hours. • Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?	No response required. No response required. No response required.

	Commenter	Position	Comment	Committee Response
			Yes, this would be adequate.	The committees appreciate the input.
6.	Superior Court of California, County of Orange By TAG <TAG@occourts.org> (On behalf of the Orange County Superior Court Civil and Appellate Division Management and Analyst Team)	NI	**Does the proposal appropriately address the stated purpose?** Yes, the proposal appropriately addresses the stated purpose. There may be times that a childcare provider or school administrator needs to access confidential information or other individual as specified, so as to protect the minor. **Should a person asking that the information of a minor be kept confidential be precluded from asking that the name of the minor not be provided to the restrained party?** No comment. **Are the forms easy for users to understand?** Yes, the language used in these forms are understandable and at a comprehendible reading level for the general public. Also, the flow of the potential filing is extremely helpful from the prospective of the litigant. **Do you have any suggestions for improving their usability and readability?** Under "People I Want to Have Access to Confidential Information," item number 9, if one chooses "Other" a "please specify relationship" would improve usability of the form. What if the minor transfers to a new school? Does "minor's school" apply to any school the minor is attending? Same with the caregiver – What if the caregiver is a relative, and then a professional	The committees thank you for your comments. No response required. No response required. The committees agree that providing some direction would improve usability. Item 9(a)(4) has been changed to "other (name of person or entity)". Yes. If the court allows the minor's school to have an unredacted copy then it could be given to any school that the minor attends. If more limited

	Commenter	Position	Comment	Committee Response
			caregiver is hired? Please provide guidance in this regard. Regarding the CH-165 Order, the court (at least in orange county) is more inclined to have the court make the redactions when parties are self-represented. We recommend adding a section on the order regarding people who may have access - that the PARTIES are responsible for THOSE copies. For example, the court will continue to make the redacted versions for the court file and the respondent's packet; however, if the court grants the request to allow the school to have access, the party would be responsible for providing the appropriate/applicable copy to the school. This would take some of the responsibility off of the court. For example, if the address is confidential from the respondent, and allegations (5c) are confidential from the school, there would potentially be four+ versions? 1 - Original/Confidential 2 - Redacted Copies 3 - Respondent's Copy 4 - Minor's School 5 - Minor's Childcare Provider	access is desired then “other” could be used to list a specific school or provider. The committees believe that responsibility for redacting the copies for third parties should rest with the same person/entity that is ordered to redact the copies for the court file. Under the rules, the court must consider a number of factors in deciding who should be responsible for redaction. If the court determines that redaction is complicated and that a self-represented litigant does not have the resources to appropriately redact, then the same concerns would likely apply to redaction of copies for third parties.

	Commenter	Position	Comment	Committee Response
			Perhaps, the Request (CH-160) should include a disclosure that the party will be required to provide copies and that the Order (CH-165) include a line item that states that the party is responsible for providing the copies based on item 10b. **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?** Procedures would need to be updated to inform court staff on processing these forms. Judicial Officers will need to be informed. Regarding public information, new informational packets will need to be printed when self-represented litigants come to the window and request confidentiality for a minor. **Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?** Three to four months would be more reasonable for implementation; however, there may not be a high volume of such requests, which may allow flexibility in implementation. **How well would this proposal work in courts of different sizes?**	No response required. No response required. The committees appreciate the input.

	Commenter	Position	Comment	Committee Response
			I believe it would work well. The new protective order forms would have an equal impact for courts of all sizes.	No response required.
7.	Superior Court of California, County of Orange By Fen-Ru Chen Administrative Analyst Family Law and Juvenile Court 657-622-5158 fchen@occourts.org	NI	**Comments** ***DV-160*** 1. Second bullet on #6 is missing a space  6 Reasons for Request To approve your request in 5, the court must expressly find all of the followi • The minor's right to privacy overcomes the public's right to access the i •There is a substantial probability that the minor's interest will be prejudice confidential; • The order to keep the information confidential is narrowly tailored; and • No less restrictive means exist to protect the minor's privacy. 2. For consistency purposes, item 9 (2)(3)(4) to mirror/require the same information on DV-179 #6  9 People I Want To Have Access To Confidential Information (Note: If you want other people to have unredacted copies of restraining order forms in this case, you should complete this item.) If my request in item 5 is granted, I want to be allowed to give the following people/entities: (1) ☐ minor's school (2) ☐ minor's childcare provider (3) ☐ supervised visitation provider (4) ☐ other copies of documents this case with the following information: (1) ☐ minor's name (2) ☐ minor's address (3) ☐ information listed in item 5c	1. Spaces have been added. 2. The committees agree and have made these items consistent across forms.

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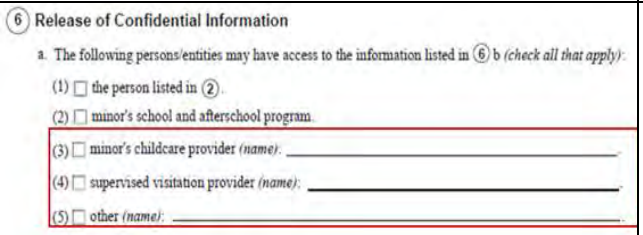
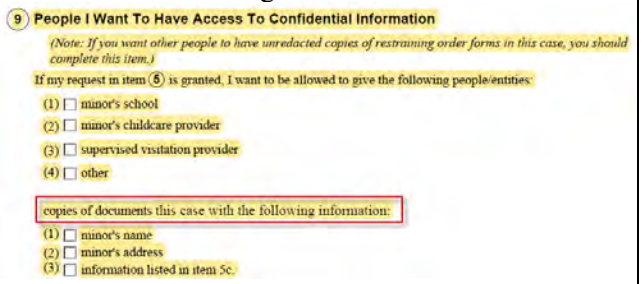
	Commenter	Position	Comment	Committee Response
			 3. After item 9 (4) language to be modified as follows: copies of unredacted documents from this case with the following information:  ***DV-165*** 4. For consistency purposes, #10 a. (2)(3) to mirror/require the same information on DV-179 #6.	3. This change has been made. 4. The committees do not agree with this suggestion. In most cases, it seems more likely that a minor/legal guardian would want the exception to apply to any childcare provider or supervised visitation provider, as these providers may change. However, form 179 is an order resulting from a request by a specific provider therefore the order should reflect the provider's name.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

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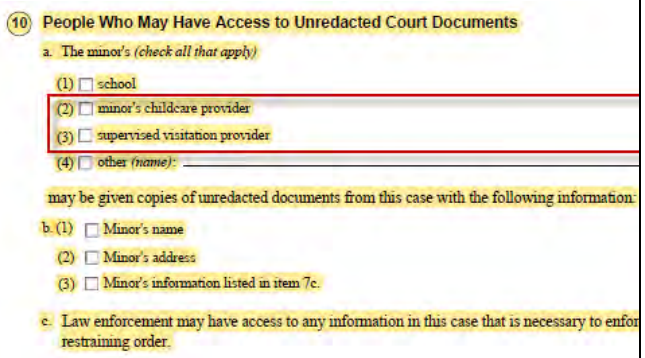
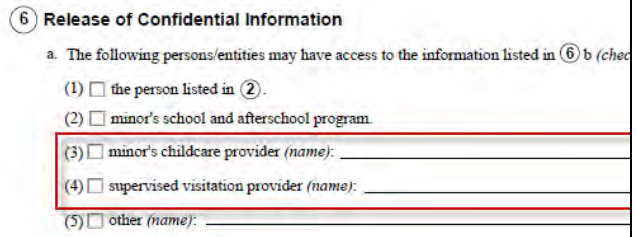
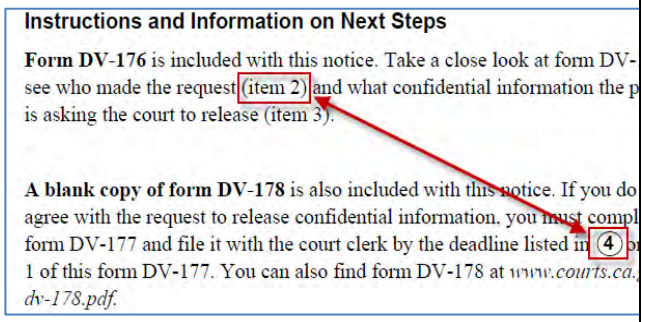
	Commenter	Position	Comment	Committee Response
			5. Also, for consistency purposes, #10 a. (1) to read: minor's school. #10 b. (1), (2), (3) lowercase "M" in  10 People Who May Have Access to Unredacted Court Documents a. The minor's *(check all that apply)* (1) ☐ school (2) ☐ minor's childcare provider (3) ☐ supervised visitation provider (4) ☐ other *(name)*: may be given copies of unredacted documents from this case with the following information: b. (1) ☐ Minor's name (2) ☐ Minor's address (3) ☐ Minor's information listed in item 7c. c. Law enforcement may have access to any information in this case that is necessary to enfor restraining order. minor's to be consistent with all other DV forms.  6 Release of Confidential Information a. The following persons/entities may have access to the information listed in 6 b *(chec* (1) ☐ the person listed in 2. (2) ☐ minor's school and afterschool program. (3) ☐ minor's childcare provider *(name)*: (4) ☐ supervised visitation provider *(name)*: (5) ☐ other *(name)*:	5. The committees have removed "minor" from this item as it is redundant.
			6. For section #11(a), it is recommended that "If your request is granted, you must file a DV-175 into your other open FL or Civil cases you may have in the state of California" be added.	6. The committees did not accept this addition as the primary audience for item 11 is the court. Information regarding when to use form DV-175, Cover Sheet for Confidential Information, is included at item 12 which is directed at the parties in the case.

	Commenter	Position	Comment	Committee Response
			7. For section #12, it is recommended that it be renamed to "Notice to All Parties," instead of To All Parties."	7. The committees prefer the current heading, as "notice" is a legal term that may not be clearly understood by self-represented litigants.
			8. For **Instruction to Clerk** (page 6 of 6) it is recommended to include the following language to item 1: Not appear in any register of actions, calendar, index, minute order, transcript in this case, any family law case, or any civil case with the same parties, in the State of California.	8. The committees agree and have included this language.
			9. Item 2. References the incorrect item (9b) twice, it should reference item **8b**. Item 2. It is recommended to include the name of the form referenced: form DV-170, *Notice of Order Protecting Information of Minor*.	9. These changes have been made.
			DV-170 10. Item 1. It is recommended to include DV-130 to the last sentence of this section. To read as follows: Confidential information may be given ONLY to law enforcement to enforce the restraining order (attached form DV-110 or DV-130).	10. The committees have removed the reference to DV-110 and prefers not to reference any form than list the different forms that a restraining order could be issued on.
			DV-175 11. It is recommended to add the following to the **Instructions to Parties**: **Instructions to Parties or Attorneys**. Make **two copies** (one redacted and one	11. The committees did not make these revisions. If an attorney represents a party in an action, the attorney will know to follow the instructions that apply to parties. Rule of Court 5.382(i) does not require the party to submit a redacted and

	Commenter	Position	Comment	Committee Response
			unredacted, if applicable, please refer to DV-165 item 9) of the documents you want to file.	unredacted copy. When a party submits form DV-175 along with two copies of the proposed filings, the court is to decide who is responsible for redaction, using the factors laid on in Rule 5.382(f).
			12. Add a section at the bottom for the date, Lawyer's name and signature.	12. The committees have added a signature block for lawyers.
			DV-176 13. It is recommended to add the name of the form (DV-177) reference under **What do I do if I received a completed copy of this form? Form DV-177,** *Notice of Request for Release of Minor's Confidential Information, item 4.*	13. This change has been made.
			14. Item 2. It is recommended to change **My Information** to **Person or Entity Requesting Minor's Confidential Information** (to be consistent with order – DV-179)	14. The committees prefer the current heading but have included a checkbox that the applicant would check if they are applying on behalf of an entity.
			15. Item 3 and Item 4 should be switched to be consistent with DV-160 and DV-165.	15. The committees have reformatted this item to make it easier to complete.
			16. Section 3 c. it is recommended to include an option for the requestor to have the ability to attach any forms CIRCLED, if any where attached to DV-165.	16. The committees are concerned that it could lead to inadvertent disclosure of confidential information. For this reason the committees chose not to include this as an option.

	Commenter	Position	Comment	Committee Response
			17. Item 5 if the recommendation above to switch Item 3 and Item 4 are approved, the following language will have to reflect item 4: **With that in mind, why should the court give you the minor's confidential information you asked for in item 4.** For section #5, the request is made on #3 of this form, and the question should read: With that in mind... in item 3?".	17. Based on the reformatting of items 3 and 4, this sentence will now refer to page 2.
			DV-177 18. For item #3, it is recommended to change the wording to "Person this notice was sent to."	18. The committees have changed this item and item 4 to use a second-person point of view (e.g you, your).
			19. Also, it is recommended to change the second checkbox to read: "Parent/Legal Guardian who requested to keep the minor's information confidential."	19. This change has been made.
			Page 2 **- Clerk's Certificate –** 20. It is recommended to for Item c. to include the name of the form referenced: form DV-160, *Request to Keep Minor's Information Confidential*	20. This change has been made.
			21. Page 2 of DV-177 In the "Instructions and Information on Next Steps" section, the format of items referenced in "Form DV-176" and "A blank	21. Items in this section will be consistently referred to using bubble numbers.

	Commenter	Position	Comment	Committee Response
			copy of form DV-178" portions are not consistent.  **Instructions and Information on Next Steps** **Form DV-176** is included with this notice. Take a close look at form DV- see who made the request (item 2) and what confidential information the p is asking the court to release (item 3). **A blank copy of form DV-178** is also included with this notice. If you do agree with the request to release confidential information, you must compl form DV-177 and file it with the court clerk by the deadline listed in (4) o 1 of this form DV-177. You can also find form DV-178 at www.courts.ca. *dv-178.pdf.* 22. Also, in paragraph 2 of "A blank copy of form DV-178," sentence two should say: If you do not agree with the request to release confidential information, you must complete form DV-178. In the **Instructions and Information on Next Steps** section: 23. It is recommended that **Form DV-176** includes the name of the form: Form DV-176, *Request for Release of Minor's Confidential Information*. 24. If the recommendations for form DV-176 (above) to switch items 3 and 4 are approved, the last section would have to reference item 4, instead of 3: *Take a close look at form DV-176 to see who made the request (item 2) and what confidential information the person is asking the court to release (item **4**).*	22. This change has been made. 23. This change has been made. 24. As noted above, the reference will now be to page 2.

	Commenter	Position	Comment	Committee Response
			25. It is recommended that form DV-178 includes the name of the form: A blank copy of form DV-178, *Response to Request for Release of Minor's Confidential Information*.	25. The title of each form will be listed in the first instance each is mentioned.
			26. It is recommended that **A blank copy form DV-178** section is modified to include the following: If you agree or disagree with the request to release confidential information, you must complete form DV-178 and file it with the court clerk by the deadline listed in item 4 on page 1 of this form DV-177. (*Agree* is referenced on form DV-178 under **Instructions** section, under the portion of **When to use this form?**). **DV-178**	26. The committees prefer the current language. The instruction on form DV-178 correctly states when the form can be used. The instruction on form DV-177 states when the form must be used (when the person does not agree to the request to release information).
			27. In the "**Instructions**" section, under the portion of "**Who should use this form?**" it is recommended to change to: If you are a minor or parent/legal guardian who requested to keep information confidential.	27. This change was made.
			28. In the **Instructions** section, under **What do I need to complete this form?** It is recommended to add to the last section: Form DV-175, Cover Sheet for Confidential Information. You will need to give the court form DV-175 and two copies (one redacted	28. As noted above, the applicable rule does not require the submission of a redacted and unredacted copy.

	Commenter	Position	Comment	Committee Response
			and one unredacted, if applicable, please refer to DV-165 item 9) of your completed form DV-178. 29. Item 2 Revised to: Name of person or entity requesting minor's confidential information (person listed on form DV-176, item 2): _____ 30. Item 4 b. to include an option to allow the party to include documents, if attached to form DV-176 under **Other information about the minor.** 31. Item 4 c. to read: **Yes, I agree to the request** and want the court to give the person listed in 2 all the confidential information they requested on form DV-176 item 3 (or 4, if the recommendation above for form DV-176 is approved to switch items 3 and 4). **DV-179** 32. #1 (a) and (b) add a line right after "Name." (Name: _____). • It is recommended that item 1 a. and 1 b. to be consistent with form DV-176. Item 1 a. (first box) Name of protected party is (second box) Name of protected party is	29. The committees believe that listing the name of the person making the request is sufficient. 30. The committees prefer the current construction. Allowing attachments may lead to inadvertent disclosure of confidential information. 31. The confidential information requested is now on page 2 of DV-176. The committees prefer the current language. 32. This change has been made.

	Commenter	Position	Comment	Committee Response
			confidential in this case. Item 1 b. (first box) Name of restrained party is _____ (second box) Name of restrained party is confidential in this case.	
			33. Item 2. It is recommended to add "or Entity" to the title of this section: **Person or Entity Asking for Release of Minor's Confidential Information**	33. The committees have revised item 2 to allow the person making the request to indicate if they are appearing on behalf of an entity or business. The committees believe that this change is sufficient to capture when requests are made by entities and not individuals.
			Item 3 a. It is recommended to add "or entity listed": **The court denies the request by the person or entity listed in 2 to release minor's confidential information.**	
			Item 3 b. It is recommended to add "or entity listed": **The person or entity listed in 2 must go to court on the date and time below to give more information why the court should release minor's confidential information.**	
			34. #3(c) To read: The court will mail a copy of this order to the minor or parent/legal guardian who requested to keep minor's information confidential.	34. The committees have revised this sentence as follows, "The court will mail a copy of this order to the person who made the request to keep minor's information confidential."
			35. Item 4 a. It is recommended to add "or entity listed": **The request made by the person or entity listed in 2 is:**	35. The committees did not make this change and believe the current language sufficiently communicates whether the request was granted or partially granted.

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	Commenter	Position	Comment	Committee Response
			36. Item 5 a. It is recommended to add "or entity listed": **In granting the request made by the person or entity listed in 2 the court finds that the:**	36. The committees do not believe the added language is necessary and may make the sentence harder to understand.
			37. #5 (a)(2) release of minor's confidential information as described in item 6 is (check at least one): #6 (a) The following persons/entities may have access to the information as described in 6 b (check all that apply):	37. The committees prefer the current language.
			38. Item 6 a. (2). It is recommended to add (name) and a line right after minor's school and afterschool program (*name*) _____.	38. The committees agree and have made these changes.
			39. #6b to read: This order releases minor's confidential information as follows:	39. This change has been made.
			40. Item 7. It is recommended to add the following language to the last sentence: Any person who misuses or discloses the minor's confidential information **to anyone other than law enforcement may be sanctioned up to $1,000 or face other court penalties.** See Family Code section 6301.5(c)(2) for the limited situations in which disclosures can be made without a court order.	40. The committees have included the following sentence, "See Family Code section 6301.5 for the limited situations in which disclosures can be made without a court order."

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

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			41. Item 8 a. It is recommended to add "or entity listed": **The court will send a copy of this order to the person or entity listed in 2…** Item 8 b. It is recommended to add "or entity listed": **The person or entity listed in 2 must have a server mail…**	41. The committees believe the current language sufficiently communicates what the responsibilities of the court or person in 2 are.
			42. #8 (a) The court will send a copy of this order to the person listed in 2 and the minor or parent/legal guardian who requested to keep the minor's information confidential. (b) The person in 2 must have a server mail a copy of this order to the minor or parent/legal guardian who requested to keep the minor's information confidential.	42. To improve readability, the phrase "minor or legal guardian" has been replaced with "person."
			43. **Clerk's Certificate area –** name of the form listed is incomplete. Sentence should read: I certify that this Order on Request for Release of Minor's Confidential Information is a true and correct copy of the original on file in the court.	43. This change has been made.
			• *Does the proposal appropriately address the stated purpose?* Yes, with the following comments:	
			44. CRC 5.382 (h) (3) (A) (ii) - For those cases in which the minor's address is not ordered to be kept confidential, service on the party that	44. The committees did not adopt this suggestion. The committees believe that creating multiple processes for service in these instances would be confusing and possibly cause additional work that

	Commenter	Position	Comment	Committee Response
			requested to keep the minor's information confidential should not be court's burden. Language may be revised to "Within ten days after filing form DV-176 with the clerk, the minor or legal guardian who requested to keep the minor's information confidential must be served, by first-class mail, with the following document, (if minor's address is ordered confidential, service will be made by the clerk): 45. (h) (3) (C) (i) (c) and (ii) (c) Service - indicates the court must mail a copy of form DV-179 to the person who filed form DV-176 and the person who requested to keep the minor's information confidential. If all parties are present in court, service portion may add: "Parties may be served in court if present at the hearing." • *Should a person asking that the information of a minor be kept confidential be precluded from asking that the name of the minor not be provided to the restrained party? (That is, should item8a(1) on DV-160 be removed? See the discussion in "Alternatives considered." above.)* No further comments. • *Are the forms easy for users to understand?*	would offset any reduction in workload for the court. 45. The committees have made this change. No response required.

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	Commenter	Position	Comment	Committee Response
			Yes. • *Do you have any suggestions for improving their usability and readability?* Yes, please refer to the Comments section above • *What would the implementation requirements be for courts - for example, training staff (please identify the position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?* Implementation would require staff training, procedure revision, and updates to the case management sytem. • *Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?* Yes.	No response required. See above for responses. No response required. The committees appreciate the input.
8.	Superior Court of California, County of San Diego By Mike Roddy, Executive Officer Central Courthouse 1100 Union Street San Diego, CA 92101	AM	1. Does the proposal appropriately address the stated purpose? Yes; however, does keeping the minor's information confidential also prevent local law enforcement from disclosing such names from their restraining order online query system? 2. Should a person asking that the information of a minor be kept confidential be precluded from asking	1. Law enforcement will have access to information through the Department of Justice's restraining order database to the extent that it is necessary to enforce the restraining per Family Code section 6301.5(d)(1)(A) and Code of Civ. Proc. section 527.6(v)(4)(A)(i). 2. The committees believe that there may be situations where it would be appropriate to make

	Commenter	Position	Comment	Committee Response
			that the name of the minor *not* be provided to the restrained party? (That is, should item 8a(1) on forms CH-160 and DV-160 be removed? See the discussion in "Alternatives considered," above.) Yes, for the due process reasons set forth in the Invitation.	the minor's name confidential from the restrained party. Courts can address due process issues on a case-by-case basis. This item will remain on the forms.
			3. Are the forms easy for users to understand? Yes.	3. No response required.
			4. Do you have any suggestions for improving their usability and readability? See General Comments.	4. The committees thank you for your comments. See responses below for each comment submitted.
			5. 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? Updating internal procedures, training staff, and adding filings to case management systems.	5. No response required.
			6. Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes, provided the final version of the forms are provided to the courts at least 30 days prior to the effective date. This will give courts sufficient time to update their procedures, configure local packets, and order printed stock.	6. The committees appreciate the input.
			7. How well would this proposal work in courts of different sizes? It appears that the proposal would work for courts of all sizes.	7. No response required.

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	Commenter	Position	Comment	Committee Response
			GENERAL COMMENTS:	
			8. **CH-160:** Replace reference to "domestic violence restraining order" with "civil harassment."	8. This change has been made.
			9. **Item 3b** (… *You do not have to give a telephone, fax, or e-mail address.*)	9. This section has been revised to be consistent with the contact section of other newly revised forms.
			10. **Item 5** (See Cal Style Manual, § 4:9 and DV-160.) Information to Be Kept Confidential ~~F~~from the Public	10. Using a capital "f" is consistent with the council's style guide, which requires capitalization of prepositions that are four letters or more.
			11. **Item 5a** *(Note: If your request is granted, the public will not have access to ~~your~~ the minor's name in this case, but law enforcement must be given this information.)*	11.This change has been made.
			12. **Item 8** (See Cal Style Manual, § 4:9.) Information to Be Kept Confidential ~~F~~from the Restrained Person	12. Same response as above.
			13. **Item 8** (See page 3, item 5c [*Note*]) *(Note: The restrained person must be given the information that is necessary to comply with the restraining order and to respond to the restraining order request.)*	13. The committees prefer the current wording and did not make this change.
			CH-160-INFO Page 1 14. A judge can make any information about a minor confidential. That means that you can ask to make confidential the minor's name, address, any	14. Because the basis for civil harassment restraining orders can include violence and other actions, the committees have changed the

	Commenter	Position	Comment	Committee Response
			statements about the minor's ~~abuse~~ harassment, or any ~~abuse~~ harassment the minor witnessed.	sentence to read as follows, "That means that you can ask to make confidential the minor's name, address, or any statements about what the minor experienced or witnessed."
			15. If you ~~only~~ want to protect the only minor's address, you do not have to make this request. **Page 2, right column** **Tips for Step 1: Complete the forms.** **I ~~only~~ want to protect only the minor's address~~:~~.** If you ~~only~~ want to protect only the minor's address, you do not have to make this request. See "What information can I ask the judge to make confidential?" on page 1 for more information.	15. The committees have changed the sentence to read as follows, "If you want to protect the minor's address only, you do not have to make this request."
			16. **I want to protect ~~multiple minors~~ more than one minor.** Only an adult who is the minors' parent or legal guardian may make a request to protect ~~multiple minors'~~ the information of more than one minor.	16. This change has been made.
			17. **I want to give the minor's school or others copies of court orders from this case.** If the court grants your request to make information regarding a minor confidential, you may want to ask the court for permission to give other people copies of certain documents in your case. You can make this request at item 9 on form CH-160.	17. This change has been made.
			18. **My right to cancel my restraining order request~~:~~.** If you are the party asking for the civil harassment restraining order and the judge does not grant your confidentiality request, you have the right	18. The committees have simplified this sentence, to read as follows, "You have the right to cancel your request for a restraining order if a judge does not grant your request to make information

	Commenter	Position	Comment	Committee Response
			to cancel your request for a civil harassment restraining order ~~request~~.	confidential. This right only applies if you are asking for the restraining order **at the same time** as your request to make information confidential.
			19. To ~~have~~ cancel your request for a civil harassment restraining order ~~request canceled~~, check the box on form CH-160, item 7a, and item 8d(1), if it applies.	19. This change has been made.
			20. If you cancel your request for a civil harassment restraining order ~~request~~, you will **not** receive a civil harassment restraining order at this time.	20. This change has been made.
			21. If, **after** canceling your request for a civil harassment restraining order ~~request~~, you want to ask for a civil harassment restraining order based on the same facts, you must start the process over. See form CH-100-INFO for more information.	21. This change has been made.
			Page 3, left column **What if the judge granted my request?** 22. Look closely at form CH-165, pages 2–~~3~~4 (items 8 and 9), to see what information the judge made confidential in your case.	22. Items 7 and 8 are referenced instead of pages 2-4.
			23. If the judge granted your request ~~to keep information confidential~~, the information the judge decided to keep confidential will not be available to the public. The information will ~~only~~ be available only to the parties in the case.	23. These changes have been made.
			24. At times, the judge may make information confidential from the other party (the restrained person) in your case.	24. This sentence has been changed to read as follows, "At times, the judge may make

	Commenter	Position	Comment	Committee Response
				information confidential from the restrained person."
			25. If this happens, the judge will complete item ~~8~~9 on form CH-165. Now, take a close look at item ~~9~~10 on form CH-165. This tells you who is responsible for redacting the information on your paperwork and the deadline for filing it with the court.	25. These changes were not made. The items are correctly referenced on the draft form CH-165 included in the proposal.
			26**. Page 3, right column** **What if the judge did not grant (denied) my request?** This means that if you move forward with your case, the minor's information on your paperwork will not be confidential ~~on your paperwork~~. This is important because anyone can go to your local courthouse and ask to see the documents you filed in this case.	26. This change was made.
			27. **What if I asked to cancel my restraining order request?** … The court will either return these forms to you, destroy them, or delete them from ~~their~~ its records unless you give the court permission to file the forms.	27. This change was made.
			28. **Is there a penalty for disclosing confidential information?** … You will not be penalized if you: - Give information to police to help them enforce the judge's orders; or - If you are the minor who has claimed ~~abuse~~ harassment.	28. The language has been changed to, "If you are the minor who has claimed harassment, violence or threats of violence."

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	Commenter	Position	Comment	Committee Response
			Page 4, right column	
			29. **Step 4: Have your server give your court papers to all parties.**	29. This change was made.
			30. For service by mail, give your server your court papers as well as form CH-~~250~~260. The court needs proof that your papers were served. After your server completes form CH-200, CH-260, or form POS-030, take it to the court to file in your case.	30. This section should reference Form POS-030, not CH-250 or CH-260.
			31. **CH-165:** **Box at bottom of page:** If item 3 is checked, file page 1 in a public file and discard pages 2-~~5~~6.	31. This change has been made.
			32. **Item 8** (See Cal Style Manual, § 4:9.) Information to Be Kept Confidential ~~f~~From the Restrained Person	32. Using a capital "f" is consistent with the council's style guide, which requires capitalization of prepositions that are four letters or more.
			33. **Item 10 ~~People~~ Who May Have Access to Unredacted Court Documents** **a(2)** – The word "minor's" is not necessary. a(4) ___ other *(full name)*:	33. The committees believe that the current language is easier to understand and did not adopt the suggested revision.
			34. **Item 12a**: Propose adding the following language "any family law case, or any other civil case **with the same parties**."	34. This change has been made.
			35. **Item 13 To the Person ~~Making the~~ Requesting ~~for~~ Confidentiality**	35. The committees believe that the current language is easier to understand and did not adopt the suggested revision.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

	Commenter	Position	Comment	Committee Response
			36. **Item 13c(1) (Form CH-170 should be the first page with all others forms stapled behind it.)** (2) ___ Form CH-100, Request for ~~Domestic Violence~~ Civil Harassment Restraining Order **CH-170**	36. These changes have been made.
			37. **Item 1**… Confidential information may be given ONLY to law enforcement to enforce the restraining order (attached form CH-110 or CH-130).	37. The reference to CH-110 has been removed as it could be other forms, like CH-130 and CH-730.
			38. **Item 2**a. Form CH-100, *Request for Civil Harassment Restraining Orders* d. Form CH-130, *Civil Harassment Restraining Order After Hearing*	38. These changes have been made to correctly reflect the titles of the two forms.
			39. **Item 3** (See CH-165, item 12a.) If you file any document that contains any confidential information in this case, any family law case, or another civil case with the same parties, **you MUST also use form CH-175 as a cover sheet.** …	39. The committees prefer the current language because it is unlikely that parties in a civil harassment case will also be the same parties in a family law case. "Civil case" means any civil proceeding, including family law and probate cases.
			40. **CH-175** **Instructions to Parties** When to use this cover sheet: ___ Item 4a or 4b on f~~F~~orm CH-165 has been ~~issued~~ checked by the court	40. The committees have changed this sentence to the following, "When information about a minor has been made confidential (granted on form CH-165)."
			CH-176 41. Propose changing first person "My" to second person "**Your**" throughout the form, which is consistent with other CH forms (e.g. CH-100, 115, etc.).	41. The committees prefer writing in the first person, when possible. The committees note that new and recently revised forms, like CH-160 and CH-115, use the first-person point of view.

	Commenter	Position	Comment	Committee Response
			42. **Instructions: What do I do if I received a completed copy of this form?** The person in 2 is asking the court for access to information that has been made confidential (see item 3 on page 2 of this form). If you do NOT agree with this request, complete and file *Response to Request for Release of Minor's Confidential Information* (form CH-177~~7~~8), by the deadline listed on form CH-177, item 4.	42. Thank you. This change has been made.
			43. **Item 2:** Propose changing "My name is" to "Full Name", as the proposed Notice form (CH-177) requires the clerk to include the requesting party's full name.	43. This has been changed to "My full name is:".
			44. **Item 4**a. The information I ~~am asking from the court~~ want released is the same for all minors. b. The information I ~~am asking from the court~~ want released is **not** the same for all minors.	44. These changes have been made with minor revisions.
			45. **Item 5 Reasons I Am Asking ~~the Court~~ for the Minor's Confidential Information**	45. The committees have changed this heading to "Reasons I Want Access to Minor's Confidential Information."
			46. To approve your request, the court must find that giving you the minor's confidential information is necessary to ~~either~~ prevent harassment or is in the best interest of the minor. The question listed should reference Item 3 not 2.	46. This change has been made.
			47. **Verification, p. 3** (See, e.g., form CH-160, page 6.) I declare under penalty of perjury under the laws	47. Item 6 incorporates attachments therefore the reference to all attachments is not needed. Form

	Commenter	Position	Comment	Committee Response
			of the State of California that the information above and on all attachments is true and correct. **CH-177** 48. **Page 1, paragraph 2** … For next steps, see the instructions on page 2. 49. **Page 2** For person in 3: **Instructions ~~and Information~~ on Next Steps** 50. **Form CH-176** is included with this notice. Take a close look at ~~form CH-176~~ it to see who made the request (item 2) and what confidential information the person wants to access (item 3). 51.**A blank copy of form CH-178** is also included with this notice. If you do not agree with the request to release confidential information, you must complete form CH-178 and file it with the court clerk by the deadline listed in 4 on page 1 of this form ~~CH-177~~. … 52. **CH-178**: Propose changing first person "My" to second person "**Your**" throughout the form, which is consistent with other CH forms (e.g. CH-100, 115, etc.). **Instructions** 53. **When ~~to use~~ should this form be used?** **Who should use this form?**	CH-160 will reflect the same declaration under penalty of perjury. 48. This change has been made. 49. This section has been rename to "Next Steps for Person in 3" 50. This change has been made. 51. The committees prefer to include the reference to form CH-177. A lot of forms are mentioned in this section and there is concern that referring to CH-177 as "this form" may be insufficient. 52. The committees prefer writing in the first person, when possible. The committees note that new and recently revised forms, like CH-160 and CH-115, use the first-person point of view. 53. The committees prefer the current language, as contained in the proposal.

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	Commenter	Position	Comment	Committee Response
			~~If you are a~~ A minor or legal guardian who made a request to keep the minor's information confidential.	
			54. **Item 4b** ___ Other information about the minor (*specify*): _____	54. The third option in item 4b is intentionally vague so the person completing the form does not unintentionally disclose or describe the confidential information that they do not want disclosed.
			55. ~~The reasons why~~ **I do not want the person to have ~~this~~ the information** checked above ~~is~~ because:	55. This change has been made.
			56**. Item 5** Should this item be revised for consistency with item 5 in form DV-178?	56. Yes, this item will be revised to be consistent with the DV form.
			You must have your server mail a redacted copy of this form (with no confidential information) to the person listed in 2.	
			CH-179, page 4	
			57. **Item 8b** Remove ", after the copy has been mailed" from hyperlink or delete underscore.	57. This change has been made.
			Clerk's Certificate 58. I certify that this *Order on Request for Release of Minor's Confidential Information (Civil Harassment Prevention) (form CH-179)* is a true and correct copy of the original on file in the court.	58. This change has been made.
			59. **DV-160-INFO Page 1, left column** A minor can make this request without the help of an adult~~,~~. This depends ~~depending~~ on the minor's	59. This change has been made.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

	Commenter	Position	Comment	Committee Response
			age, though. If the minor is 12 years old or younger, the judge may want an adult to help the minor make this request. (See CH-160 INFO.) 60. If you ~~only~~ want to protect the only minor's address, you do not have to make this request. … **Page 2, right column** 61. **Tips for Step 1: Complete the forms.** **I ~~only~~ want to protect only the minor's address~~:~~.** If you ~~only~~ want to protect only the minor's address, you do not have to make this request. See "What information can I ask the judge to make confidential?" on page 1 for more information. 62. **I want to protect ~~multiple minors~~ more than one minor.** Only an adult who is the minors' parent or legal guardian may make a request to protect ~~multiple minors'~~ the information of more than one minor. 63. **My right to cancel my restraining order request~~:~~.** If you are the party asking for the civil harassment restraining order and the judge does not grant your confidentiality request, you have the right to cancel your request for a domestic violence restraining order ~~request~~.To ~~have~~ cancel your request for a domestic violence restraining order ~~request canceled~~, check the box on form DV-160, item 7a, and item 8d(1), if it applies.	60. The sentence has been revised to "If you want to protect the minor's address only…" 61. The sentence has been revised to "I want to protect the minor's address only." 62. This change has been made. 63. The committees have simplified this sentence, to read as follows, "You have the right to cancel your request for a restraining order if a judge does not grant your request to make information confidential. This right only applies if you are asking for the restraining order **at the same time** as your request to make information confidential.

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	Commenter	Position	Comment	Committee Response
			64. If you cancel your request for a domestic violence restraining order ~~request~~, you will **not** receive a domestic violence restraining order at this time. If, **after** canceling your request for a domestic violence restraining order ~~request~~, you want to ask for a domestic violence restraining order based on the same facts, you must start the process over. See form DV-505-INFO for more information.	64. These changes have been made.
			65. **Page 3, left column** **What if the judge granted my request?** Look closely at form DV-165, pages 2–~~5~~4 (items 7 and 8), to see what information the judge made confidential in your case.	65. Items 7 and 8 are now referenced instead of pages 2-4.
			66. If the judge granted your request ~~to keep information confidential~~, the information the judge decided to keep confidential will not be available to the public. The information will ~~only~~ be available only to the parties in the case.	66. These changes have been made.
			67. Redacting means to hide (~~whited or blacked~~ blacken or whiten out) information so it cannot be seen. If the judge makes you responsible for redacting the information, your local self-help center may be able to help you.	67. This change has been made.
			DV-165: 68. **Item 3a –** Italicize titles of forms. The court will NOT make a decision on the *Request for Domestic Violence Restraining Order* (form DV-100).	68. These changes have been made.

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	Commenter	Position	Comment	Committee Response
			The court will make a decision on the *Request for Domestic Violence Restraining Order* (form DV-100).	
			69. **Box at bottom of page 1:** If item 3 is checked, file page 1 in a public file and discard pages 2-~~5~~6.	69. This change has been made.
			70. **Top of page 2 –** Insert period. *Court will complete the rest of this form if the request is partially or fully granted.*	70. This change has been made.
			71. **Item 7** Information to Be Kept Confidential from the Public	71. This change has been made.
			72. Item 10 ~~People~~ Who May Have Access to Unredacted Court Documents	72. The committees believe that the current language is easier to understand and did not adopt the suggested revision.
			73. **Item 10a(2)** – The word "minor's" is not necessary. (4) ___ other *(full name)*:	73. "Minor's" has been deleted.
			74. **Item 13 To the Person ~~Making the~~ Requesting ~~for~~ Confidentiality**	74. The committees believe that the current language is easier to understand and did not adopt the suggested revision.
			75. **Item 13a** *(See form DV-~~160~~200-INFO to find out how to meet this requirement. ….)*	75. This change has been made.
			76. **Item 13c(1) (Form DV-170 should be the first page with all others forms stapled behind it.)**	76. This change has been made.

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	Commenter	Position	Comment	Committee Response
			77. Box at bottom of page 6 If item ~~9b~~ 8b is checked, provide the person making this request no more than three certified copies of forms DV-100, DV-109, and DV-110, which must include any information in item 7 but must NOT include any information listed in item ~~9b~~ 8b. Use form DV-17~~0~~5 as a cover sheet for each set of forms.	77. The committees agree that item 8b is the correct reference. However, form DV-170 is the correct for the clerk to use as a cover sheet, not form DV-175.
			78. Any information listed in item 8b must not be available to the restraining person and must be filed in a confidential file.(See CH-165.)	78. This change has been made.
			79. **DV-170:** Item 1: Confidential information may be given ONLY to law enforcement to enforce the restraining order (attached form DV-110 or DV-130).	79. Instead of listing all the possible forms that a restraining order could be issued on, the committees have removed the reference to DV-110.
			80. **Item 3:** Remove underscore from "you MUST also_use…**"**	80. This change has been made.
			Center footer 81. Notice ~~O~~of Order Protecting Information of Minor	81. This change has been made.
			82. **DV-175 Instructions to Parties** When to use this cover sheet: ___ Item 4a or 4b on f~~F~~orm DV-165 has been ~~issued~~ checked by the court	82. The committees have changed this sentence to the following, "When information about a minor has been made confidential (granted on form DV-165)."
			83. **Item 2a(2)** Another civil~~/~~ or family law case	83. This change has been made.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

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	Commenter	Position	Comment	Committee Response
			DV-176 84. Propose changing first person "My" to second person "**Your**", which is consistent with other DV forms (e.g. DV-100, 115, etc.).	84. The committees prefer writing in the first person, when possible. The committees note that new and recently revised forms, like CH-160 and CH-115, use the first-person point of view.
			85. **Item 2**. Propose changing "My name is" to "Full Name", as the proposed Notice form (DV-177) requires the clerk to include the requesting party's full name.	85. This has been changed to "My full name is:".
			86. **Item 4a**. The information I ~~am asking from the court~~ want released is the same for all minors. b. The information I ~~am asking from the court~~ want released is **not** the same for all minors.	86. The committees have reformatted this section to make it easier to complete.
			87. **Item 5: Reasons I Am Asking ~~the Court~~ for the Minor's Confidential Information**	87. The committees have changed this heading to "Reasons I Want Access to Minor's Confidential Information."
			88. The question listed should reference Item 3 not 2.	88. The page number is now referenced instead of an item number.
			89. **Verification, p. 3** (See, e.g., form CH-160, page 6.) I declare under penalty of perjury under the laws of the State of California that the information above and on all attachments is true and correct.	89. To state the same idea but with simpler language, the committees propose adding "and on all papers."
			DV-178 90. Propose changing first person "My" to second person "**Your**" throughout the form, which is consistent with other DV forms (e.g. DV-100, 115, etc.).	90. The committees prefer writing in the first person, when possible. The committees note that new and recently revised forms, like DV-160 and DV-115, use the first-person point of view.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

	Commenter	Position	Comment	Committee Response
			Instructions 91. **When ~~to use~~ <u>should</u> this form <u>be used</u>?** **Who should use this form?** ~~If you are a~~ <u>A</u> minor or legal guardian who made a request to keep <u>the minor's</u> information confidential.	91. The committees prefer the current language, as contained in the proposal.
			92. **Item 4a -** Should the following be added? It appears in this item (4a) on form CH-178. ___ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 4a" for a title.*	92. There appears to be enough space for a complete answer therefore the overflow checkboxes will be deleted from Form CH-178 for this item.
			93. **Item 4b** ___ Other information about the minor (*specify*): _____	93. The third option in item 4b is intentionally vague so the person completing the form does not unintentionally disclose or describe the confidential information that they do not want disclosed.
			94.~~ The reasons why~~ **I do not want the person to have ~~this~~ <u>the</u> information** <u>checked</u> above ~~is~~ <u>because</u>:	94. This change has been made.
			95. **Item 4b -** Should the following be added? It appears in this item (4b) on form CH-178. ___ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 4b" for a title.*	95. There appears to be enough space for a complete answer therefore the overflow checkboxes will be deleted from Form CH-178 for this item.
			DV-179 96. **Page 4, Clerk's Certificate**	96. This change has been made.

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	Commenter	Position	Comment	Committee Response
			I certify that this *Order on Request for Release of Minor's Confidential Information* is a true and correct copy of the original on file in the court **Rule 3.1161** **Subd. (h)(3)(C)** 97. The request may be granted or denied in whole or in part without a hearing or the court may set the matter for hearing on at least 10 days' notice to the person who made the request for release of confidential information and the person who made the request for confidential information. ~~Any~~ The hearing must be confidential and closed. 98**. Subd. (h)(3)(C)(i)c.** ~~c. *Service*~~ c. If the court grants the request for release of information based on the pleadings, the court must mail a copy of form CH-179 to the person who filed form CH-176 and the person who made the request to keep the minor's information confidential. **Subd. (h)(3)(C)(ii)c.** ~~c. *Service*~~ c. If the court denies the request for release of information based on the pleadings, the court must mail a copy of form CH-179 to the person who filed form CH-176 and the person who made the request to keep the minor's information confidential. **Rule 5.382** 99. **Subd. (h)(3)(A)(ii)**: the statutes do not state that the clerk has to serve the documents on the minor or legal guardian who made the request to keep the	97. Because a hearing is optional, the use of "any" is appropriate. 98. The committees prefer to keep this sub-heading. 99. The committees believe that providing notice in this instance is an appropriate function of the court. In other instances, courts are required to provide notice by mailing. The committees

	Commenter	Position	Comment	Committee Response
			minor's information confidential. If the court is going to be required to serve the documents, a fee should be charged for this service.	understand that this policy requires additional work by the courts but does not believe there is any other way that notice can be given to the person who made the request confidential. The contact information for the person who made the request for confidentiality is provided on a confidential form which the person requesting release of confidential information would not have access to.
			100. 10 days should be changed to 10 business or court days as 10 calendar days may not be sufficient time for the clerk to serve the documents.	100. The committees believe that 10 calendar days provides courts with sufficient time to serve the documents by mail.
			101. **(h)(3)(A)(ii)(c)**. *Notice of Request for ~~Limited~~ Release of Minor's Confidential Information* (form DV-177); Title of DV-177 does not include "Limited."	101. This change has been made.
			102. **Subd. (h)(3)(B)(ii)** (ii) The person filing a response must serve a copy of the response form (<u>form</u> DV-178) on the person requesting release of confidential information before filing the response form with the court unless the response form contains confidential information. If the response form contains confidential information, service must be done as soon as possible after the response form has been redacted.	102. This has been changed to, "…of the response (form DV-178)."
			103. **Subd. (h)(3)(C)** The request may be granted or denied in whole or in part without a hearing or the court may set the matter for hearing on at least 10 days' notice to the person who made the request for release of	103. Because a hearing is optional, the use of "any" is appropriate.

	Commenter	Position	Comment	Committee Response
			confidential information and the person who made the request for confidential information. ~~Any~~ The hearing must be confidential and closed. 104. **Subd. (h)(3)(C)(i)c.** ~~c. *Service*~~ c. If the court grants the request for release of information based on the pleadings, the court must mail a copy of form DV-179 to the person who filed form DV-176 and the person who made the request to keep the minor's information confidential. **Subd. (h)(3)(C)(ii)c.** ~~c. *Service*~~ c. If the court denies the request for release of information based on the pleadings, the court must mail a copy of form DV-179 to the person who filed form DV-176 and the person who made the request to keep the minor's information confidential.	104. The committees prefer to keep this sub-heading.
9.	TCPJAC/CEAC Joint Rules Subcommittee (JRS), on behalf of the Trial Court Presiding Judges Advisory Committee (TCPJAC) and the Court Executives Advisory Committee (CEAC)	A	The JRS notes the following impact to court operations: • Impact on existing automated systems (e.g., case management system, accounting system, technology infrastructure or security equipment, Jury Plus/ACS, etc.) • Results in additional training, which requires the commitment of staff time and court resources. • Increases court staff workload. • Proposed date for implementation is not feasible or is problematic. JRS also notes that the proposal is required to conform to a change of law.	The committees thank you for your comments.

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			Request for Specific Comments: 1. Does the proposal appropriately address the stated purpose? • Yes	No response required.
			2. Are the forms easy for users, especially self-represented litigants, to understand? • Yes	No response required.
			3. Do you have any suggestions for improving their usability or readability? • No	No response required.
			4. What would the implementation requirements be for the court? • Training for Judicial Officers and staff, CLETS input clerks in counties where the court processes CLETS orders. Revision of procedures will be required. In courts with CMS automated processes or online forms and CLETS reporting, development and update will be required; this will require time, development and cost. There will also be a cost to recycling and replacing outdated forms with new forms in areas where paper copies and packets are used.	No response required.
			5. Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? • In courts with manual processes, training and changing out of forms could be performed within a three-month window. Where CMS changes are required, current time to implement change is	The committees do not recommend delaying the effective date. The committees note that all the courts that responded to this question stated that three months would provide enough time for implementation.

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			lengthy relative to the CMS vendor and contractual obligation to provide updates with legislative or other change is imposed upon trial court.	

Item number: 40

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Recommend JC approval (has circulated for comment)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Gun Violence Restraining Orders: Extend duration and expand categories of petitioners; relinquishment of firearm rights

Committee or other entity submitting the proposal:
Civil and Small Claims Advisory Commitee

Staff contact (name, phone and e-mail): Kristi Morioka, 916-643-7056, kristi.morioka@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Three recently enacted bills amend the statutes relating to gun violence restraining orders (GVRO), and so require revision to GVRO forms if they are enacted. Assembly Bill 12 changes the duration of a GVRO, among other things. Assembly Bill 61 adds two new categories of parties who may seek GVROs, coworkers and employees of a school that the person with the guns recently attended. Assembly Bill 1493 authorizes the respondent to a petition for a GVRO to voluntarily relinquish the right to own or possess 4 # New or One-Time Projects4 firearms, and become subject to a GVRO, by filing a form with the court. The GVRO forms must be amended to reflect the changes in the statutes. At the same time, the committee will consider expanding the item on the GVRO form EPO-002 that asks for the gender of the restrained party.

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.)
JC staff is waiting for a policy decision from Department of Justice. This is discussed more fully in the attached memorandum to the Rules and Projects Committee.

JUDICIAL COUNCIL OF CALIFORNIA

2860 Gateway Oaks Drive, Suite 400 • Sacramento, California 95833-4336
Telephone 916-263-7885 • Fax 916-263-1966 • TDD 415-865-4272

MEMORANDUM

Date
March 31, 2020

To
Rules and Projects Committee
Hon. Harry E. Hull, Jr., Chair

From
Civil and Small Claims Advisory Committee
Hon. Ann I. Jones, Chair

Subject
Protective Orders: Duration and Categories of Petitioners for Gun Violence Restraining Orders; Relinquishment of Firearm Rights

Adopt form GV-125; revise forms EPO-002, GV-009, GV-020, GV-020-INFO, GV-030, GV-100, GV-100-INFO, GV-109, GV-110, GV-120, GV-120-INFO, GV-130, GV-600, GV-610, GV-620, GV-630, GV-700, and GV-710

Action Requested
Please review for Rules and Projects Committee RUPRO meeting

Deadline
April 9, 2020

Contact
Kristi Morioka
916-643-7056 phone
kristi.morioka@jud.ca.gov

Introduction

This proposal recommends adopting one new gun violence restraining order (GVRO) form and revising 18 existing forms. These changes are needed to implement recent amendments in the Penal Code: Assembly Bill 12 allows an officer to file a GVRO in the name of the officer's law enforcement agency and extends the duration of a GVRO to a maximum of five years; Assembly Bill 61 allows an employer, coworker, or school administrator or teacher of a person believed to be dangerous to file a petition requesting a GVRO; and Assembly Bill 1493 authorizes a person

who is the subject of a GVRO to submit a form to the court voluntarily relinquishing his or her firearm rights. This memorandum highlights adding an option for nonbinary individuals to forms EPO-002, GV-030, GV-110, and GV-130 for the committee to consider when reviewing this proposal.

Gender neutrality and adding an option for nonbinary individuals pending Department of Justice action

The proposal circulated for public comment from December 13, 2019 to February 11, 2020. Comments were received from a total of 13 commenters. The Civil and Small Claims Advisory Committee members met in person and on the telephone on March 9, 2020, to discuss the comments and make appropriate revisions to the forms. Comment submitted during the public comment period from December 13, 2019 to February 11, 2020 suggested revising the section of the order forms that request description information for the restrained person to change "sex" to "gender" and to add an option for nonbinary individuals. Though the Department of Justice (DOJ), Restraining Order Unit has confirmed that the programming is possible by September 1, 2020, the DOJ has requested additional time to determine official DOJ policy.

Three commenters suggested revising the section of forms GV-030 and GV-130, which ask for descriptive information about the restrained person. The Superior Court of California, County of Los Angeles, and the Joint Rules Subcommittee (JRS) of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee suggested either removing the gender options entirely or adding an option for nonbinary individuals. The Giffords Law Center suggested adding a box in the sex category of "Description of Restrained Person" for those who do not identify as male or female to form GV-030. The order forms GV-030 and GV-130 request the sex of the restrained person but only allow an option for male or female. Form GV-100 does not request this information, but one commenter asked whether this information should also be included on this form. Because forms EPO-002 and GV-110 also request the sex of the restrained person, if changes are made to the other order forms, the committee recommends that this form be changed to be consistent.

The proposed changes are consistent with the laws for identity documents in California.[1] The suggestion to remove this item completely from the GVRO forms is not possible because it is a required field in law enforcement databases to assist in identification of the restrained person to enforce the restraining order.

The language on forms EPO-002, item 1, GV-030, under Description of Restrained Person, GV-110, item 2, and GV-130, item 2 is proposed to be revised as follows:

[1] Senate Bill 179 (Atkins; Stats. 2017, ch. 853).

Gender ☐ Male ☐ Female ☐ Nonbinary
or if there is not enough space on the form:
Gender ☐ M ☐ F ☐ X[2]

The DOJ has taken the request to add nonbinary as an option under advisement, and staff is waiting for a policy decision from the executive staff. The materials in your packet contain two versions of forms EPO-002, GV-030, GV-110, and GV-130. Version 1 does not include the revisions to the description of the restrained person, version 2 contains the changes as described below. The committee requests that the Rules and Projects Committee approve both versions of the forms to move forward to the Judicial Council. If the DOJ makes a policy decision before the materials are due to the Judicial Council that allows the gender option to be added to the forms, then version 2 will be recommended to the Judicial Council; if the DOJ does not decide in that time, then version 1 will be recommended to the Judicial Council.

Conclusion

Please consider the issue discussed above in preparation for the Rules and Projects Committee meeting.

Attachments

1. Judicial Council Report at pages 5-15.
2. Forms EPO-002, GV-009, GV-020, GV-020-INFO, GV-030, GV-100, GV-100-INFO, GV-109, GV-110, GV-120, GV-120-INFO, GV-125, GV-130, GV-600, GV-610, GV-620, GV-630, GV-700, GV-710, EPO-002 version 2, GV-030 version 2, GV-110 version 2, and GV-130 version 2 at pages 16–84.
3. Comment chart at pages 85–114.

[2] The California Department of Motor Vehicles is using these same gender category codes on California Drivers License and California Identification cards, < https://www.dmv.ca.gov/portal/dmv/detail/dl/gender_id>.

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on: May 15, 2020

Title

Protective Orders: Duration and Categories of Petitioners for Gun Violence Restraining Orders; Relinquishment of Firearm Rights

Rules, Forms, Standards, or Statutes Affected

Adopt form GV-125; revise forms EPO-002, GV-009, GV-020, GV-020-INFO, GV-030, GV-100, GV-100-INFO, GV-109, GV-110, GV-120, GV-120-INFO, GV-130, GV-600, GV-610, GV-620, GV-630, GV-700, and GV-710

Recommended by

Civil and Small Claims Advisory Committee
Hon. Ann I. Jones, Chair

Agenda Item Type

Action Required

Effective Date

September 1, 2020

Date of Report

March 3, 2020

Contact

Kristi Morioka, 916-643-7056
kristi.morioka@jud.ca.gov

Executive Summary

The Civil and Small Claims Advisory Committee recommends adopting 1 new gun violence restraining order (GVRO) form and revising 18 existing forms. These changes are needed to implement recent amendments in the Penal Code: Assembly Bill 12,[1] allows an officer to file a GVRO in the name of the officer's law enforcement agency and extends the duration of a GVRO to a maximum of five years; Assembly Bill 61,[2] allows an employer, coworker, or school administrator or teacher of a person believed to be dangerous to file a petition requesting a

[1] Assem. Bill 12 (Stats. 2019, ch. 724).

[2] Assem. Bill 61 (Stats. 2019, ch. 725).

GVRO; and Assembly Bill 1493,[3] authorizes a person who is the subject of a GVRO to submit a form to the court voluntarily relinquishing his or her firearm rights.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council, effective September 1, 2020:

1. Adopt *Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-125) to implement AB 1493, which amends the Penal Code to allow the subject of a petition to file a form relinquishing his or her firearm rights; and

2. Revise the following forms to implement recent statutory changes legislated in AB 12, AB 61, and AB 1493, and to use gender-neutral terms where appropriate:

    - *Gun Violence Emergency Protective Order* (form EPO-002)
    - *Notice of Court Hearing* (form GV-009)
    - *Response to Gun Violence Emergency Protective Order* (form GV-020)
    - *How Can I Respond to a Gun Violence Emergency Protective Order?* (form GV-020-INFO)
    - *Gun Violence Restraining Order After Hearing on EPO-002* (form GV-030)
    - *Petition for Gun Violence Restraining Order* (form GV-100)
    - *Can a Gun Violence Restraining Order Help Me?* (form GV-100-INFO)
    - *Notice of Court Hearing* (form GV-109)
    - *Temporary Gun Violence Restraining Order* (form GV-110)
    - *Response to Petition for Gun Violence Restraining Order* (form GV-120)
    - *How Can I Respond to a Petition for a Gun Violence Restraining Order?* (form GV-120-INFO)
    - *Gun Violence Restraining Order After Hearing* (form GV-130)
    - *Request to Terminate Gun Violence Restraining Order* (form GV-600)
    - *Notice of Hearing on Request to Terminate Gun Violence Restraining Order* (form GV-610)
    - *Response to Request to Terminate Gun Violence Restraining Order* (form GV-620)
    - *Order on Request to Terminate Gun Violence Restraining Order* (form GV-630)
    - *Request to Renew Gun Violence Restraining Order* (form GV-700)
    - *Notice of Hearing on Request to Renew Gun Violence Restraining Order* (form GV-710)

The proposed new and revised forms are attached at pages 12–xx.

[3] Assem. Bill 1493 (Stats. 2019, ch. 733).

Relevant Previous Council Action

Gun violence restraining orders were authorized by statute, which was enacted in 2014 and effective January 1, 2016, in response to a mass shooting in Isla Vista, California.[4] The Judicial Council created the majority of the GVRO forms in 2015, effective January 1, 2016, including several of the forms revised in this proposal.[5] The forms that the Judicial Council created in response to SB 1200 (Stats. 2018, ch. 898), which required courts to hold a hearing on an emergency gun violence protective order within 21 days of its issuance, were effective September 1, 2019.[6]

The Judicial Council, effective September 1, 2019, revised 22 GVRO forms to comply with other provisions in SB 1200, which required orders under Penal Code section 18100 et seq. to be referred to as gun violence restraining orders, expanded the definition of ammunition to include a magazine, prohibited a filing fee for GVRO forms and documents, required a law enforcement officer to make a specific request when serving a gun violence restraining order, and provided that parties do not need to pay the sheriff for service of a GVRO.

Analysis/Rationale

Changes to petitioner name to include law enforcement agency

AB 12 (Stats. 2019, ch. 724)[7] authorizes a law enforcement officer to bring a petition for a gun violence restraining order "in the name of the law enforcement agency in which the officer is employed."[8] The purpose of this statutory change is to allow an officer to use the name of the officer's law enforcement agency, rather than the officer's name, when filing a petition so that the law enforcement agency's name appears in the case caption. The individual officer still must sign the form and declare under penalty of perjury that the facts meet the statutory requirements for the restraining order. Item 1 or item 2, as applicable, has been revised on the following forms, to add law enforcement agency as a petitioner in a layout that allows the clerk to easily find and accurately enter the case name using the name of the petitioner, whether an individual or a law enforcement agency: GV-009, GV-030, GV-100, GV-109, GV-110, GV-120, GV-130, GV-600, GV-610, GV-620, GV-630, GV-700, and GV-710.

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[4] See Assem. Bill 1014 (Stats. 2015, ch. 872).

[5] Forms EPO-002, GV-100, GV-100-INFO, GV-109, GV-110, GV-120, GV-120-INFO, GV-130, GV-600, GV-610, GV-620, GV-630, GV-700, and GV-710.

[6] Forms GV-009, GV-020, GV-020-INFO, and GV-030.

[7] Assem. Bill 61 incorporates additional changes to Pen. Code, §§ 18170 & 18190 proposed by Assem. Bill 12 to be operative only if this bill and Assem. Bill 12 are enacted and this bill is enacted last, which is the order that the bills were chaptered and enrolled. Assem. Bill 1493 incorporates the changes in Pen. Code, § 18175 from Assem. Bill 12 and Assem. Bill 61.

[8] Pen. Code, § 18109(b), eff. Jan. 1, 2020; oper. Sept. 1, 2020.

New categories of petitioners

AB 61 (Stats. 2019, ch. 725) authorizes the following people, in addition to an immediate family member of the subject of the petition, to file a petition for an ex parte, one-year, or renewed GVRO:

> (1) An employer of the subject of the petition.
> (2) A coworker of the subject of the petition, if they had substantial and regular interactions with the subject . . . and have obtained the approval of the employer.
> (3) An employee or teacher of a secondary or postsecondary school that the subject has attended in the last six months, [with] approval of a school administrator or a school administration staff member with a supervisorial role.

(Pen. Code, § 18150.)

Petition for Gun Violence Restraining Order (form GV-100) would be revised to add to item 1a, new categories of petitioners and information or instructions about them: for an employer, the employer's position and name of company; for a coworker who has had substantial and regular interactions with the respondent for at least one year and has obtained permission from his or her employer to file the petition, the name of company; and for an employee or teacher of a secondary or postsecondary school that the respondent has attended in the last six months—and who has obtained approval from a school administrator to file the petition—the name of the school. Form EPO-002 would add to the warning and information section that an "employer, coworker, teacher, or school administrator" may seek a restraining order that lasts between one to five years.

Forms GV-109, GV-110, GV-130, GV-620, GV-700, and GV-710 would be revised to add the additional categories of petitioners and their relationship to the respondent. The information sheets, forms GV-100-INFO and GV-120-INFO would be revised to add the new categories of petitioners. The committee considered adding additional information, but did not go beyond the statutory requirements.

Expanded duration for GVRO and renewal of GVRO

AB 12 (Stats. 2019, ch. 724) changes the duration of a GVRO to "a period of time between one to five years"[9] and changes the renewal of a GVRO from one year to "a duration of between one to five years."[10] It also requires a court, in determining the duration of the GVRO, to consider the length of time that the threat of personal injury is likely to continue and to issue the order based

[9] Pen. Code, § 18170(a)(1), eff. Jan. 1, 2020; oper. Sept. 1, 2020.

[10] Pen. Code, § 18190(f)(1), eff. Jan. 1, 2020; oper. Sept. 1, 2020.

on that determination.[11] Revisions would be made to include the change in duration and, in response to public comment, the revisions mirror the statutory language of "between one to five years."[12] The following forms would be revised to change the existing language that states that the GVRO will last for up to a year: EPO-002, GV-020-INFO, GV-100, GV-100-INFO, GV-110, GV-120, GV-120-INFO, GV-700, and GV-710.

Petition for Gun Violence Restraining Order (form GV-100), item 7, would be revised to allow the petitioner to request a specific number of years, between one and five, for the restraining order to last. And a space would be provided for the petitioner to answer, "Why are you asking for this amount of time?" to provide information for the judge to make an informed decision about the duration of the GVRO in accordance with the statutory requirement that the judge consider the length of time that the person will pose a significant danger of causing personal injury to themselves or another person by possessing a firearm. Also, item 9 would be revised to include that the order will last "between one and five years."

Request for termination of GVRO

AB 12 also allows the restrained person to request a hearing annually to request termination of the GVRO.[13] Revisions consistent with the legislation have been proposed for forms GV-030, GV-130, and GV-600. On *Request to Terminate Gun Violence Restraining* Order (form GV-600), the instruction "You may make only one request each year that the order is in effect" would be added. And in item 3c, a check box would be added that says, "I have requested the court to terminate the order before, but my request was denied. It has been a year since I made my previous request." The instructions following item 3 would be revised to say that the request to terminate can be made "one time each year" and "one time each year" for any renewal period.

Changes to gender terms

AB 1493 (Stats. 2019, ch. 733) amended the language in Penal Code sections 18115 and 18175 to make it gender neutral. Although doing so is not required by the statute, the Rules and Projects Committee has asked advisory bodies to consider making such changes to Judicial Council forms. The advisory committee proposes to change "he or she" to "person," "himself or herself" to "themself" or "themselves," "his or her" to "their" or "Respondent," and "him or her" to "the officer," or "that person" where they appear on the following forms: GV-020-INFO, GV-030, GV-100, GV-100-INFO, GV-109, GV-110, GV-120, GV-130, and GV-630. On form GV-130, item 6, "No Fee to Serve," "he or she will do it for free" would be revised to "service will be free." Additional changes to the specific section of the forms related to gender of the restrained person is discussed separately below.

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[11] Pen. Code, § 18175(d)(2), eff. Jan. 1, 2020; oper. Sept. 1, 2020.

[12] Pen. Code, § 18170(a)(1), eff. Jan. 1, 2020; oper. Sept. 1, 2020.

[13] Pen. Code, § 18180(b), eff. Jan. 1, 2020; oper. Sept. 1, 2020.

Hearing information

In response to a suggestion from a court, a field for the hearing department was added to form EPO-002. With the revision of form EPO-002 to allow the officer to either list the follow-up court date or check the box that a notice of hearing would be sent to the restrained person, forms GV-020 and GV-020-INFO would be revised to reflect that the hearing information may be on form EPO-002.

New type of California Law Enforcement Telecommunication System (CLETS) order for form GV-030

The Department of Justice's California Restraining and Protective Order System (CARPOS) division suggested adding a new GVRO type for form GV-030 to be able to distinguish between emergency protective orders and other types of GVROs in CARPOS. Thus, the footer of the form would be changed from "CLETS-OGV" to "CLETS-HGV."

New form for relinquishment of firearm rights

The committee recommends adopting a new form for relinquishment of firearm rights, rather than revising the existing response form to include relinquishment. A standalone form to relinquish rights and consent to a gun violence restraining order identifies its purpose, providing clarity to the clerk and judicial officer concerning necessary actions, which include removing the hearing from the calendar, entering the GVRO, and entering the relinquishment form promptly into CARPOS.

The proposed new form, *Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-125), has instructions for filing and service, and a reference to the *Response to Petition for GVRO* (form GV-120) if the respondent wishes to contest the petition. Form GV-125 includes a notice about how and when respondents are required to surrender their guns, ammunition, and magazines. And it includes "Instructions to Clerk," which details how to submit the proposed order to the judicial officer, how to issue a GVRO, the time frame for filing and service, and how to submit the form to CARPOS. Item 3 includes a check box for the respondent to confirm understanding of and agreement with the following:

- The respondent will give up rights to own, possess, or purchase guns, magazines, and ammunition for the time requested in the petition (between one and five years) or, if no time is specified, for one year.
- The respondent will not contest the petition.
- The petitioner can request to renew this order for one to five years.
- The respondent can request to terminate this order only once per year while it is in effect.

Revisions to other forms because of new form GV-125

The advisory committee proposes that forms GV-109, GV-120, and GV-120-INFO be revised to provide information to the respondent about the possibility of relinquishing the respondent's firearm rights and the existence of a form to help the respondent do so.

The advisory committee also proposes that form GV-130 be revised to change the title to *Gun Violence Restraining Order After Hearing or Consent to Gun Violence Restraining Order* (CLETS-OGV) to acknowledge the new form and the new judicial findings. Form GV-130 would be revised to indicate that a hearing was not held, and to include judicial findings based on the relinquishment form that "Respondent agreed not to have in Respondent's custody or control, own, purchase, possess, or receive a firearm, ammunition, or magazine or attempt to purchase or receive a firearm, ammunition, or magazine until (*expiration date*): _____." Additional changes would be to add new items specific to notice. Item 8c would be added: "This is an order based on the Respondent's filing a *Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-125). The court will provide notice to all parties" and "Instructions to Clerk" would be added: "This order must be served on all parties by the court, if it is made following the filing of a *Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-125)."

Minor form revisions

The committee proposes other minor form revisions including editing changes on forms GV-020 and GV-120-INFO to fix technical mistakes and formatting.

Policy implications

This proposal revises the GVRO forms to implement legislation that is meant to promote public safety and due process. It also increases judicial efficiency and cooperation between law enforcement and the judiciary.

Comments

The proposal circulated for public comment from December 13, 2019 to February 11, 2020. Comments were received from a total of 13 commenters. The largest number of comments were about changing the name of the new form GV-125, followed by comments suggesting that the demographic information on the petition forms be revised to be gender neutral. There were several commenters who suggested alternate language for some of the forms. Two commenters agreed with the proposal, nine commenters agreed if modified, one commenter, who only commented on the title of form GV-125, did not agree with the proposal, and one commenter did not indicate a position.

Revise the title of form GV-125

Four commenters, two individuals and two advocacy organizations—Brady United and the Giffords Law Center to Prevent Gun Violence—suggested that the title of form GV-125 should be changed from "Relinquishment of Firearm Rights (Gun Violence Prevention)" to "Consent to Gun Violence Restraining Order." The reasons for changing the name of the form are to avoid people misunderstanding the form and to avoid what commenters believe is an unnecessarily broad title. Penal Code section 18175(d)(1) does not require a specific title on the form; it provides "The subject of the petition may file a form with the court relinquishing the subject's firearm rights for the duration specified on the petition or, if not stated in the petition, for one year from the date of the proposed hearing, and stating that the subject is not contesting the petition."

The committee discussed the proposed change to the title and felt that it would be a helpful revision to describe its purpose, but that it needed to be clearer that the restrained person had to relinquish their firearms. The committee determined that "And Surrender of Firearms" should be added to the proposed title to accurately convey the impact of the form. The committee proposes, "Consent to Gun Violence Restraining Order and Surrender of Firearms" for the title of form GV-125. Other forms that refer to form GV-125 by form name would be revised accordingly.

Gender neutrality and adding an option for nonbinary

Three commenters suggested revising the section of forms GV-030 and GV-130, which ask for descriptive information about the restrained person. The Superior Court Los Angeles County, and the Joint Rules Subcommittee (JRS) of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee suggested either removing the gender options entirely or adding an option for nonbinary individuals. The Giffords Law Center suggested adding a box in the sex category of "Description of Restrained Person" for those who do not identify as male or female to form GV-030. The order forms GV-030 and GV-130 request the sex of the restrained person but only allow an option for male or female. Form GV-100 does not request this information, but one commenter asked whether this information should also be included on this form. Because form EPO-002 also requests the sex of the restrained person, if changes are made to the other order forms; the committee recommends that this form be changed to be consistent.

The proposed changes are consistent with the laws for identity documents in California.[14] The suggestion to remove this item completely from the GVRO forms is not possible because it is a required field in law enforcement databases to assist in identification of the restrained person to enforce the restraining order.

The language on forms EPO-002, item 1, GV-030 under Description of Restrained Person, GV-100, item 2, and GV-130, item 2, would be revised as follows:

> Gender ☐ Male ☐ Female ☐ Nonbinary
> or if there is not enough space on the form:
> Gender ☐ M ☐ F ☐ X[15]

Law enforcement officer and law enforcement agency as petitioners

The committee drafted the forms with the idea that it is preferable for the officer to file the petition in the name of their law enforcement agency (LEA) because it clearly conveys that it is an agency filing a GVRO, not an individual; it keeps the officer's name out of case indexes and databases as a petitioner, which could be problematic in background checks; it allows the court to search for cases and collect case data by the LEA; and it allows a case to continue seamlessly

[14] Sen. Bill 179 (Atkins; Stats. 2017, ch. 853).

[15] The California Department of Motor Vehicles is using these same gender category codes on California Driver's License and California Identification cards, < *https://www.dmv.ca.gov/portal/dmv/detail/dl/gender_id*>.

in the name of the LEA when an officer is not employed by that LEA or has a different job assignment.

The Giffords Law Center commented that since a GVRO may be requested in the name of the law enforcement officer or "the name of the law enforcement agency in which the officer is employed,"[16] the forms should allow both options. Newly added Penal Code section 18109(b) states that, "A petition brought by a law enforcement officer may be made in the name of the law enforcement agency in which the officer is employed." The committee originally revised the forms with a line calling for the full name to allow the law enforcement officer (officer) to list either their full name or law enforcement agency (LEA). Staff sent the proposal to a small number of LEAs for their input but did not receive any comments on this issue.

Form EPO-002 requires the officer to declare that there are reasonable grounds for the issuance of an emergency gun violence protective order. It lists the officer's name and LEA, and requires their signature under penalty of perjury. A case is initiated when the LEA transmits form EPO-002 to the court. The documents that are filed subsequently, GV-020 and GV-030, list the "Requesting Agency" as the petitioner.

Form GV-100 lists for the petitioner, "Your full name or name of law enforcement agency." And under the check boxes for more specific information for petitioner, it lists "An officer of a law enforcement agency (A petition may be filed in the name of the law enforcement agency in which the officer is employed. If you listed your full name above, list the name of the law enforcement agency that employs you):" This allows the officer to choose whether to file the petition under the officer's or LEA's name.

The new training requirements for law enforcement in the area of GVROs should help to alleviate any hurdles for law enforcement petitioners by providing instruction on what name to use when initiating a petition. In 2019, the Governor signed GVRO training legislation that requires "each municipal police department and county sheriff's department, the Department of the California Highway Patrol, and the University of California and California State University Police Departments shall, on or before January 1, 2021, develop, adopt, and implement written policies and standards relating to gun violence restraining orders."[17]

Term for restrained person

The Department of Justice commented that in all areas where the forms refer to "Restrained Person" it should be changed to "Respondent." The Giffords Law Center added that the forms could specify that a respondent is a person to be restrained, the first time it shows up on each form. The committee determined that the terms circulated for comment accurately describe the parties and did not make changes based on these comments.

[16] Pen. Code, § 18109, operative Sept. 1, 2020.

[17] Assembly Bill 339 (Irwin; Stats. 2019, ch. 727).

Specific language revisions

Form EPO-002

- Instead of "Permanent order" consider "longer-term order" because it is not a permanent order. The committee understood the reasoning of the commenter and chose to use the language from the statute "Between one to five years."
- Add to the warnings to the restrained person on the front and back, "Law enforcement is required to ask for your firearms." This is necessary to remind law enforcement and to avoid a situation where law enforcement does not ask and the subject retains access to firearms unnecessarily, putting themselves and others at risk. Add on the back, "You must surrender them upon request to law enforcement." The committee added this language.
- Where "searched for" appears, "at the scene" should be added to address existing confusion about whether "searched for" means searching a database or a physical person or location search. The committee added this language.

- Form GV-020
  - In the instructions on the second point, "Fill out this form and take it to the court clerk," change court clerk to "filing clerk" or "the filing window at your local court" to eliminate confusion about where to take the form. The committee does not recommend making this change because they did not believe it necessary to avoid confusion.
- Form GV-100
  - Add name of administrator and employer when they are petitioners. The committee did not make this change because it goes beyond the scope of the law.
- Form GV-100-INFO
  - On page 1, second paragraph, change "You can ask for one if you are connected to the person you think is dangerous as," to "You can ask for one if you regularly have contact with the person you think is dangerous as:" The committee did not revise this language because it is not in line with the statutory requirements.

Alternatives considered

The committee considered creating two additional new forms but, after discussion, opted to revise existing forms. To implement AB 1493, the committee considered amending response form GV-120 and the related information sheet, and it reviewed drafts of revised forms. After consideration, the committee recommends creating a new form, *Relinquishment of Firearm Rights* (form GV-125). A standalone form to relinquish rights identifies its purpose, providing clarity to the clerk and judicial officer concerning necessary actions—removing the hearing from the calendar, entering the GVRO, sending notice to the petitioner, and entering the relinquishment form into CARPOS. The committee also considered creating a new order form, *GVRO on Relinquishment of Firearm Rights,* but decided to revise existing order form GV-130. Revising form GV-130 is easier for CARPOS and CLETS programming and enforcement, and

using a revised form GV-130 when respondents voluntarily relinquish their firearms rights, as well as when hearings are contested, appears workable.

For the forms that added the new categories of petitioners, especially form GV-100, the committee considered whether to ask who gave the approval for the coworker and the teacher or school administrator to file the GVRO petition,. but decided that requesting that information went beyond what was required by the statute and could be a deterrent to filing.

Fiscal and Operational Impacts

Three courts—Superior Courts of Los Angeles, Orange, and San Diego Counties—commented on the implementation process and operational impacts for this proposal. The courts indicated that they would have to update court procedures and case management codes. Training materials would need to be developed and training would be needed for clerical staff, supervisors, legal processing specialists, courtroom clerks, judicial assistants, and judicial officers.

Attachments and Links

1. Forms EPO-002, GV-009, GV-020, GV-020-INFO, GV-030, GV-100, GV-100-INFO, GV-109, GV-110, GV-120, GV-120-INFO, GV-125, GV-130, GV-600, GV-610, GV-620, GV-630, GV-700, and GV-710 at pages 12–xx.
2. Chart of comments at pages xx–xx.
3. Link A: Penal Code section 18105, *https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PEN&sectionNum=18105.*
4. Link B: Penal Code section 18115, *https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PEN&sectionNum=18115.*
5. Link C: Penal Code section 18175, *https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PEN&sectionNum=18175.*
6. Link D: Assembly Bill 12 (Stats. 2019, ch. 724), *https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB12.*
7. Link E: Assembly Bill 61 (Stats. 2019, ch. 725), *https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB61.*
8. Link F: Assembly Bill 1493 (Stats. 2019, ch. 733), *https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB61.*

Version 1 forms

EPO-002

GUN VIOLENCE EMERGENCY PROTECTIVE ORDER

LAW ENFORCEMENT CASE NUMBER:

1. **RESTRAINED PERSON** *(insert name):* _____

Address or Mailing Address: _____

Sex: ☐ M ☐ F Ht.: _____ Wt.: _____ Hair color: _____

Eye color: _____ Race: _____ Age: _____ Date of birth: _____

2. **TO THE RESTRAINED PERSON** *(also see important Warnings and Information on page 2):*

You are required to surrender all firearms, ammunition, and magazines that you own or possess in accordance with section 18120 of the Penal Code and you may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearm, ammunition, or magazine while this order is in effect. However a gun violence restraining order that lasts from 1 - 5 years may be obtained from the court. You may seek the advice of an attorney as to any matter connected with the order. The attorney should be consulted promptly so that the attorney may assist you in any matter connected with the order.

If you have any firearms, ammunition, and magazines, **you MUST IMMEDIATELY SURRENDER THEM** if asked by a police officer. If a police officer does not ask you to surrender any of the above, within 24 hours of getting this order, you must take them to a police station or a licensed gun dealer to sell or store them and must file a receipt with the court proving that this has been done. You have 48 hours to file a receipt with the court shown to the right. **If you do not file a receipt within 48 hours you have violated this order and can go to jail.**

Clerk stamps date here when form is filed.

DRAFT Not approved by the Judicial Council 3.2.2020

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

3. **This order will last until:** _____ **Time** _____

INSERT DATE OF 21st CALENDAR DAY (DO NOT COUNT DAY THE ORDER IS GRANTED)

4. **Court Hearing** ☐ A court hearing will be set within 21 days.

☐ A court hearing will take place at the court above on: Date: _____ Time/Dept: _____

You must go to the court hearing if you do not want this restraining order against you. At the hearing, the judge can make this order last from 1 - 5 years.

5. Reasonable grounds for the issuance of this order exist, and a Gun Violence Emergency Protective Order (1) is necessary because the Restrained Person poses an immediate danger of causing personal injury to himself or herself or to another by having custody or control, owning, purchasing, possessing, or receiving any firearms, ammunition, or magazines; **and** (2) less restrictive alternatives were ineffective or have been determined to be inadequate or inappropriate under the circumstances.

6. Judicial officer *(name):* granted this order on *(date):* at *(time):*

APPLICATION

7. Officer has a reasonable cause to believe that the grounds set forth in item 5, above, exist *(state supporting facts and dates; specify weapons—number, type and location):*

_____

_____

_____

_____

_____

8. ☐ Firearms were ☐ observed ☐ reported ☐ searched for at the scene ☐ seized.
☐ Ammunition (including magazines) was ☐ observed ☐ reported ☐ searched for at the scene ☐ seized.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

By: _____ ▶ _____

(PRINT NAME OF LAW ENFORCEMENT OFFICER) (SIGNATURE OF LAW ENFORCEMENT OFFICER)

Agency: _____ Telephone No: _____ Badge No: _____

Address: _____

PROOF OF SERVICE

9. I personally delivered copies of this Order to the restrained person name in item 1.
Date of service: _____ Time of service: _____ Address:

10. At the time of service, I was at least 18 years of age.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____ _____ ▶ _____

(TYPE OR PRINT NAME OF SERVER/LAW ENFORCEMENT OFFICER) (SIGNATURE OF SERVER)

WARNINGS AND INFORMATION

TO THE RESTRAINED PERSON: You are prohibited from owning, possessing, purchasing, receiving, or attempting to purchase or receive a firearm, ammunition, or a magazine. (Pen. Code, § 18125 et seq.) A violation of this order is a misdemeanor punishable by a $1,000 fine or imprisonment for six months or both. (Pen. Code, §§ 19, 18205.) Law enforcement is required to ask for your firearms. You must surrender them on request to law enforcement.

Within 24 hours of receipt of this order, you must turn in all firearms, ammunition, and magazines to a law enforcement agency or sell them to or store them with a licensed firearms dealer until the expiration of this order. (Pen. Code, § 18125 et seq.) A receipt proving surrender, sale, or storage must be filed with the court within 48 hours of receipt of this order, or on the next court business day if the 48-hour period ends on a day when the court is closed. You must also file the receipt with the law enforcement agency that served you with this Order. You may use *Proof of Firearms, Ammunition, and Magazines Turned In, Sold, or Stored* (form GV-800).

This Gun Violence Emergency Protective Order is effective when made. It will last until the date and time in item 3 on the front. The court will hold a hearing within 21 days to determine if a longer-term order should be issued. If the date and time are not stated in item 4 on the front, you will get a notice with the date and time of the hearing in the mail at the residential address listed on page 1 of this form. If you would like to respond to this order in writing you must use *Response to Gun Violence Emergency Protective Order* (form GV-020). A family member, employer, coworker, teacher, or school administrator may also seek a gun violence restraining order that lasts from 1 to 5 years from the court.

If you violate this order, you will also be prohibited from having in your custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm, ammunition, or magazine for an additional five-year period, to begin on the expiration of the more permanent gun violence restraining order. (Pen. Code, § 18205.)

This protective order must be enforced by all law enforcement officers in the state of California who are aware of it or shown a copy of it. The terms and conditions of this order remain enforceable regardless of the acts or any agreement of the parties; it may be changed only by order of the court.

A LA PERSONA RESTRINGIDA: Tiene prohibido ser dueño de un arma de fuego, municiones o cargadores, o poseer, comprar, recibir, o tratar de comprar o recibir un arma de fuego, municiones o cargadores. (Código Penal, §§ 18125 y siguientes). Una violación de esta orden está sujeta a una multa de $1000 o encarcelamiento de seis meses o ambos. (Código Penal, §§ 19 y 18205.)

Dentro de las 24 horas de recibir esta orden, tiene que entregar sus armas de fuego, municiones y cargadores a una agencia del orden público o venderlos a un comerciante de armas autorizado, o almacenarlos con el mismo hasta el vencimiento de esta orden. (Código Penal, §§ 18125 y siguientes). Se tiene que presentar a la corte una prueba de haberlos entregado, vendido, o almacenado dentro de las 48 horas de recibir esta orden. Se puede usar el formulario GV-800, *Prueba de entrega, venta o almacenamiento de armas de fuego, municiones y cargadores*, por este propósito.

Esta orden de protección de emergencia de armas de fuego entra en vigencia en el momento en que se emite. Durará hasta la fecha y hora indicadas en el punto 3 de la primera página. Se realizará una audiencia dentro de 21 días para determinar si es necesario emitir una orden que dure por más tiempo. Si la fecha y la hora no se indican en el punto 4 de la primera página, recibirá un aviso con la fecha y la hora de la audiencia por correo a la dirección residencial indicada en la primera página. Si desea responder a esta orden por escrito, tiene que usar el formulario GV-020, *Respuesta a la orden de protección de emergencia de armas de fuego*. Un miembro de su familia, su empleador, un colega del trabajo, un maestro o profesor, o administrador educativo también puede solicitar al tribunal una orden de restricción más permanente.

Si contraviene esta orden de restricción, se le prohibirá tener en su posesión o control, comprar, poseer o recibir, o tratar de comprar o recibir un arma de fuego, municiones o cargadores por otro periodo de cinco años más, comenzando a partir del vencimiento de la orden de restricción de armas de fuego más permanente. (Código Penal, § 18205.)

Todo agente del orden público del estado de California que tenga conocimiento de la orden o a quien se le muestre una copia de la misma deberá hacer cumplir esta orden de protección. Los términos y condiciones de esta orden se podrán hacer cumplir independientemente de las acciones de las partes; solo la corte podrá cambiar esta orden.

To law enforcement: The Gun Violence Emergency Protective Order must be served on the restrained person by the officer if the restrained person can reasonably be located. Ask the restrained person if he or she has any firearms, ammunition, or magazines in his or her possession or under his or her custody or control. A copy must be filed with the court as soon as practicable after issuance so a hearing can be set, if one was not already scheduled. If the court did not give you a hearing date when issuing the order (to put in item 4 on the front), the court will set a hearing within 21 days and will provide you with notice of the hearing. Also, the officer must have the order entered into the computer database system for protective and restraining orders maintained by the Department of Justice.

The provisions in this temporary Gun Violence Emergency Protective Order do not affect those of any other protective or restraining order in effect, including a criminal protective order. The provisions in another existing protective order remain in effect.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form Save this form Clear this form

GV-009 Notice of Court Hearing

Clerk stamps date here when form is filed.

DRAFT 03/12/2020

1 Requesting Agency or Officer

(A petition may be filed in the name of the law enforcement agency in which the officer is employed)

Law enforcement agency or officer who applied for the *Gun Violence Emergency Protective Order:* _____

Fill in court name and street address:

Superior Court of California, County of

2 Restrained Person

Full Name: _____

Address: _____

_____

_____

Court fills in case number.

Case Number:

3 Hearing

A *Gun Violence Emergency Protective Order* (form EPO-002) having been served on the Restrained Person, the court will hold a hearing at the time and place below to determine if a longer-term gun violence restraining order should be issued.

Hearing Date → Date: _____ Time: _____

Dept.: _____ Room: _____

Name and address of court if different from above:

_____

_____

_____

_____

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this cause, and that a true copy of the *Notice of Court Hearing (Gun Violence Prevention)* (form GV-009) was mailed first class, postage fully prepaid, in a sealed envelope, addressed as shown below, and that the notice was mailed at *(place)*: , California, on *(date)*:

Date: Clerk, by _____, Deputy

Name and address of law enforcement officer and agency

Name and address of Restrained Person

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

GV-020 Response to Gun Violence Emergency Protective Order

Clerk stamps date here when form is filed.

Draft 3.2.2020

Use this form if you do not want the court to extend the *Gun Violence Emergency Protective Order* for a period of time between 1 - 5 years.

1. Read *How Can I Respond to a Gun Violence Emergency Protective Order?* (form GV-020-INFO) to protect your rights.
2. Fill out this form and take it to the filing window at the court.
3. Have someone age 18 or older—**not you**—mail a copy of this form and any attached pages to the law enforcement agency that applied for the *Gun Violence Emergency Protective Order* (form EPO-002). *(Use,* Proof of Service by Mail *form GV-025).*

Fill in court name and street address:

Superior Court of California, County of

1 Requesting Agency or Officer

(A petition may be filed in the name of the law enforcement agency in which the officer is employed.)

_____

See Notice of Hearing for case number and fill in:

Case Number:

2 Restrained Person

a. Your Name: _____

Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

b. Your Address *(If you have a lawyer, give your lawyer's information. You do not have to give telephone, fax, or email address.)*

Address: _____

City: _____ State: ____ Zip: _____

Telephone: _____ Fax: _____

Email Address: _____

Be prepared to tell the court at the hearing why you don't agree. Write your hearing date, time, and place from the Notice of Hearing or *Gun Violence Emergency Protective Order* (form EPO-002) here:

Hearing Date → Date: _____ Time: _____

Dept.: _____ Room: _____

You must obey the *Gun Violence Emergency Protective Order* until the expiration date. At the hearing, the court may make an order against you for a period of time between 1–5 years.

3 Gun Violence Restraining Order

☐ I do not agree that a gun violence restraining order should be extended for 1–5 years *(explain)*:

_____

_____

_____

_____

_____

_____

_____

☐ *Check here if there is not enough space above for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 3—Reasons I Disagree" as a title. You may use form MC-025,* Attachment.

Case Number:

4 ☐ Denial, Justification, or Excuse

☐ I did not do anything described in item 7 of form EPO-002.

☐ If I did some of the things stated in the Gun Violence Emergency Protective Order, my actions were justified or excused for the following reasons *(explain):*

_____

_____

_____

_____

_____

_____

_____

_____

_____

☐ *Check here if there is not enough space above for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 4–Denial, Justification, or Excuse" as a title. Use form MC-025,* Attachment.

5 Surrender of Guns, Ammunition, and Magazines

A *Gun Violence Emergency Protective Order* (form EPO-002) was issued against you. You cannot own or possess any guns, other firearms, ammunition, or magazines. You must surrender any of these items in your possession to law enforcement when they ask you to do so. If not asked, you must sell to or store with a licensed gun dealer, or turn in to a law enforcement agency, any other guns, other firearms, ammunition, or magazines in your immediate possession or control within 24 hours of being served with form EPO-002. You must file a receipt with the court and the law enforcement agency. You may use *Proof of Firearms, Ammunition, and Magazines Turned In, Sold, or Stored* (form GV-800) for the receipt.

a. ☐ I do not own or control any guns, other firearms, ammunition, or magazines.

b. ☐ I have turned in my guns, other firearms, ammunition, and magazines to a law enforcement officer or agency, or sold them to or stored them with a licensed gun dealer. A copy of the receipt

☐ is attached ☐ has already been filed with the court and the law enforcement agency.

6 Number of pages attached to this form, if any: _____

Date: _____

_____ ▶ _____

Lawyer's name (if any) *Lawyer's signature*

I declare under penalty of perjury under the laws of the State of California that the information above and on all attachments is true and correct.

Date: _____

_____ ▶ _____

Type or print your name *Sign your name*

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

GV-020-INFO How Can I Respond to a Gun Violence Emergency Protective Order?

What is a *Gun Violence Emergency Protective Order* (form EPO-002)?

It is a court order requested by law enforcement that prohibits someone from having any guns, ammunition, or magazines (any ammunition feeding device). A person who is served with the order must surrender all guns, ammunition, and magazines that person currently owns.

Who can ask for a Gun Violence Emergency Protective Order?

The Gun Violence Emergency Protective Order must have been requested by a law enforcement officer and was issued by a judicial officer based on the statements made under penalty of perjury in the protective order.

I've been served with a *Gun Violence Emergency Protective Order* (form EPO-002) and a *Notice of Court Hearing*. What do I do now?

Read the papers served on you very carefully. The *Notice of Court Hearing* or form EPO-002 tells you when to appear in court and where the court is located. Follow the *Gun Violence Emergency Protective Order* (form EPO-002) prohibiting you from having any guns, ammunition, or magazines and requiring you to surrender, sell, or store any guns, ammunition, or magazines that you currently own or possess. You must obey the order until the expiration date on the form.

What if I don't obey the emergency protective order?

The police can arrest you. You can go to jail and pay a fine. You may also be prohibited for a longer period of time from having access to firearms and ammunition.

What if I don't want the order to be extended?

If you disagree with the order that has been issued and do not want the court to extend it for a longer time, fill out *Response to Gun Violence Emergency Protective Order* (form GV-020), before your hearing date. File the form with the court and serve it on the requesting law enforcement agency. You can get the form from legal publishers or on the Internet at *www.courts.ca.gov.* You also may be able to find it at your local courthouse or county law library.

Will I have to pay a filing fee?

No.

Do I have to serve the other person with a copy of my response?

Yes. Have someone age 18 or older—**not you**—mail a copy of the completed *Response to Gun Violence Emergency Protective Order* (form GV-020) to the law enforcement agency that issued the *Gun Violence Emergency Protective Order* (form EPO-002). (This is called "service by mail.")

The person who serves the form by mail must fill out *Proof of Service by Mail* (form GV-025). Have the person who did the mailing sign the original form GV-025. Take the completed form back to the court clerk or bring it with you to the hearing.

Should I go to the court hearing?

Yes. You should go to court on the date listed on the *Notice of Court Hearing* or the *Gun Violence Emergency Protective Order (form* EPO-002). If you do not go to the hearing, the judge can extend the order against you for a period of time between 1 -5 years without hearing from you.

How Can I Respond to a Gun Violence Emergency Protective Order?

Can I bring a witness to the court hearing?

Yes. You can bring witnesses or documents that support your case to the hearing. But if possible, you should also bring the witnesses' written statements of what they saw or heard. Their statements must be made under penalty of perjury. (You can use *Declaration* (form MC-030), for this purpose.)

Do I need a lawyer?

Having a lawyer is always a good idea, but it is not required, and you are not entitled to a free, court-appointed attorney. Ask the court clerk about free and low-cost legal services and self-help centers in your county.

How long does the order last?

The *Gun Violence Emergency Protective Order* (form EPO-002) will last until the expiration date listed on the front of the form in item 3. The court will decide at the hearing whether to issue a gun violence restraining order that can last for a period of time between 1 -5 years.

Will I see the person who asked for the court order at the court hearing?

It's possible the law enforcement officer may appear at the court hearing.

What if I need help to understand English?

When you file your papers, ask your court's clerk or self-help center if your court will provide an interpreter. To request an interpreter, you may use form INT-300. You should also check your local court's website via Find My Court for additional information on how to request an interpreter for a civil matter. If an interpreter is not available for your court date, you should ask someone who is over age 18 to interpret for you.

What if I am deaf or hard of hearing?

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five court days before the hearing. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons with Disabilities and Response* (form MC-410). (Civ. Code, § 54.8.)

For help in your area, contact:

[Local information may be inserted.]

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

GV-030 Gun Violence Restraining Order After Hearing on EPO-002

The court will complete this form.

Clerk stamps date here when form is filed.

Draft 2020

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 Requesting Agency or Officer

(A petition may be filed in the name of the law enforcement agency in which the officer is employed.)

Law enforcement agency or officer that applied for the Gun Violence Emergency Protective Order: _____

2 Restrained Person

Full Name: _____

Lawyer *(if there is one for this case)*:
Name: _____ State Bar No.: _____
Firm Name: _____
Address: _____
City: _____ State: ____ Zip: _____
Telephone: _____ Fax: _____
Email Address: _____

Description of Restrained Person

Sex: ☐ M ☐ F Height: _____ Weight: _____ Date of Birth: _____
Hair Color: _____ Eye Color: _____ Age: _____ Race: _____
Home Address: _____
City: _____ State: _____ Zip: _____

3 Expiration Date

This order expires at:

(Time): _____ ☐ a.m. ☐ p.m. ☐ midnight on *(date):* _____

If no expiration date is written here, this order expires one year from the date of issuance.

4 Hearing

a. There was a hearing on *(date):* _____ at *(time):* _____ in Dept.: _____ Room: _____.
(Name of judicial officer): _____ made the orders at the hearing.

b. These people were at the hearing:

(1) ☐ The officer or representative of the Requesting Agency _____

(2) ☐ The Restrained Person ☐ Lawyer for the Restrained Person *(name):* _____

This is a Court Order.

Case Number:

5 Findings

a. ☐ The court finds by clear and convincing evidence that the following are true:

(1) The Restrained Person poses a significant danger of causing personal injury to themself or another person by having in their custody or control, owning, purchasing, possessing, or receiving firearms, ammunition, or magazines.

(2) A gun violence restraining order is necessary to prevent personal injury to the Restrained Person or to another person because less restrictive alternatives either have been tried and found to be ineffective, or have been determined to be inadequate or inappropriate for the current circumstances.

(3) ☐ The court has received credible information that the Restrained Person owns or possesses one or more firearms, ammunition, or one or more magazines.

(4) ☐ The facts as stated in the *Gun Violence Emergency Protective Order* (form EPO-002) and supporting documents submitted at the time of the hearing, which are incorporated here by reference, and for the reasons set forth below, establish sufficient grounds for the issuance of this Order.

☐ See the attached *Attachment* (form MC-025)

b. ☐ A gun violence restraining order is not being issued for the reasons below:

This is a Court Order.

6 Order Prohibiting All Firearms, Ammunition, and Magazines

a. You cannot have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearm or ammunition, including magazines (ammunition feeding devices).

You must:

(1) Surrender all firearms and ammunition, including magazines, in your custody or control or that you possess or own. If a law enforcement officer orders you to surrender all of your firearms and ammunition, including magazines, to the officer, you must do so immediately. If no order to surrender is made by a law enforcement officer, you must surrender all of your firearms and ammunition, including magazines, within 24 hours of being served with this Order. You may do so by:

a. surrendering all of your firearms and ammunition, including magazines, in a safe manner to the local law enforcement agency; or
b. selling all of your firearms and ammunition, including magazines, to a licensed gun dealer; or
c. storing all of your firearms and ammunition, including magazines, with a licensed gun dealer for as long as this Order or any more permanent order granted at the hearing in item 4 is in effect.

(2) Within 48 hours of receiving this Order, file a receipt with the court that proves that your firearms and ammunition have been turned in, sold, or stored. *(You may use* Proof of Firearms, Ammunition, and Magazines Turned In, Sold, or Stored (form GV-800) *for the receipt.)* You must also file a copy of the receipt with the law enforcement agency that served you with this order. **FAILURE TO FILE THIS RECEIPT IS A VIOLATION OF THIS ORDER.**

b. ☐ **Order dissolving (terminating) *Gun Violence Emergency Protective Order*.**

The court dissolves (terminates) the *Gun Violence Emergency Protective Order* (form EPO-002) originally issued on *(date):* _____ as of *(date of hearing):* _____ .

7 Service of Order on the Restrained Person

a. ☐ The Restrained Person personally attended the hearing. No other proof of service is needed. The clerk has provided the Restrained Person with a blank copy of, *Request to Terminate Gun Violence Restraining Order* (form GV-600), if a restraining order was granted.

b. ☐ The Restrained Person did not attend the hearing. The Restrained Person must be personally served with a court file-stamped copy of this order and a blank copy of *Request to Terminate Gun Violence Restraining Order* (form GV-600), if a restraining order was granted.

8 Number of pages attached to this Order, if any: _____

Date: _____ _____

Judicial Officer

Warnings and Notices to the Restrained Party

This order is valid until the expiration date and time noted on page 1. If you have not done so already, you must surrender all firearms, ammunition, and magazines that you own or possess in accordance with Section 18120 of the Penal Code. You may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearms, ammunition, or magazines while this Order is in effect. Under section 18185, you have the right to request one hearing per year to terminate this Order during its effective period. You may seek the advice of an attorney as to any matter connected with the order.

This is a Court Order.

Violation of this Order is a misdemeanor punishable by a $1,000 fine or imprisonment for six months or both. (Pen. Code, §§ 19, 18205.) If you violate this Order, you will be prohibited from having in your custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, any firearm, ammunition, or magazine for a period of up to five years. This Order must be enforced by any law enforcement officer in the State of California who is aware of or shown a copy of this Order. The Order remains enforceable regardless of the acts of the parties; it may be terminated only by an order of the court.

Instructions for Law Enforcement

Duties of Officer Serving This Order

The officer who serves this order on the Restrained Person must do the following:

- Ask if the Restrained Person is in possession of any firearms, ammunition, or magazines or has custody or control of any that they have not already turned in.
- Order the Restrained Person to immediately surrender to you all firearms, ammunition, and magazines.
- Issue a receipt to the Restrained Person for all firearms, ammunition, and magazines that have been surrendered.
- Complete a proof of personal service and file it with the court. You may use Form GV-200 for this purpose.
- Within one business day of service, submit the proof of service directly into the California Restraining and Protective Order System (CARPOS), including the serving officer's name and law enforcement agency.

Duties of Agency on Surrender of Firearms, Ammunition, and Magazines

The law enforcement agency that has received surrendered firearms, ammunition, or magazines must do the following:

- Retain the firearms, ammunition, or magazines until the expiration of this Order or of any other gun violence restraining order issued by the court.
- On the expiration of this order or of any later gun violence restraining order issued by the court, return the firearms and ammunition to the Restrained Person as provided by chapter 2 of division 11 of title 4 of the Penal Code (commencing with section 33850). Firearms, ammunition, or magazines that are not claimed are subject to the requirements of section 34000.
- If someone other than the Restrained Person claims title to any of the firearms, ammunition, or magazines surrendered, determine whether that person is the lawful owner. If so, return the firearms, ammunition, and magazines to that person as provided by chapter 2 of division 11 of title 4 of the Penal Code (commencing with section 33850).

Enforcing This Order

The law enforcement officer should determine if the Restrained Person had notice of the order. Consider the Restrained Person "served" (given notice) if:

- The officer sees a copy of the proof of service or confirms that the proof of service is on file;
- The Restrained Person was informed of the order by an officer; or
- Item 7a is checked, the Restrained Person attended the hearing.

This is a Court Order.

Instructions for Law Enforcement

(continued)

An officer can obtain information about the contents of the order and proof of service in CARPOS. If proof of service on the respondent cannot be verified, the agency must advise the restrained person of the terms of the order and then enforce it *(see above: Duties of Officer Serving This Order)*.

The provisions in this *Gun Violence Restraining Order After Hearing on EPO-002* do not affect those of any other protective or restraining order in effect, including a criminal protective order. The provisions in another existing protective order remain in effect.

(Clerk will fill out this part.)

—Clerk's Certificate—

Clerk's Certificate [seal]

I certify that this *Gun Violence Restraining Order After Hearing on EPO-002 (CLETS-HGV)* (form GV-030) is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____ , Deputy

This is a Court Order.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

GV-100 Petition for Gun Violence Restraining Order

Clerk stamps date here when form is filed.

DRAFT - Not approved by Judicial Council 2020

Read *Can a Gun Violence Restraining Order Help Me?* (form GV-100-INFO) before completing this form.

1 Petitioner

a. Your Full Name or Name of Law Enforcement Agency: _____

I am:

☐ A family member of the Respondent

☐ An officer of a law enforcement agency *(A petition may be filed in the name of the law enforcement agency in which the officer is employed. If you wrote your full name above, write the name of the law enforcement agency that employs you):* _____

☐ An employer of the Respondent (*your position and name of company*): _____

☐ A coworker of the Respondent. I have had substantial and regular interactions with the Respondent for at least one year and I have obtained the approval of my employer to file this petition *(name of company):* _____

☐ An employee or teacher of a secondary or postsecondary school that the Respondent has attended in the last 6 months. I have obtained the approval of a school administrator to file this petition *(name of the school):* _____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

b. Your Lawyer *(if you have one for this case):* Name: _____

Firm Name: _____ State Bar No.: _____

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or email. Law enforcement officer, give agency information.)*

Address: _____

City: _____ State: ____ Zip: _____

Telephone: _____ Fax: _____

Email Address: _____

2 Respondent

Full Name: _____ Age: _____

Address *(if known):* _____

City: _____ State: ____ Zip: _____

This is not a Court Order.

Case Number:

3 Venue

Why are you filing in this county? *(Check all that apply):*

a. ☐ The Respondent lives in this county.

b. ☐ Other *(specify):* _____

4 Other Court Cases

a. Are you aware of any other court cases, civil or criminal, involving the Respondent?

☐ Yes ☐ No *If yes, check each kind of case and give as much information as you know as to where and when each was filed:*

Kind of Case	Filed in *(County/State)*	Year Filed	Case Number *(if known)*
(1) ☐ Civil Harassment			
(2) ☐ Domestic Violence			
(3) ☐ Divorce, Nullity, Legal Separation			
(4) ☐ Paternity, Parentage, Child Custody			
(5) ☐ Elder or Dependent Adult Abuse			
(6) ☐ Eviction			
(7) ☐ Workplace Violence			
(8) ☐ Criminal			
(9) ☐ Other *(specify):* _____			

b. Are there now any protective or restraining orders in effect relating to Respondent?

☐ Yes ☐ No ☐ I don't know *If yes, attach a copy if you have one.*

5 Description of Respondent's Firearms, Ammunition, or Magazines

If you have reason to believe that the respondent is in possession of firearms, ammunition, or magazines, answer (a) or check (b).

a. ☐ I am informed, and on that basis believe, that Respondent currently possesses or controls the following firearms, ammunition or magazines (*describe the number, types, and locations of any firearms, ammunition, or magazines that you believe that the Respondent currently possesses or controls):*

_____

_____

_____

_____

_____

_____

_____

_____

_____

b. ☐ I am informed, and on that basis believe, that Respondent currently possesses or controls firearms, ammunition, or magazines, but I have no further specific information as to the number, types, and locations of those firearms, ammunition, or magazines.

This is not a Court Order.

Case Number:

6 Grounds for Issuance of a Gun Violence Restraining Order

I have reasonable cause to believe both of the following are true:

a. The Respondent poses a significant danger in the near future of causing personal injury to themself or another person by having in their custody or control, owning, purchasing, possessing, or receiving a firearm, ammunition, or a magazine.

b. A gun violence restraining order is necessary to prevent personal injury to Respondent or to another person because less restrictive alternatives either have been tried and found to be ineffective, or have been determined to be inadequate or inappropriate for the current circumstances.

c. The facts supporting the above statements are set forth:

☐ Below

☐ On *Attached Declaration* (form MC-031).

7 Request for Gun Violence Restraining Order

I request that the court issue an order prohibiting Respondent from having in their custody or control, owning, purchasing, possessing or receiving, or attempting to purchase or receive, any firearms, ammunition, or magazines. I further request that Respondent be ordered to immediately surrender all firearms, ammunition, and magazines currently in their possession to a law enforcement officer or to sell the firearms, ammunition, and magazines to or store them with a licensed gun dealer.

a. I request the order above for _____ years. (*Please include a number of years between one and five years.)*

b. I am asking for this amount of time because:

This is not a Court Order.

Case Number:

8 No Fee to Serve (Notify) Restrained Person

If you want the sheriff or marshal to serve (notify) the restrained person about the orders, they will do it for free.

9 Request for Hearing

I request that the court set a hearing in this matter for the purpose of issuing a gun violence restraining order that will last between one and five years.

10 ☐ Temporary Gun Violence Restraining Order

I request that a Temporary Gun Violence Restraining Order (TGV) be issued against the Respondent to last until the hearing. I am presenting *Temporary Restraining Order* (form GV-110) for the court's signature together with this Petition.

Has the Respondent been told that you were going to court to seek a TGV?

☐ Yes ☐ No *(If you answered no, explain why below):*

☐ Reasons stated in Attachment 10.

_____

_____

_____

11 ☐ Request to Give Less Than Five Days' Notice of Hearing

You must have your papers personally served on Respondent at least five calendar days before the hearing, unless the court orders a shorter time for service. (Form GV-200-INFO explains What Is "Proof of Personal Service"? Proof of Personal Service (*form GV-200) may be used to show the court that the papers have been served.)*

If you want there to be fewer than five days between service and the hearing, explain why below:

☐ Reasons stated in Attachment 11.

_____

_____

_____

_____

12 Number of pages attached to this form, if any: _____

Date: _____

_____ ▶ _____

Lawyer's name (if any) *Lawyer's signature*

I declare under penalty of perjury under the laws of the State of California that the information above and on all attachments is true and correct.

Date: _____

_____ ▶ _____

Type or print your name *Sign your name*

This is not a Court Order.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

GV-100-INFO Can a Gun Violence Restraining Order Help Me?

These instructions cannot cover all of the questions that may arise in a particular case. If you do not know what to do to protect your rights, you should see a lawyer or a self-help center.

What is a gun violence restraining order?

It is a court order that temporarily prohibits someone from having any guns, ammunition, or magazines (ammunition feeding devices). The person must surrender all guns, ammunition, and magazines that he or she currently owns. The police will come and remove the guns or the person can store them with a licensed gun dealer while the restraining order is in effect. The restrained person also cannot buy any guns, ammunition, or magazines during this time.

Can I get a gun violence restraining order against someone?

You can ask for one if you are connected to the person you think is dangerous as:

1. An immediate family member;
2. An employer;
3. A coworker who has substantial and regular interactions with the person, and has worked with them for at least a year. You must have permission from your employer to ask for this restraining order;
4. An employee or teacher at a school that the person has attended in the last six months, and you have permission from a school administrator or a school administration staff who has a supervisorial role; and/or
5. A law enforcement officer or law enforcement agency.

Immediate family members include:
(1) Your spouse or domestic partner;
(2) Your parents, children, siblings, grandparents, and grandchildren and their spouses, including any stepparent or stepgrandparent;
(3) Your spouse's parents, children (your stepchildren), siblings, grandparents, and grandchildren; and
(4) Any other person who regularly resides in the household, or who, within the last six months, regularly resided in the household.
If you do not have the necessary relationship, advise a law enforcement officer of the situation. The officer may investigate and file the petition if he or she finds that the grounds exist.

Will I have to pay a filing fee to request the order?

No.

Will the order protect me in other ways, such as keeping the person from coming near me?

No, the only order the court can make is to force the person to not have firearms, ammunition, or magazines. If you need personal protection from a family member, you should proceed under the Domestic Violence Prevention Act. See *Can a Domestic Violence Restraining Order Help Me?* (form DV-500-INFO) for information on how to proceed. For information on other civil restraining orders, please see *www.courts.ca.gov/selfhelp-abuse.htm.*

What forms do I need to get the order?

You must fill out the following forms:

- *Petition for Gun Violence Restraining Order* (form GV-100);
- *Confidential CLETS Information* (form CLETS-001);
- *Notice of Court Hearing* (form GV-109), items 1 and 2 only; and
- *Temporary Gun Violence Restraining Order* (form GV-110), items 1 and 2 only.

You may need other local forms. Ask your self-help center or visit your court's website.

Where can I get these forms?

You can get the forms from legal publishers or on the Internet at *www.courts.ca.gov.* You also may be able to find them at your local courthouse or county law library.

What do I need to do to get the order?

You must go to the superior court in the county where the person to be restrained lives. At the court, ask where you should file your request for a gun violence restraining order. (A self-help center or legal aid association may be able to assist you in filing your request.) Give your forms to the clerk of the court. The clerk will give you a hearing date on the *Notice of Court Hearing* form.

How soon can I get the order?

You can ask for a *Temporary Gun Violence Restraining Order*, which will be effective right away if granted. The court may decide whether or not to grant the temporary order based only on the facts that you have stated in your petition. If so, the court will decide within 24 hours whether or not to make the temporary order. Sometimes the court will want to examine you personally under oath. The clerk will tell you whether you should wait to talk to the judge or come back later to find out if the court has signed a temporary order.

If you don't ask for a temporary restraining order, you will have to wait until the hearing, at which the court will decide whether to make an order that will last for a period of time between 1-5 years.

How will the person to be restrained know about the order?

If the court issues a temporary restraining order, someone age 18 or older—**not you**—must personally "serve" (give) the person to be restrained a copy of the order. The server must then fill out *Proof of Personal Service* (form GV-200) and give it to you to file with the court. If the person to be restrained attends the hearing, no further proof of service is required. But if they do not attend the hearing, then any order issued at the hearing must also be personally served. For help with service, ask the court clerk for *What Is "Proof of Personal Service?"* (form GV-200-INFO). Note: A sheriff or marshal can serve the order for free.

Do I need a lawyer?

Having a lawyer is always a good idea, but it is not required and you are not entitled to a free, court-appointed attorney. Ask the court clerk about free and low-cost legal services and self-help centers in your county.

What do I have to prove to get the order?

You will have to convince the judge that the person to be restrained poses a significant danger in the near future of causing personal injury to himself, herself, or another person by having in his or her custody or control, owning, purchasing, possessing, or receiving any firearms, ammunition, or magazines.

You will also have to convince the judge that a gun violence restraining order is needed to prevent personal injury to the person to be restrained or to another person because less restrictive alternatives either have been tried and haven't worked, or are inadequate or inappropriate for the current circumstances.

How can I convince the judge?

You will need to give the judge specific information. You should tell the judge everything that you know about the firearms, ammunition, or magazines that the person to be restrained currently owns, including how many the person owns, the types, and where they are kept.

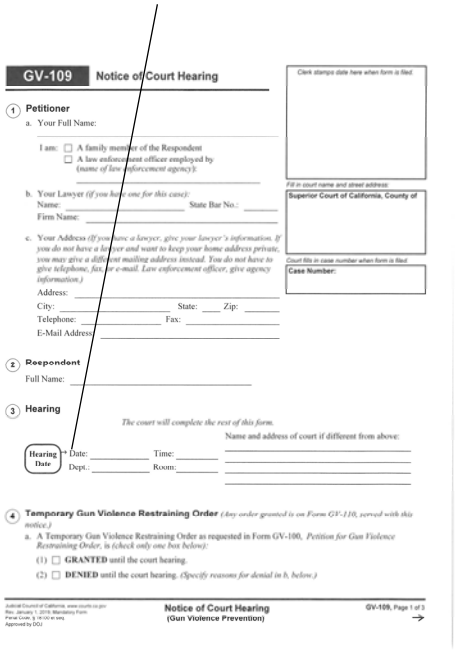
Then you will need to present facts to show that the person to be restrained is dangerous. This could be information about any threat of violence that the person to be restrained has made, any violent incident in which the person has been involved, or any crime of violence the person has committed. It could also be evidence that the person to be restrained has violated a protective order or abuses controlled substances or alcohol. It could also be evidence of the unlawful and reckless use, display, or brandishing of a firearm or the recent acquisition of a firearm. Or it could be evidence that the person to be restrained has been identified by a mental health provider as someone prohibited from purchasing, possessing or controlling any firearms.

You should include all of this information in your Petition and also be prepared to present it to the judge at the hearing.

GV-100-INFO Can a Gun Violence Restraining Order Help Me?

Do I have to go to court?

Yes. Go to court on the date the clerk gives you.



GV-109 Notice of Court Hearing

1 Petitioner
a. Your Full Name:
I am: ☐ A family member of the Respondent
☐ A law enforcement officer employed by (name of law enforcement agency):
b. Your Lawyer (if you have one for this case):
Name: State Bar No.:
Firm Name:
c. Your Address (If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer, give agency information.)
Address:
City: State: Zip:
Telephone: Fax:
E-Mail Address:

Clerk stamps date here when form is filed.

Fill in court name and street address:
Superior Court of California, County of

Court fills in case number when form is filed.
Case Number:

2 Respondent
Full Name:

3 Hearing
The court will complete the rest of this form.
Hearing Date
Date: Time:
Dept.: Room:
Name and address of court if different from above:

4 Temporary Gun Violence Restraining Order (Any order granted is on Form GV-110, served with this notice.)
a. A Temporary Gun Violence Restraining Order as requested in Form GV-100, Petition for Gun Violence Restraining Order, is (check only one box below):
(1) ☐ GRANTED until the court hearing.
(2) ☐ DENIED until the court hearing. (Specify reasons for denial in b, below.)

Notice of Court Hearing (Gun Violence Prevention) GV-109, Page 1 of 3

Will I see the restrained person at the court hearing?

If the person comes to the hearing, yes. If you are afraid, tell the court officer.

Can I bring someone with me to court?

Yes. You can bring someone to sit with you during the hearing, but that person cannot speak for you in court. Only you or your lawyer (if you have one) can speak for you.

Do I need to bring a witness to the hearing?

Witnesses are not required, but it helps to have more proof than just your word. For example, consider bringing:

- Witnesses
- Written statements from witnesses made under oath
- Photos
- Medical or police reports
- Damaged property
- Threatening letters, emails, or telephone messages

The court may or may not let witnesses speak at the hearing. So, if possible, you should bring their written statements under oath to the hearing. (You can use *Declaration* (form MC-030) for this purpose.)

How long does the order last?

If the court makes a temporary order, it will last until your hearing date, which must be within 21 days of the date of the temporary order. If at the hearing the court issues a more permanent order, it will last for one to five years. It may be renewed for an additional one to five years.

What if the restrained person does not obey the order?

Call the police. The restrained person can be arrested and charged with a crime.

Can I agree with the restrained person to terminate the order?

No. Once the order is issued, only the judge can change or terminate it. The restrained person would have to file a request with the court to terminate the order.

What if I need help to understand English?

When you file your papers, ask your court's clerk or self-help center if your court will provide an interpreter for you at no cost. If not, you will have to pay a fee for the interpreter. If an interpreter is not available for your court date, you should ask someone who is over age 18 to interpret for you.

What if I am deaf or hard of hearing?

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the hearing. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons with Disabilities and Response* (Form MC-410). (Civ. Code, § 54.8.)

For help in your area, contact:

[Local information may be inserted.]

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

GV-109 Notice of Court Hearing

Clerk stamps date here when form is filed.

Petitioner must complete items (1) and (2) only.

(1) Petitioner

a. Your Full Name or Name of Law Enforcement Agency:

_____

I am:
- ☐ A family member of the Respondent.
- ☐ An officer of a law enforcement agency.
- ☐ An employer of the Respondent.
- ☐ A coworker of the Respondent.
- ☐ An employee or teacher of a secondary or postsecondary school that the Respondent has attended in the last 6 months.

b. Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or email. Law enforcement officer, give agency information.)*

Address: _____

City: _____ State: ____ Zip: _____

Telephone: _____ Fax: _____

Email Address: _____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(2) Respondent

Full Name: _____

The court will complete the rest of this form.

(3) Hearing

Hearing Date →

Date: _____ Time: _____

Dept.: _____ Room: _____

Name and address of court if different from above:

_____

_____

_____

_____

(4) Temporary Gun Violence Restraining Order *(Any order granted is on form GV-110, served with this notice.)*

a. A Temporary Gun Violence Restraining Order as requested in *Petition for Gun Violence Restraining Order* (form GV-100) is *(check only one box below):*

(1) ☐ **GRANTED** until the court hearing.

(2) ☐ **DENIED** until the court hearing. *(Specify reasons for denial in b, below.)*

4 b. Reasons for denial of a Temporary Gun Violence Restraining Order as requested in *Petition for Gun Violence Restraining Order* (form GV-100) are:

(1) ☐ The facts as stated in form GV-100 do not show that there is a substantial likelihood that both of the following are true:

Respondent poses a significant danger of causing personal injury to themself or another person by having custody or control of, owning, purchasing, possessing, or receiving firearms, ammunition, or magazines.

A gun violence restraining order is necessary to prevent personal injury to Respondent or to another person because less restrictive alternatives either have been tried and found to be ineffective, or have been determined to be inadequate or inappropriate for the current circumstances.

(2) ☐ Other *(as stated):* ☐ Below ☐ On Attachment 4b(2)

_____

_____

_____

_____

_____

5 Service of Documents on Respondent

At least ☐ five ☐ _____ calendar days before the hearing, a law enforcement officer or someone age 18 or older—**and not a party to the action**—must personally give (serve) a court file-stamped copy of this Form GV-109 to the Respondent, along with a copy of all the forms indicated below:

a. GV-100, *Petition for Gun Violence Restraining Order* (file-stamped)

b. ☐ GV-110, *Temporary Gun Violence Restraining Order* (file-stamped) **IF GRANTED**

c. GV-120, *Response to Petition for Gun Violence Restraining Order* (blank form)

d. GV-120-INFO, *How Can I Respond to a Petition for a Gun Violence Restraining Order?*

e. GV-250, *Proof of Service by Mail* (blank form)

f. GV-125, *Consent to Gun Violence Restraining Order and Surrender of Firearms* (blank form)

g. ☐ Other *(specify):* _____

Date: _____

_____

Judicial Officer

Case Number:

To the Petitioner in 1:

- The court cannot make an order at the court hearing unless the Respondent has been personally given (served) a copy of the Petition and a temporary order if issued. To show that the Respondent has been served, the person who served the forms must fill out a proof of service form. *Proof of Personal Service* (form GV-200) may be used.
- For information about service, read *What Is "Proof of Personal Service"?* (form GV-200-INFO).
- If you are unable to serve the Respondent in time, you may ask for a later hearing date, which will give you more time to serve the documents. Use *Request to Continue Court Hearing for Gun Violence Restraining Order* (form GV-115).

To the Respondent:

- If you want to oppose the *Petition for Gun Violence Restraining Order* (form GV-100) in writing, file *Response to Petition for Gun Violence Restraining Order* (form GV-120) and have someone age 18 or older—**not you**—mail it to the Petitioner.
- The person who mailed the form must fill out a proof of service form. *Proof of Service by Mail* (form GV-250), may be used. File the completed form with the court before the hearing and bring a copy with you to the court hearing.
- Whether or not you respond in writing, go to the hearing if you want the judge to hear from you before making an order. You may tell the judge why you agree or disagree with the order requested.
- You may bring witnesses and other evidence.
- At the hearing, the judge may order you to turn in to law enforcement, or sell to or store with, a licensed gun dealer, any firearms, ammunition, or magazines that you own or possess. If issued, the order will last for one year.
- If you do not oppose the petition and are willing to give up your firearm rights, complete and file a *Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-125).

Request for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the hearing. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons with Disabilities and Response* (form MC-410). (Civ. Code, § 54.8.)

(Clerk will fill out this part.)

—Clerk's Certificate—

I certify that this *Notice of Court Hearing* (form GV-109) is a true and correct copy of the original on file in the court.

Clerk's Certificate

Date: _____

[seal]

Clerk, by _____, Deputy

GV-110 Temporary Gun Violence Restraining Order

Clerk stamps date here when form is filed.

Petitioner must complete items (1) and (2) only.

(1) Petitioner

a. Your Full Name or Name of Law Enforcement Agency:

I am:
- ☐ A family member of the Respondent
- ☐ An officer of a law enforcement agency
- ☐ An employer of the Respondent
- ☐ A coworker of the Respondent
- ☐ An employee or teacher of a secondary or postsecondary school that the Respondent has attended in the last 6 months

b. Your Lawyer *(if you have one for this case):*
Name: _____ State Bar No.: _____
Firm Name: _____

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or email. Law enforcement officer, give agency information.)*
Address: _____
City: _____ State: ____ Zip: _____
Telephone: _____ Fax: _____
Email Address: _____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(2) Respondent

Full Name: _____
Description:

Sex: ☐ M ☐ F Height: _____ Weight: _____ Date of Birth: _____
Hair Color: _____ Eye Color: _____ Age: _____ Race: _____
Home Address *(if known):* _____
City: _____ State: _____ Zip: _____
Relationship to Petitioner: _____

The court will complete the rest of this form.

(3) Expiration Date

This Order expires at the end of the hearing scheduled for the date and time below:

Date: _____ Time: _____ ☐ a.m. ☐ p.m.

This is a Court Order.

Case Number:

4 Findings

☐ Having examined ☐ Petitioner ☐ and other witnesses under oath,

☐ Having considered the declarations of ☐ Petitioner ☐ and other witnesses under penalty of perjury,

a. The court finds that there is a substantial likelihood that both of the following are true:

(1) Respondent poses a significant danger in the near future of causing personal injury to themself or another person by having in their custody or control, owning, purchasing, possessing, or receiving firearms, ammunition, or magazines.

(2) A temporary gun violence restraining order is necessary to prevent personal injury to Respondent or to another person because less restrictive alternatives either have been tried and found to be ineffective, or have been determined to be inadequate or inappropriate for the current circumstances.

b. ☐ The court has received credible information that Respondent owns or possesses one or more firearms, ammunition, or magazines.

c. ☐ The facts as stated in the Petition and supporting documents, which are incorporated here by reference, establish sufficient grounds for the issuance of this Order. And for the reasons stated below.

☐ See the attached *Attachment* (form MC-025).

5 No Fee to Serve (Notify) Restrained Person

If the sheriff or marshal serves this order, service will be free.

This is a Court Order.

6 Order Prohibiting All Firearms, Ammunition, and Magazines

a. You cannot have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearm or ammunition, including magazines (ammunition feeding devices).

b. The court has received credible information that you own or possess one or more firearms, ammunition, or one or more magazines that have not been surrendered or sold. You must:

(1) Surrender all firearms and ammunition, including magazines, in your custody or control or that you possess or own. If a law enforcement officer orders you to surrender all of your firearms and ammunition, including magazines, to the officer, you must surrender them to the officer. If no order to surrender is made by a law enforcement officer, you must surrender all of your firearms and ammunition, including magazines, within 24 hours of being served with this Order. You may do so by:

a. surrendering all of your firearms and ammunition, including magazines, in a safe manner to the local law enforcement agency; or

b. selling all of your firearms and ammunition, including magazines, to a licensed gun dealer; or

c. storing all of your firearms and ammunition, including magazines, with a licensed gun dealer for as long as this Order or any more permanent order granted at the hearing in item 3 is in effect.

(2) Within 48 hours of receiving this Order, file a receipt with the court that proves that your firearms and ammunition have been turned in, sold, or stored. *(You may use* Proof of Firearms, Ammunition, and Magazines Turned In, Sold, or Stored (form GV-800) *for the receipt.)* You must also file a copy of the receipt with the law enforcement agency that served you with this order. **FAILURE TO FILE THIS RECEIPT IS A VIOLATION OF THIS ORDER.**

7 Number of pages attached to this Order, if any: _____

Date: _____ _____

Judicial Officer

Warnings and Notices to the Respondent

To the restrained person: This Order is valid until the expiration date and time noted on page 1. You are required to surrender all firearms, ammunition, and magazines that you own or possess in accordance with section 18120 of the Penal Code and you may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearm, ammunition, or magazines while this order is in effect. A hearing will be held on the date and at the time noted on Page 1 to determine if a more permanent gun violence restraining order should be issued. Failure to appear at the hearing may result in a court making an order against you that is valid for a period between one and five years. You may seek the advice of an attorney as to any matter connected with the order. The attorney should be consulted promptly so that the attorney may assist you in any matter connected with the order.

Violation of this Order is a misdemeanor. If you violate this Order, you will be prohibited from having in your custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm, ammunition, or magazine for a period of five years. This Order must be enforced by any law enforcement officer in the State of California who is aware of or shown a copy of this Order. The Order remains enforceable regardless of the acts of the parties; it may be changed only by an order of the court.

This is a Court Order.

After You Have Been Served With a Temporary Order

- Obey the order by turning in all firearms, ammunition, and magazines to a law enforcement agency or selling them to or storing them with a licensed gun dealer.
- Read *How Can I Respond to a Petition for Gun Violence Restraining Order?* (form GV-120-INFO) to learn how to respond to this Order.
- If you do not oppose the petition, fill out *Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-125) and file it with the court clerk.
- If you disagree with the petition, fill out *Response to Petition for Gun Violence Restraining Order* (form GV-120) and file it with the court clerk.
- You must have form GV-120 served by mail on the Petitioner or the Petitioner's attorney. You cannot do this yourself. The person who does the mailing should complete and sign *Proof of Service of Response by Mail* (form GV-250). File the completed proof of service with the court clerk before the hearing date or bring it with you to the hearing.
- In addition to the response, you may file and have declarations served, signed by you and other persons who have personal knowledge of the facts. You may use *Declaration* (form MC-030) for this purpose. It is available from the clerk's office at the court shown on page 1 of this form or at *www.courts.ca.gov/forms*. If you do not know how to prepare a declaration, you should see a lawyer.
- Whether or not you file a response, you should attend the hearing. If you have any witnesses, they must also go to the hearing.
- At the hearing, the judge can make a gun violence restraining order against you that lasts between one to five years. Tell the judge why you disagree with the order requested.

Instructions for Law Enforcement

Duties of Officer Serving This Order

The officer who serves this order on the Restrained Person must do the following:

- Ask if the Restrained Person is in possession of any firearms, ammunition, or magazines or has custody or control of any that they have not already turned in.
- Order the Restrained Person to immediately surrender to you all firearms, ammunition, and magazines.
- Issue a receipt to the Restrained Person for all firearms, ammunition, and magazines that have been surrendered.
- Complete a proof of personal service and file it with the court. You may use form GV-200 for this purpose.
- Within one business day of service, submit the proof of service directly into the California Restraining and Protective Order System (CARPOS), including the serving officer's name and law enforcement agency.

Duties of Agency on Surrender of Firearms, Ammunition, or Magazines

The law enforcement agency that has received surrendered firearms, ammunition, or magazines must do the following:

- Retain the firearms, ammunition, or magazines until the termination or expiration of this Order or of any other gun violence restraining order issued by the court.
- On the expiration of this Order or of any later gun violence restraining order issued by the court, return the firearms, ammunition, or magazines to the respondent as provided by chapter 2 of division 11 of title 4 of the Penal Code (commencing with section 33850). Firearms, ammunition, or magazines that are not claimed are subject to the requirements of section 34000.

This is a Court Order.

Instructions for Law Enforcement

(continued)

- If someone other than the Respondent claims title to any of the firearms, ammunition, or magazines surrendered, determine whether that person is the lawful owner. If so, return the firearms, ammunition, or magazines to that person as provided by chapter 2 of division 11 of title 4 of the Penal Code (commencing with section 33850).

Enforcing This Order

The law enforcement officer should determine if the Respondent had notice of the order. Consider the Respondent "served" (given notice) if:

- The officer sees a copy of the proof of service or confirms that the proof of service is on file;
- The Respondent was informed of the order by an officer; or
- The officer sees a filed copy of form GV-125.

An officer can obtain information about the contents of the order and proof of service in CARPOS. If proof of service on the Respondent cannot be verified, the agency must advise the restrained person of the terms of the order and then enforce it *(see above: Duties of Officer Serving This Order).*

The provisions in this *Temporary Gun Violence Restraining Order* do not affect those of any other protective or restraining order in effect, including a criminal protective order. The provisions in any other another existing protective order remain in effect.

Clerk's Certificate
[seal]

(Clerk will fill out this part.)

—Clerk's Certificate—

I certify that this *Temporary Gun Violence Restraining Order (CLETS-TGV)* (form GV-110) is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____, Deputy

This is a Court Order.

GV-120 Response to Petition for Gun Violence Restraining Order

Clerk stamps date here when form is filed.

DRAFT 2020

Fill in court name and street address:

Superior Court of California, County of

See Petition for case number and fill in:

Case Number:

Use this form to respond to the Petition (form GV-100)

- Read *How Can I Respond to a Petition for a Gun Violence Restraining Order?* (form GV-120-INFO) to protect your rights.
- If you agree to the Petition for a gun violence restraining order filed against you, use *Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-125) to agree to a voluntary gun violence restraining order.
- If you do not agree to the gun violence restraining order filed against you, fill out this form and take it to the filing window at the court.
- Have someone age 18 or older—**not you**—mail a copy of this form and any attached pages to the Petitioner or to their lawyer. *(Use* Proof of Service by Mail *(form GV-250).)*

1 Petitioner

Name of person or law enforcement agency seeking order *(see form GV-100, item 1):*

2 Respondent

a. Your Name: _____

Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or email.)*

Address: _____

City: _____ State: ____ Zip: _____

Telephone: _____ Fax: _____

Email Address: _____

Be prepared to tell the court at the hearing why you don't agree. Write your hearing date, time, and place from form GV-109 item 3 here:

Hearing Date → Date: _____ Time: _____

Dept.: _____ Room: _____

If a Temporary Gun Violence Restraining Order was issued, you must obey it until the hearing. At the hearing, the court may make an order against you for one to five years.

3 Gun Violence Restraining Order

☐ I do not agree to the order requested in the Petition because:

_____

_____

_____

_____

_____

_____

_____

_____

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 3—Reasons I Disagree" as a title. You may use* Attachment *(form MC-025).*

Case Number:

4 ☐ Denial

I did not do anything described in item 6 of form GV-100.

5 ☐ Justification or Excuse

If I did some or all of the things that the Petitioner has accused me of, my actions were justified or excused for the following reasons *(explain):*

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 5–Justification or Excuse" as a title. You may use* Attachment *(form MC-025).*

6 Surrender of Guns, Ammunition, and Magazines

If a *Temporary Gun Violence Restraining Order* (form GV-110) was issued, you cannot own or possess any guns, other firearms, ammunition, or magazines. (See item 6 of form GV-110.) You must sell to or store with a licensed gun dealer, or turn in to a law enforcement agency or officer, any guns, other firearms, ammunition, or magazines in your immediate possession or control within 24 hours of being served with form GV-110. You must file a receipt with the court. You may use *Proof of Firearms, Ammunition, and Magazines Turned In, Sold, or Stored* (form GV-800) for the receipt.

a. ☐ I do not own or control any guns, other firearms, ammunition, or magazines.

b. ☐ I have turned in my guns, other firearms, ammunition, and magazines to a law enforcement officer or agency, or sold them to or stored them with a licensed gun dealer. A copy of the receipt
   ☐ is attached. ☐ has already been filed with the court.

7 Number of pages attached to this form, if any: _____

Date: _____

_____ ▶ _____

Lawyer's name (if any) *Lawyer's signature*

I declare under penalty of perjury under the laws of the State of California that the information above and on all attachments is true and correct.

Date: _____

_____ ▶ _____

Type or print your name *Sign your name*

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

GV-120-INFO How Can I Respond to a Petition for a Gun Violence Restraining Order?

What is a gun violence restraining order?

It is a court order that temporarily prohibits someone from having any guns, ammunition, or magazines (any ammunition feeding device). The person must surrender all guns, ammunition, and magazines that he or she currently owns.

I've been served with a *Petition for Gun Violence Restraining Order*. What do I do now?

Read the papers served on you very carefully. The *Notice of Court Hearing* (form GV-109) tells you when to appear in court. There may also be a *Temporary Gun Violence Restraining Order* (form GV-110) prohibiting you from having any guns, ammunition, or magazines and requiring you to surrender, sell, or store any guns, ammunition, or magazines that you currently own or possess. You must obey the order until the hearing.

Who can ask for a gun violence restraining order?

The petition must have been filed by a:

- Law enforcement officer or law enforcement agency,
- An employer,
- A coworker who has had "regular interactions" with you for at least a year,
- A teacher or employee of a school that you have attended in the last 6 months, or
- An immediate family member of yours.

Immediate family member is defined by this law to include people who are not blood relatives. The definition includes (1) your spouse or domestic partner; (2) your parents, children, siblings, grandparents, and grandchildren and their spouses, including any stepparent or stepgrandparent; (3) your spouses parents, children (your stepchildren), siblings, grandparents, and grandchildren; and (4) any other person who regularly resides in the household, or who, within the last six months, regularly resided in the household.

What if I don't obey the temporary order?

The police can arrest you. You can go to jail and pay a fine. You could lose access to firearms for a longer period of time.

What if I don't agree with what the order says?

If you disagree with the order that the Petitioner is asking for, fill out *Response to Petition for Gun Violence Restraining Order* (form GV-120) before your court date and file it with the court. You can get the form from legal publishers or on the Internet at *www.courts.ca.gov.* You also may be able to find it at your local courthouse or county law library.

What if I don't oppose the Petition?

If you agree to give up your access to firearms and your rights to own, possess, and buy guns, ammunition, and magazines for the time period requested in the petition, which is between one and five years, then you can fill out *Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-125) and check the box for item 4a. Make sure you take it to the court clerk and file it, and then mail it to the person or law enforcement agency that applied for the petition. The court will issue the gun violence restraining order before the hearing and remove the hearing from the calendar. You do not have to go to your court date, and the court will mail you a copy of the order. Make sure you check with the court to see if you have to show up for your court date.

Will I have to pay a filing fee?

No.

Do I have to serve the other person with a copy of my response?

Yes. Have someone age 18 or older—**not you**—mail a copy of completed *Response to Petition for Gun Violence Restraining Order* (form GV-120) to the person who asked for the order (or that person's lawyer). (This is called "service by mail.")

The person who serves the form by mail must fill out *Proof of Service by Mail* (form GV-250). Have the person who did the mailing sign the original. Take the completed form back to the court clerk or bring it with you to the hearing.

GV-120-INFO How Can I Respond to a Petition for a Gun Violence Restraining Order?

Do I need a lawyer?

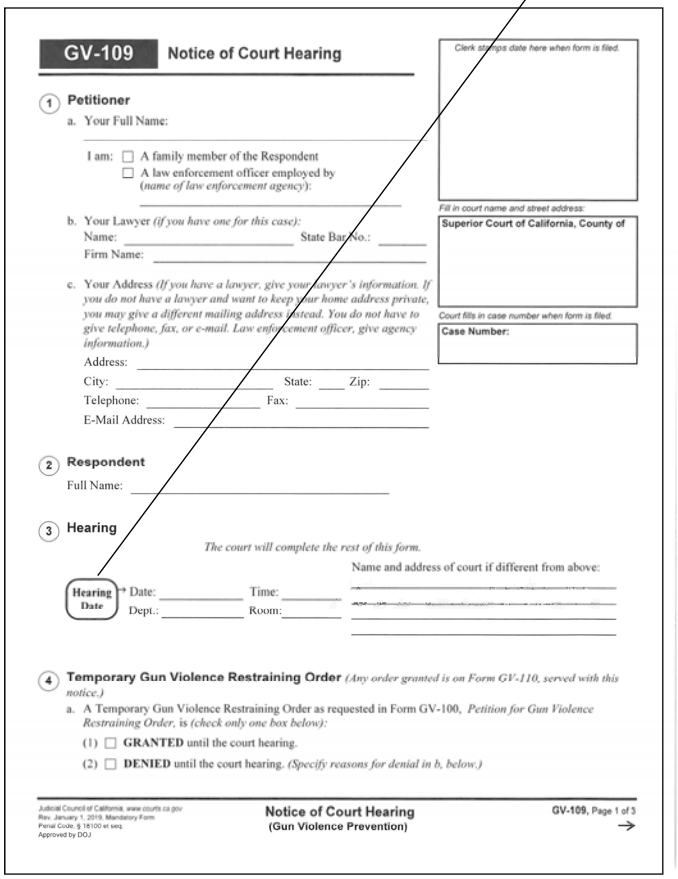
Having a lawyer is always a good idea, but it is not required, and you are not entitled to a free, court-appointed attorney. Ask the court clerk about free and low-cost legal services and self-help centers in your county.

How long does the order last?

If the court issued a temporary restraining order before the hearing, it will last until your hearing date. At that time, the court will decide whether to issue a gun violence restraining order that can last for one to five years.

Should I go to the court hearing?

Yes. You should go to court on the date listed on *Notice of Court Hearing* (form GV-109). If you do not go to the hearing, the judge can extend the order against you for a period between one and five years without hearing from you.



GV-109 Notice of Court Hearing

Clerk stamps date here when form is filed.

1 Petitioner

a. Your Full Name:

I am: ☐ A family member of the Respondent
☐ A law enforcement officer employed by (name of law enforcement agency):

b. Your Lawyer (if you have one for this case):
Name: State Bar No.:
Firm Name:

c. Your Address (If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail. Law enforcement officer, give agency information.)
Address:
City: State: Zip:
Telephone: Fax:
E-Mail Address:

Fill in court name and street address:
Superior Court of California, County of

Court fills in case number when form is filed.
Case Number:

2 Respondent
Full Name:

3 Hearing
The court will complete the rest of this form.
Hearing Date * Date: Time:
Dept.: Room:
Name and address of court if different from above:

4 Temporary Gun Violence Restraining Order (Any order granted is on Form GV-110, served with this notice.)
a. A Temporary Gun Violence Restraining Order as requested in Form GV-100, Petition for Gun Violence Restraining Order, is (check only one box below):
(1) ☐ GRANTED until the court hearing.
(2) ☐ DENIED until the court hearing. (Specify reasons for denial in b, below.)

Judicial Council of California, www.courts.ca.gov
Rev. January 1, 2019, Mandatory Form
Penal Code, § 18100 et seq.
Approved by DOJ

Notice of Court Hearing
(Gun Violence Prevention)

GV-109, Page 1 of 3

Will I see the person who asked for the order at the court hearing?

Assume that the person who is asking for the order will attend the hearing. It is probably best not to talk to them unless the judge or that person's attorney says that you can.

Can I bring a witness to the court hearing?

Yes. You can bring witnesses or documents that support your case to the hearing. But if possible, you should also bring the witnesses' written statements of what they saw or heard. Their statements must be made under penalty of perjury. (You can use *Declaration* (form MC-030) for this purpose.)

Can I agree with the protected person to terminate the order?

No. Once the order is issued, only the judge can change or terminate it. You would have to file a request with the court to terminate the order.

What if I need help to understand English?

When you file your papers, ask your courts clerk or self-help center if your court will provide an interpreter for you at no cost. If not, you will have to pay a fee for the interpreter. If an interpreter is not available for your court date, you should ask someone who is over age 18 to interpret for you.

What if I am deaf or hard of hearing?

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five court days before the hearing. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons with Disabilities and Response* (form MC-410). (Civ. Code, § 54.8.)

For help in your area, contact:

[Local information may be inserted.]

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form Save this form Clear this form

GV-125 Consent to Gun Violence Restraining Order and Surrender of Firearms

Clerk stamps date here when form is filed.

DRAFT 2020

Use this form if you have been served with a Petition for Gun Violence Restraining Order *(form GV-100) and you want to agree to voluntarily give up your firearm rights without a court hearing.*

- Fill out this form and take it to the court clerk.
- Have someone age 18 or older—**not you**—mail a copy of this form and any attached pages to the Petitioner or to their lawyer. *(Use* Proof of Service by Mail (form GV-250)*.)*
- If you do not agree to a gun violence restraining order, use *Response to Petition for Gun Violence Restraining Order* (form GV-120) to tell the court you oppose a gun violence restraining order.

Fill in court name and street address:

Superior Court of California, County of

See Petition for case number and fill in:

Case Number:

1 Petitioner

Name of person or law enforcement agency seeking order *(see form GV-100, item 1):*

2 Respondent

a. Your Name: _____

Your Lawyer *(if you have one for this case):*
Name: _____ State Bar No.: _____
Firm Name: _____

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or email.)*

Address: _____
City: _____ State: ____ Zip: _____
Telephone: _____ Fax: _____
Email Address: _____

3 Gun Violence Restraining Order

☐
- By checking this box and signing this form, I agree to give up my right to own, possess, or purchase guns, magazines, and ammunition for the time requested in the petition (between one to five years) or, if no time is specified, then for one year.
- I am not contesting the petition.
- I understand that the petitioner can request to renew this order for one to five years.
- I understand that I can only request to terminate this order once per year while it is in effect.

Case Number:

4 Surrender of Guns, Ammunition, and Magazines

- **After you file this form, the court will issue a *Gun Violence Restraining Order After Hearing or Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-130) and send it to you and the petitioner in the mail.**
- **This form will be listed in the statewide California Restraining and Protective Order System, where it will be accessible to all law enforcement.**
- **You cannot own or possess any guns, other firearms, ammunition, or magazines. You must sell to or store with a licensed gun dealer, or turn in to a law enforcement agency, any guns, other firearms, ammunition, or magazines in your immediate possession or control within 48 hours of filing this form. You must file a receipt with the court. You may use *Proof of Firearms, Ammunition, and Magazines Turned In, Sold, or Stored* (form GV-800) for the receipt.**

a. ☐ I do not own or control any guns, other firearms, ammunition, or magazines.

b. ☐ I have turned in my guns, other firearms, ammunition, and magazines to a law enforcement officer or agency, or sold them to or stored them with a licensed gun dealer. A copy of the receipt
☐ is attached. ☐ has already been filed with the court.

Instructions to Clerk

- On the filing *Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-125), the clerk must submit the proposed order, *Gun Violence Restraining Order After Hearing or Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-130) to the judicial officer, because the court must issue the order at least five court days before the scheduled hearing, or if this form is filed within five court days before the scheduled hearing, the court must issue, without any hearing, the gun violence restraining order, as soon as possible.
- Within one business day of issuance of the order, submit this form directly into the California Restraining and Protective Order System (CARPOS) or to law enforcement to enter into CARPOS within one business day of receipt from the court.

Date: _____

_____ ▶ _____
Lawyer's name (if any) *Lawyer's signature*

I declare under penalty of perjury under the laws of the State of California that the information above and on all attachments is true and correct.

Date: _____

_____ ▶ _____
Type or print your name *Sign your name*

For your protection and privacy, please press the Clear This Form button after you have printed the form.

49

Print this form Save this form Clear this form

GV-130 Gun Violence Restraining Order After Hearing or Consent to Gun Violence Restraining Order

Clerk stamps date here when form is filed.

Petitioner must complete items (1) and (2) only.

(1) Petitioner

a. Your Full Name or Name of Law Enforcement Agency:

_____

I am:
- ☐ A family member of the Respondent.
- ☐ An officer of a law enforcement agency *(A petition may be filed in the name of the law enforcement agency in which the officer is employed).*
- ☐ An employer of the Respondent.
- ☐ A coworker of the Respondent.
- ☐ An employee or teacher of a secondary or postsecondary school that the Respondent has attended in the last 6 months.

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

b. Your Lawyer *(if you have one for this case):*
Name: _____ State Bar No.: _____
Firm Name: _____

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or email. Law enforcement officer, give agency information.)*
Address: _____
City: _____ State: ____ Zip: _____ Telephone: _____
Email Address: _____ Fax: _____

(2) Respondent

Full Name: _____
Description:

Sex: ☐ M ☐ F Height: _____ Weight: _____ Date of Birth: _____
Hair Color: _____ Eye Color: _____ Age: _____ Race: _____
Home Address *(if known)*: _____
City: _____ State: _____ Zip: _____
Relationship to Petitioner: _____

(3) Expiration Date

The court will complete the rest of this form.

This Order expires at:

(Time): _____ ☐ a.m. ☐ p.m. ☐ midnight on *(date):* _____

If no expiration date is written here, this Order expires one year from the date of issuance.

This is a Court Order.

Case Number:

4 Hearing

a. ☐ There was a hearing *(date):* _____ at *(time):* _____ in Dept.: _____ Room: _____.

(Name of judicial officer): _____ made the orders at the hearing.

b. ☐ These people were at the hearing.

(1) ☐ The Petitioner (3) ☐ The lawyer for the Petitioner *(name):* _____

(2) ☐ The Respondent (4) ☐ The lawyer for the Respondent *(name):* _____

c. ☐ There was not a hearing because Respondent filed a *Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-125).

5 Findings

a. The court finds by clear and convincing evidence that the following are true:

(1) Respondent poses a significant danger of causing personal injury to themselves, or another person by having in their custody or control, owning, purchasing, possessing, or receiving firearms, ammunition, or magazines.

(2) A gun violence restraining order is necessary to prevent personal injury to Respondent or to another person because less restrictive alternatives either have been tried and found to be ineffective, or have been determined to be inadequate or inappropriate for the current circumstances.

b. ☐ The court has received credible information that the Respondent owns or possesses one or more firearms, ammunition, or one or more magazines.

c. ☐ The facts as stated in the Petition and supporting documents, which are incorporated here by reference, establish sufficient grounds for the issuance of this Order. And/or for the reasons stated below.

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

☐ See the attached *Attachment* (form MC-025).

d. ☐ The Respondent filed *Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-125). The court finds that Respondent agreed not to have in Respondent's custody or control, own, purchase, possess, or receive a firearm, ammunition, or magazine or attempt to purchase or receive a firearm, ammunition, or magazine until: *(expiration date)* _____.

This is a Court Order.

6 No Fee to Serve

If the sheriff or marshal serves this order, service will be free.

7 Order Prohibiting All Firearms, Ammunition, and Magazines

a. You cannot have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearm, ammunition, or magazine (any ammunition feeding device).

b. You must:

(1) Surrender all firearms and ammunition, including magazines, in your custody or control or that you possess or own. If a law enforcement officer orders you to surrender all of your firearms and ammunition, including magazines, to the officer, you must do so immediately. If no order to surrender is made by a law enforcement officer, you must surrender all of your firearms and ammunition, including magazines, within 24 hours of being served with this Order. You may do so by:

a. surrendering all of your firearms and ammunition, including magazines, in a safe manner to the local law enforcement agency; or

b. selling all of your firearms and ammunition, including magazines, to a licensed gun dealer; or

c. storing all of your firearms and ammunition, including magazines, with a licensed gun dealer for as long as this Order is in effect.

(2) Within 48 hours of receiving this Order, file a receipt with the court that proves that your firearms and ammunition have been turned in, sold, or stored. *(You may use* Proof of Firearms, Ammunition, and Magazines Turned In, Sold, or Stored (form GV-800) *for the receipt.)* You must also file a copy of the receipt with the law enforcement agency that served you with this order. **FAILURE TO FILE THIS RECEIPT IS A VIOLATION OF THIS ORDER.**

8 Service of Order on Respondent

a. ☐ The Respondent personally attended the hearing. No other proof of service is needed. The clerk has provided the Respondent with a blank copy of *Request to Terminate Gun Violence Restraining Order* (form GV-600).

b. ☐ The Respondent did not attend the hearing. The Respondent must be personally served with a court file-stamped copy of this Order and a blank copy of *Request to Terminate Gun Violence Restraining Order* (form GV-600) by a law enforcement officer or someone age 18 or older, **and not a party to the action.**

c. ☐ This is an order based on the Respondent's filing a *Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-125). The court will provide notice to all parties.

9 Number of pages attached to this Order, if any: _____

Date: _____ _____

Judicial Officer

This is a Court Order.

Case Number:

Warnings and Notices to the Respondent

This Order is valid until the expiration date and time noted on page 1. If you have not done so already, you must surrender all firearms, ammunition, and magazines that you own or possess in accordance with section 18120 of the Penal Code. You may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearm, ammunition, or magazines while this Order is in effect. Under section 18185, you have the right to request one hearing per year to terminate this Order during its effective period. You may seek the advice of an attorney as to any matter connected with the order.

Violation of this Order is a misdemeanor punishable by a $1,000 fine or imprisonment for six months or both. (Pen. Code, §§ 19, 18205.) If you violate this Order, you will be prohibited from having in your custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, any firearm, ammunition, or magazines for a period of five years. This Order must be enforced by any law enforcement officer in the State of California who is aware of or shown a copy of this Order. The Order remains enforceable regardless of the acts of the parties; it may be terminated only by an order of the court.

Instructions for Law Enforcement

Duties of Officer Serving This Order

The officer who serves this order on the Restrained Person must do the following:

- Ask if the Restrained Person is in possession of any firearms, ammunition, or magazines or has custody or control of any that they have not already turned in.
- Order the Restrained Person to immediately surrender to you all firearms, ammunition, and magazines.
- Issue a receipt to the Restrained Person for all firearms, ammunition, and magazines that have been surrendered.
- Complete a proof of personal service and file it with the court. You may use form GV-200 for this purpose.
- Within one business day of service, submit the proof of service directly into the California Restraining and Protective Order System (CARPOS), including the serving officer's name and law enforcement agency.

Duties of Agency on Surrender of Firearms and Ammunition

The law enforcement agency that has received surrendered firearms, ammunition, or magazines must do the following:

- Retain the firearms, ammunition, or magazines until the expiration of this order or of any other gun violence restraining order issued by the court.
- On the expiration of this order or of any later gun violence restraining Order issued by the court, return the firearms and ammunition to the Respondent as provided by chapter 2 of division 11 of title 4 of the Penal Code (commencing with section 33850). Firearms, ammunition, or magazines that are not claimed are subject to the requirements of section 34000.
- If someone other than the Respondent claims title to any of the firearms, ammunition, or magazines surrendered, determine whether that person is the lawful owner. If so, return the firearms, ammunition, and magazines to him or her as provided by chapter 2 of division 11 of title 4 of the Penal Code (commencing with section 33850).

This is a Court Order.

Case Number:

Instructions for Law Enforcement

(continued)

Enforcing This Order

The law enforcement officer should determine if the Respondent had notice of the order. Consider the Respondent "served" (given notice) if:

- The officer sees a copy of the proof of service or confirms that the proof of service is on file; or
- The respondent was informed of the Order by an officer.
- Item 8a or 8c is checked.

An officer can obtain information about the contents of the order and proof of service in CARPOS. If proof of service on the respondent cannot be verified, the agency must advise the restrained person of the terms of the order and then enforce it *(see above: Duties of Officer Serving This Order)*.

The provisions in this *Gun Violence Restraining Order After Hearing or Consent to Gun Violence Restraining Order* (form GV-130) do not affect those of any other protective or restraining order in effect, including a criminal protective order. The provisions in any other existing protective order(s) remain in effect.

Instructions to Clerk

This order must be served on all parties by the court, if it is made following the filing of a *Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-125).

(Clerk will fill out this part.)

—Clerk's Certificate—

Clerk's Certificate
[seal]

I certify that this *Gun Violence Restraining Order After Hearing or Consent to Gun Violence Restraining Order (CLETS-OGV)* (form GV-130) is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____ , Deputy

This is a Court Order.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

GV-600 Request to Terminate Gun Violence Restraining Order

Clerk stamps date here when form is filed.

Use this form to ask the court to terminate a gun violence restraining order against you. You may make only one request each year that the order is in effect.

1 Respondent

a. Full Name: _____

b. Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or email.)*

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____

Email Address: _____

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

2 Petitioner

a. Full Name or Name of Law Enforcement Agency: _____

b. Address *(if known):* _____

City: _____ State: _____ Zip: _____

3 ☐ Request to Terminate Restraining Order

a. I ask the court to terminate the:

☐ *Gun Violence Restraining Order After Hearing on EPO-002* (form GV-030)

☐ *Gun Violence Restraining Order After Hearing or Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-130)

☐ *Order on Request to Renew Gun Violence Restraining Order* (Form GV-730)

because *(give reasons below):*

_____

_____

_____

_____

_____

_____

_____

_____

_____

☐ *Check here if there is not enough space for your answer. Attach a sheet of paper and write "Attachment 3 Reasons to Terminate Order" for a title. You may use* Attachment *(form MC-025).*

This is not a Court Order.

Case Number:

3 ☐ Request to Terminate Restraining Order *(continued from the prior page)*

b. ☐ A copy of the current order is attached.

c. ☐ I have not previously requested that the court terminate the Order.

☐ I have requested the court to terminate the Order before, but my request was denied. It has been a year since I made my previous request.

☐ The Order has been renewed. I have not previously requested that the court terminate the Order since it was renewed.

(You may request termination of a gun violence restraining order only one time per year while the order is in effect and one time per year during any period of renewal. If the court denies your request, you may not request termination again for another year.)

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____
Type or print your name

▶ _____
Sign your name

This is not a Court Order.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

GV-610 Notice of Hearing on Request to Terminate Gun Violence Restraining Order

Clerk stamps date here when form is filed.

Respondent completes items (1) and (2). Court completes items (3) and (4).

(1) Respondent

a. Full Name: _____

b. Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or email.)*

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____

Email Address: _____

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

(2) Petitioner

a. Full Name or Name of Law Enforcement Agency: _____

b. Address *(if known):* _____

City: _____ State: _____ Zip: _____

(3) Court Hearing

The judge has set a court hearing date. *Court will fill in box below.*

The current restraining order stays in effect unless terminated by the court.

Hearing Date →

Date: _____ Time: _____

Dept.: _____ Room: _____

Name and address of court if different from above:

_____

_____

_____

_____

To the Respondent:

(4) Service

Someone age 18 or older—**not you**—must serve a copy of the following forms on the Petitioner:

- *Request to Terminate Gun Violence Restraining Order* (form GV-600);
- *Notice of Hearing on Request to Terminate Gun Violence Restraining Order* (form GV-610) (this form); and
- *Response to Request to Terminate Gun Violence Restraining Order* (form GV-620) (blank copy).

This is a Court Order.

4 a. ☐ The forms must be personally served on the Petitioner _____ days before the hearing.
b. ☐ The forms may be served by mail on the Petitioner or the Petitioner's lawyer _____ days before the hearing.

The person who serves the forms must fill out either *Proof of Personal Service* (form GV-200) or *Proof of Service by Mail* (form GV-250). Have the person who served sign the original. Take the completed proof of service form back to the court clerk for filing or bring it with you to the hearing. For help with personal service, see *What is* "*Proof of Personal Service*"*?* (form GV-200-INFO).

Date: _____

_____
Judicial Officer

To the Petitioner:

If you wish to make a written response to this request to terminate the current firearms restraining order, you may fill out *Response to Request to Terminate Gun Violence Restraining Order* (form GV-620). File the original with the court before the hearing and have someone age 18 or older—**not you**— mail a copy of it to the other party at the address in 1 at least _____ days before the hearing. Also file *Proof of Service by Mail (*form GV-250) with the court before the hearing.

Request for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the hearing. Contact the clerk's office for *Request for Accommodations by Persons with Disabilities and Response* (form MC-410). (Civ. Code, § 54.8.)

(Clerk will fill out this part.)

—Clerk's Certificate—

I certify that this *Notice of Hearing on Request to Terminate Gun Violence Restraining Order* (form GV-610) is a true and correct copy of the original on file in the court.

Clerk's Certificate
[seal]

Date: _____

Clerk, by _____, Deputy

This is a Court Order.

GV-620 Response to Request to Terminate Gun Violence Restraining Order

Clerk stamps date here when form is filed.

Use this form to respond to the *Request to Terminate Gun Violence Restraining Order* (Form GV-600).

- Fill out this form and then take it to the court clerk.
- Have someone age 18 or older—**not you**—mail a copy of this form and any attached pages to the Respondent at the address in (2) below. Use *Proof of Service of Response by Mail* (form GV-200-INFO).

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

(1) Petitioner

a. Your Full Name or Name of Law Enforcement Agency:

_____

I am:
- ☐ A family member of the Respondent.
- ☐ An officer of a law enforcement agency.
- ☐ An employer of the Respondent.
- ☐ A coworker of the Respondent.
- ☐ An employee or teacher of a secondary or postsecondary school that the Respondent has attended in the last 6 months.

Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or email. Law enforcement officer, give agency information.)*

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____

Email Address: _____

The court will consider your response at the hearing. Write your hearing date, time, and place from form GV-610 item (3) here.

Hearing Date → Date: _____

Time: _____

Dept.: _____ Room: _____

(2) Respondent

Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Case Number:

3 Response

a. ☐ I do not oppose termination of the order.

b. ☐ I oppose termination of the order for the following reasons *(specify below)*:

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 3b—Reasons Not to Terminate" for a title. You may use* Attachment *(form MC-025).*

Date: _____

_____ ▶ _____

Lawyer's name, if you have one *Lawyer's signature*

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____ ▶ _____

Type or print your name *Sign your name*

To the Petitioner:

1. Have someone age 18 or older—**not you**—mail a copy of this completed form GV-620 to the Respondent or to the Respondent's lawyer, if any. This is called "service by mail."
2. The person who serves the form by mail must fill out *Proof of Service by Mail* (form GV-250). Have the person who did the mailing sign the original form GV-250.
3. Take the completed *Proof of Service by Mail* (form GV-250) back to the court clerk or bring it with you to the hearing.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

GV-630 Order on Request to Terminate Gun Violence Restraining Order

Clerk stamps date here when form is filed.

Prevailing party completes items (1) and (2). If the Order is granted, the Respondent is the prevailing party. If the Order is denied, the Petitioner is the prevailing party.

(1) Respondent

a. Full Name: _____

b. Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or email.)*

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____

Email Address: _____

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

(2) Petitioner

Full Name or Name of Law Enforcement Agency: _____

Address *(if known)*: _____

City: _____ State: _____ Zip: _____

(3) Hearing

There was a hearing on *(date):* _____ at time: _____ ☐ a.m. ☐ p.m. Dept.: _____ Room: _____

(Name of judicial officer): _____ made the orders at the hearing.

These people were at the hearing:

a. ☐ The Petitioner ☐ The lawyer for the Petitioner *(name):* _____

b. ☐ The Respondent ☐ The lawyer for the Respondent *(name):* _____

(4) Findings

☐ The court finds that there is no longer clear and convincing evidence that:

- Respondent poses a significant danger of causing personal injury to themself or another person by having in the person's custody or control, owning, purchasing, possessing, or receiving firearms, ammunition, or magazines; and
- A gun violence restraining order is necessary to prevent personal injury to Respondent or to another person because less restrictive alternatives either have been tried and found to be ineffective or have been determined to be inadequate or inappropriate for the current circumstances.

☐ There remains clear and convincing evidence that grounds continue to exist to support the order.

This is a Court Order.

Case Number:

5 Order on Request to Terminate

The request to terminate the *Gun Violence Restraining Order After Hearing or Consent to Gun Violence Restraining Order* (form GV-130), originally issued on *(date)*: _____

☐ and most recently renewed on *(date)*: _____ is:

a. ☐ **GRANTED**. The order is terminated as of *(date of hearing)*: _____

b. ☐ **DENIED**. The order and expiration date remain in effect.

To the Prevailing Party:

6 Service of Order

If service is required, someone age 18 or older—**not you**—must serve a copy of this order on the other party. If a party is represented, you are required to serve the attorney instead of the party.

a. ☐ **Order Granted**—The Petitioner attended the hearing. **No further service is required.**

b. ☐ **Order Granted**—The Petitioner did not attend the hearing. **Service is required:** This Order:

☐ Must be personally served on the Petitioner within _____ days of the date of this Order.

☐ May be served by mail on the Petitioner within five days of the date of this Order.

c. ☐ **Order Denied**—If the Petitioner did not attend the hearing, **Service by Mail:** The Petitioner may be served with this Order by mail.

Date: _____

_____
Judicial Officer

(Clerk will fill out this part.)

—Clerk's Certificate—

I certify that this *Order on Request to Terminate Gun Violence Restraining Order* (form GV-630) is a true and correct copy of the original on file in the court.

Clerk's Certificate
[seal]

Date: _____ Clerk, by _____, Deputy

This is a Court Order.

GV-700 Request to Renew Gun Violence Restraining Order

Clerk stamps date here when form is filed.

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

1 Petitioner

a. Your Full Name or Name of Law Enforcement Agency:

_____

I am:
- ☐ A family member of the Respondent.
- ☐ An officer of a law enforcement agency *(a petition may be filed in the name of the law enforcement agency in which the officer is employed).*
- ☐ An employer of the Respondent.
- ☐ A coworker of the Respondent.
- ☐ An employee or teacher of a secondary or postsecondary school that the Respondent has attended in the last 6 months.

b. Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or email. Law enforcement officer, give agency information.)*

Address: _____

City: _____ State: ____ Zip: _____

Telephone: _____ Fax: _____

Email Address: _____

2 Respondent

Full Name: _____

Address *(if known):* _____

City: _____ State: _____ Zip: _____

3 Request to Renew Restraining Order

I ask the court to renew the *Gun Violence Restraining Order After Hearing or Consent to Gun Violence Restraining Order* (form GV-130) for an additional period of between 1 and 5 years. A copy of the order is attached.

a. The order currently will end on *(date):* _____

(If the order has already expired, you must file a new petition.)

b. ☐ This is my first request to renew the order.

☐ The order has been renewed _____ times.

This is not a Court Order.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

3 c. I ask the court to renew the gun violence restraining order because *(explain below):*

☐ *Check here if there is not enough space for your answer. Attach a sheet of paper and write "Attachment 3c—Reasons to Renew Order" for a title. You may use* Attachment *(form MC-025)*.

Date:

Lawyer's name (if any)

Lawyer's signature

I declare under penalty of perjury under the laws of the State of California that the information above and on all attachments is true and correct.

Date:

Type or print your name

Sign your name

This is not a Court Order.

GV-710 Notice of Hearing on Request to Renew Gun Violence Restraining Order

Clerk stamps date here when form is filed.

DRAFT NOT APPRIOVED BY JUDICIAL COUNCIL 2020

Respondent completes items (1) and (2). Court completes items (3) and (4).

(1) Petitioner

a. Your Full Name or Name of Law Enforcement Agency:

_____

I am:
- ☐ A family member of the Respondent.
- ☐ An officer of a law enforcement agency *(a petition may be filed in the name of the law enforcement agency in which the officer is employed).*
- ☐ An employer of the Respondent.
- ☐ A coworker of the Respondent.
- ☐ An employee or teacher of a secondary or postsecondary school that the Respondent has attended in the last 6 months.

Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or email. Law enforcement officer, give agency information.)*

Address: _____

City: _____ State: _____ Zip: _____ Fax: _____

Telephone: _____ Email: _____

(2) Respondent

Full Name: _____

Address *(if known)*: _____

City: _____ State: _____ Zip: _____

(3) Court Hearing

The judge has set a court hearing date. *Court will fill in box below.*

The current restraining order stays in effect.

Name and address of court if different from above:

Hearing Date →

Date: _____ Time: _____

Dept.: _____ Room: _____

This is a Court Order.

Case Number:

To the Petitioner:

4 Service on Respondent

Someone age 18 or older—**not you**—must serve a copy of the following forms on the Respondent

- *Request to Renew Gun Violence Restraining Order* (form GV-700);
- *Notice of Hearing on Request to Renew Gun Violence Restraining Order* (form GV-710) (this form);
- *Response to Request to Renew Gun Violence Restraining Order* (form GV-720) (blank copy);

a. ☐ The forms must be personally served on the Respondent _____ days before the hearing.
b. ☐ The forms may be served by mail on the Respondent or the Respondent's lawyer _____ days before the hearing.

Date: _____ _____
Judicial Officer

To the Respondent:

At the hearing, the judge can renew the current restraining order for between one and five years. You *must* continue to obey the current restraining order. At the hearing, you can tell the judge if you do not want the order against you renewed. If the restraining order is renewed, you *must* continue to obey the order even if you do not attend the hearing.

If you wish to make a written response to the request to renew the restraining order, you may fill out *Response to Request to Renew Gun Violence Restraining Order* (form GV-720). File the original with the court before the hearing and have someone age 18 or older—**not you**—mail a copy of it to the Petitioner at the address in (1) at least _____ days before the hearing. Also file *Proof of Service by Mail* (form GV-250) with the court before the hearing or bring it with you to the hearing.

Requests for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the proceeding. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons With Disabilities and Response* (form MC-410). (Civ. Code, § 54.8.)

(Clerk will fill out this part.)

—Clerk's Certificate—

Clerk's Certificate
[seal]

I certify that this *Notice of Hearing on Request to Renew Gun Violence Restraining Order* (form GV-710) is a true and correct copy of the original on file in the court.

Date: _____

Clerk, by _____, Deputy

This is a Court Order.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

Version 2 forms

EPO-002

GUN VIOLENCE EMERGENCY PROTECTIVE ORDER

LAW ENFORCEMENT CASE NUMBER:

1. **RESTRAINED PERSON** *(insert name):* _____

Address or Mailing Address: _____

Sex: ☐ M ☐ F ☐ X Ht.: _____ Wt.: _____ Hair color: _____

Eye color: _____ Race: _____ Age: _____ Date of birth: _____

Clerk stamps date here when form is filed.

DRAFT Not approved by the Judicial Council 3.2.2020

2. **TO THE RESTRAINED PERSON** *(also see important Warnings and Information on page 2):*

You are required to surrender all firearms, ammunition, and magazines that you own or possess in accordance with section 18120 of the Penal Code and you may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearm, ammunition, or magazine while this order is in effect. However a gun violence restraining order that lasts from 1 - 5 years may be obtained from the court. You may seek the advice of an attorney as to any matter connected with the order. The attorney should be consulted promptly so that the attorney may assist you in any matter connected with the order.

If you have any firearms, ammunition, and magazines, **you MUST IMMEDIATELY SURRENDER THEM** if asked by a police officer. If a police officer does not ask you to surrender any of the above, within 24 hours of getting this order, you must take them to a police station or a licensed gun dealer to sell or store them and must file a receipt with the court proving that this has been done. You have 48 hours to file a receipt with the court shown to the right. **If you do not file a receipt within 48 hours you have violated this order and can go to jail.**

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

3. **This order will last until:** _____ **Time** _____

INSERT DATE OF 21st CALENDAR DAY (DO NOT COUNT DAY THE ORDER IS GRANTED)

4. **Court Hearing** ☐ A court hearing will be set within 21 days.

☐ A court hearing will take place at the court above on: Date: _____ Time/Dept: _____

You must go to the court hearing if you do not want this restraining order against you. At the hearing, the judge can make this order last from 1 - 5 years.

5. Reasonable grounds for the issuance of this order exist, and a Gun Violence Emergency Protective Order (1) is necessary because the Restrained Person poses an immediate danger of causing personal injury to himself or herself or to another by having custody or control, owning, purchasing, possessing, or receiving any firearms, ammunition, or magazines; **and** (2) less restrictive alternatives were ineffective or have been determined to be inadequate or inappropriate under the circumstances.

6. Judicial officer *(name):* granted this order on *(date):* at *(time):*

APPLICATION

7. Officer has a reasonable cause to believe that the grounds set forth in item 5, above, exist *(state supporting facts and dates; specify weapons—number, type and location):*

_____

_____

_____

_____

_____

8. ☐ Firearms were ☐ observed ☐ reported ☐ searched for at the scene ☐ seized.
☐ Ammunition (including magazines) was ☐ observed ☐ reported ☐ searched for at the scene ☐ seized.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

By: _____ ▶ _____

(PRINT NAME OF LAW ENFORCEMENT OFFICER) (SIGNATURE OF LAW ENFORCEMENT OFFICER)

Agency: _____ Telephone No: _____ Badge No: _____

Address: _____

PROOF OF SERVICE

9. I personally delivered copies of this Order to the restrained person name in item 1.
Date of service: _____ Time of service: _____ Address:

10. At the time of service, I was at least 18 years of age.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____ _____ ▶ _____

(TYPE OR PRINT NAME OF SERVER/LAW ENFORCEMENT OFFICER) (SIGNATURE OF SERVER)

WARNINGS AND INFORMATION

TO THE RESTRAINED PERSON: You are prohibited from owning, possessing, purchasing, receiving, or attempting to purchase or receive a firearm, ammunition, or a magazine. (Pen. Code, § 18125 et seq.) A violation of this order is a misdemeanor punishable by a $1,000 fine or imprisonment for six months or both. (Pen. Code, §§ 19, 18205.) Law enforcement is required to ask for your firearms. You must surrender them on request to law enforcement.

Within 24 hours of receipt of this order, you must turn in all firearms, ammunition, and magazines to a law enforcement agency or sell them to or store them with a licensed firearms dealer until the expiration of this order. (Pen. Code, § 18125 et seq.) A receipt proving surrender, sale, or storage must be filed with the court within 48 hours of receipt of this order, or on the next court business day if the 48-hour period ends on a day when the court is closed. You must also file the receipt with the law enforcement agency that served you with this Order. You may use *Proof of Firearms, Ammunition, and Magazines Turned In, Sold, or Stored* (form GV-800).

This Gun Violence Emergency Protective Order is effective when made. It will last until the date and time in item 3 on the front. The court will hold a hearing within 21 days to determine if a longer-term order should be issued. If the date and time are not stated in item 4 on the front, you will get a notice with the date and time of the hearing in the mail at the residential address listed on page 1 of this form. If you would like to respond to this order in writing you must use *Response to Gun Violence Emergency Protective Order* (form GV-020). A family member, employer, coworker, teacher, or school administrator may also seek a gun violence restraining order that lasts from 1 to 5 years from the court.

If you violate this order, you will also be prohibited from having in your custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm, ammunition, or magazine for an additional five-year period, to begin on the expiration of the more permanent gun violence restraining order. (Pen. Code, § 18205.)

This protective order must be enforced by all law enforcement officers in the state of California who are aware of it or shown a copy of it. The terms and conditions of this order remain enforceable regardless of the acts or any agreement of the parties; it may be changed only by order of the court.

A LA PERSONA RESTRINGIDA: Tiene prohibido ser dueño de un arma de fuego, municiones o cargadores, o poseer, comprar, recibir, o tratar de comprar o recibir un arma de fuego, municiones o cargadores. (Código Penal, §§ 18125 y siguientes). Una violación de esta orden está sujeta a una multa de $1000 o encarcelamiento de seis meses o ambos. (Código Penal, §§ 19 y 18205.)

Dentro de las 24 horas de recibir esta orden, tiene que entregar sus armas de fuego, municiones y cargadores a una agencia del orden público o venderlos a un comerciante de armas autorizado, o almacenarlos con el mismo hasta el vencimiento de esta orden. (Código Penal, §§ 18125 y siguientes). Se tiene que presentar a la corte una prueba de haberlos entregado, vendido, o almacenado dentro de las 48 horas de recibir esta orden. Se puede usar el formulario GV-800, *Prueba de entrega, venta o almacenamiento de armas de fuego, municiones y cargadores*, por este propósito.

Esta orden de protección de emergencia de armas de fuego entra en vigencia en el momento en que se emite. Durará hasta la fecha y hora indicadas en el punto 3 de la primera página. Se realizará una audiencia dentro de 21 días para determinar si es necesario emitir una orden que dure por más tiempo. Si la fecha y la hora no se indican en el punto 4 de la primera página, recibirá un aviso con la fecha y la hora de la audiencia por correo a la dirección residencial indicada en la primera página. Si desea responder a esta orden por escrito, tiene que usar el formulario GV-020, *Respuesta a la orden de protección de emergencia de armas de fuego*. Un miembro de su familia, su empleador, un colega del trabajo, un maestro o profesor, o administrador educativo también puede solicitar al tribunal una orden de restricción más permanente.

Si contraviene esta orden de restricción, se le prohibirá tener en su posesión o control, comprar, poseer o recibir, o tratar de comprar o recibir un arma de fuego, municiones o cargadores por otro periodo de cinco años más, comenzando a partir del vencimiento de la orden de restricción de armas de fuego más permanente. (Código Penal, § 18205.)

Todo agente del orden público del estado de California que tenga conocimiento de la orden o a quien se le muestre una copia de la misma deberá hacer cumplir esta orden de protección. Los términos y condiciones de esta orden se podrán hacer cumplir independientemente de las acciones de las partes; solo la corte podrá cambiar esta orden.

To law enforcement: The Gun Violence Emergency Protective Order must be served on the restrained person by the officer if the restrained person can reasonably be located. Ask the restrained person if he or she has any firearms, ammunition, or magazines in his or her possession or under his or her custody or control. A copy must be filed with the court as soon as practicable after issuance so a hearing can be set, if one was not already scheduled. If the court did not give you a hearing date when issuing the order (to put in item 4 on the front), the court will set a hearing within 21 days and will provide you with notice of the hearing. Also, the officer must have the order entered into the computer database system for protective and restraining orders maintained by the Department of Justice.

The provisions in this temporary Gun Violence Emergency Protective Order do not affect those of any other protective or restraining order in effect, including a criminal protective order. The provisions in another existing protective order remain in effect.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

GV-030 Gun Violence Restraining Order After Hearing on EPO-002

The court will complete this form.

Clerk stamps date here when form is filed.

Draft 2020

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 Requesting Agency or Officer

(A petition may be filed in the name of the law enforcement agency in which the officer is employed.)

Law enforcement agency or officer that applied for the Gun Violence Emergency Protective Order: _____

2 Restrained Person

Full Name: _____

Lawyer *(if there is one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

Address: _____

City: _____ State: ____ Zip: _____

Telephone: _____ Fax: _____

Email Address: _____

Description of Restrained Person

Gender: ☐ Male ☐ Female ☐ Nonbinary

Height: _____ Weight: _____ Date of Birth: _____

Hair Color: _____ Eye Color: _____ Age: _____ Race: _____

Home Address: _____

City: _____ State: _____ Zip: _____

3 Expiration Date

This order expires at:

(Time): _____ ☐ a.m. ☐ p.m. ☐ midnight on *(date):* _____

If no expiration date is written here, this order expires one year from the date of issuance.

4 Hearing

a. There was a hearing on *(date):* _____ at *(time):* _____ in Dept.: _____ Room: _____.
(Name of judicial officer): _____ made the orders at the hearing.

b. These people were at the hearing:

(1) ☐ The officer or representative of the Requesting Agency _____

(2) ☐ The Restrained Person ☐ Lawyer for the Restrained Person *(name):* _____

This is a Court Order.

5 Findings

a. ☐ The court finds by clear and convincing evidence that the following are true:

(1) The Restrained Person poses a significant danger of causing personal injury to themself or another person by having in their custody or control, owning, purchasing, possessing, or receiving firearms, ammunition, or magazines.

(2) A gun violence restraining order is necessary to prevent personal injury to the Restrained Person or to another person because less restrictive alternatives either have been tried and found to be ineffective, or have been determined to be inadequate or inappropriate for the current circumstances.

(3) ☐ The court has received credible information that the Restrained Person owns or possesses one or more firearms, ammunition, or one or more magazines.

(4) ☐ The facts as stated in the *Gun Violence Emergency Protective Order* (form EPO-002) and supporting documents submitted at the time of the hearing, which are incorporated here by reference, and for the reasons set forth below, establish sufficient grounds for the issuance of this Order.

☐ See the attached *Attachment* (form MC-025)

b. ☐ A gun violence restraining order is not being issued for the reasons below:

This is a Court Order.

6 Order Prohibiting All Firearms, Ammunition, and Magazines

a. You cannot have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearm or ammunition, including magazines (ammunition feeding devices).

You must:

(1) Surrender all firearms and ammunition, including magazines, in your custody or control or that you possess or own. If a law enforcement officer orders you to surrender all of your firearms and ammunition, including magazines, to the officer, you must do so immediately. If no order to surrender is made by a law enforcement officer, you must surrender all of your firearms and ammunition, including magazines, within 24 hours of being served with this Order. You may do so by:

a. surrendering all of your firearms and ammunition, including magazines, in a safe manner to the local law enforcement agency; or
b. selling all of your firearms and ammunition, including magazines, to a licensed gun dealer; or
c. storing all of your firearms and ammunition, including magazines, with a licensed gun dealer for as long as this Order or any more permanent order granted at the hearing in item 4 is in effect.

(2) Within 48 hours of receiving this Order, file a receipt with the court that proves that your firearms and ammunition have been turned in, sold, or stored. *(You may use* Proof of Firearms, Ammunition, and Magazines Turned In, Sold, or Stored (form GV-800) *for the receipt.)* You must also file a copy of the receipt with the law enforcement agency that served you with this order. **FAILURE TO FILE THIS RECEIPT IS A VIOLATION OF THIS ORDER.**

b. ☐ **Order dissolving (terminating) *Gun Violence Emergency Protective Order*.**

The court dissolves (terminates) the *Gun Violence Emergency Protective Order* (form EPO-002) originally issued on *(date):* _____ as of *(date of hearing):* _____ .

7 Service of Order on the Restrained Person

a. ☐ The Restrained Person personally attended the hearing. No other proof of service is needed. The clerk has provided the Restrained Person with a blank copy of, *Request to Terminate Gun Violence Restraining Order* (form GV-600), if a restraining order was granted.

b. ☐ The Restrained Person did not attend the hearing. The Restrained Person must be personally served with a court file-stamped copy of this order and a blank copy of *Request to Terminate Gun Violence Restraining Order* (form GV-600), if a restraining order was granted.

8 Number of pages attached to this Order, if any: _____

Date: _____ _____
Judicial Officer

Warnings and Notices to the Restrained Party

This order is valid until the expiration date and time noted on page 1. If you have not done so already, you must surrender all firearms, ammunition, and magazines that you own or possess in accordance with Section 18120 of the Penal Code. You may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearms, ammunition, or magazines while this Order is in effect. Under section 18185, you have the right to request one hearing per year to terminate this Order during its effective period. You may seek the advice of an attorney as to any matter connected with the order.

This is a Court Order.

Violation of this Order is a misdemeanor punishable by a $1,000 fine or imprisonment for six months or both. (Pen. Code, §§ 19, 18205.) If you violate this Order, you will be prohibited from having in your custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, any firearm, ammunition, or magazine for a period of five years. This Order must be enforced by any law enforcement officer in the State of California who is aware of or shown a copy of this Order. The Order remains enforceable regardless of the acts of the parties; it may be terminated only by an order of the court.

Instructions for Law Enforcement

Duties of Officer Serving This Order

The officer who serves this order on the Restrained Person must do the following:

- Ask if the Restrained Person is in possession of any firearms, ammunition, or magazines or has custody or control of any that they have not already turned in.
- Order the Restrained Person to immediately surrender to you all firearms, ammunition, and magazines.
- Issue a receipt to the Restrained Person for all firearms, ammunition, and magazines that have been surrendered.
- Complete a proof of personal service and file it with the court. You may use Form GV-200 for this purpose.
- Within one business day of service, submit the proof of service directly into the California Restraining and Protective Order System (CARPOS), including the serving officer's name and law enforcement agency.

Duties of Agency on Surrender of Firearms, Ammunition, and Magazines

The law enforcement agency that has received surrendered firearms, ammunition, or magazines must do the following:

- Retain the firearms, ammunition, or magazines until the expiration of this Order or of any other gun violence restraining order issued by the court.
- On the expiration of this order or of any later gun violence restraining order issued by the court, return the firearms and ammunition to the Restrained Person as provided by chapter 2 of division 11 of title 4 of the Penal Code (commencing with section 33850). Firearms, ammunition, or magazines that are not claimed are subject to the requirements of section 34000.
- If someone other than the Restrained Person claims title to any of the firearms, ammunition, or magazines surrendered, determine whether that person is the lawful owner. If so, return the firearms, ammunition, and magazines to that person as provided by chapter 2 of division 11 of title 4 of the Penal Code (commencing with section 33850).

Enforcing This Order

The law enforcement officer should determine if the Restrained Person had notice of the order. Consider the Restrained Person "served" (given notice) if:

- The officer sees a copy of the proof of service or confirms that the proof of service is on file;
- The Restrained Person was informed of the order by an officer; or
- Item 7a is checked, the Restrained Person attended the hearing.

This is a Court Order.

Instructions for Law Enforcement

(continued)

An officer can obtain information about the contents of the order and proof of service in CARPOS. If proof of service on the respondent cannot be verified, the agency must advise the restrained person of the terms of the order and then enforce it *(see above: Duties of Officer Serving This Order)*.

The provisions in this *Gun Violence Restraining Order After Hearing on EPO-002* do not affect those of any other protective or restraining order in effect, including a criminal protective order. The provisions in another existing protective order remain in effect.

(Clerk will fill out this part.)

—Clerk's Certificate—

Clerk's Certificate [seal]

I certify that this *Gun Violence Restraining Order After Hearing on EPO-002 (CLETS-HGV)* (form GV-030) is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____ , Deputy

This is a Court Order.

GV-110 Temporary Gun Violence Restraining Order

Clerk stamps date here when form is filed.

Petitioner must complete items (1) and (2) only.

(1) Petitioner

a. Your Full Name or Name of Law Enforcement Agency: _____

I am:
- ☐ A family member of the Respondent
- ☐ An officer of a law enforcement agency
- ☐ An employer of the Respondent
- ☐ A coworker of the Respondent
- ☐ An employee or teacher of a secondary or postsecondary school that the Respondent has attended in the last 6 months

b. Your Lawyer *(if you have one for this case):*
Name: _____ State Bar No.: _____
Firm Name: _____

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or email. Law enforcement officer, give agency information.)*
Address: _____
City: _____ State: _____ Zip: _____
Telephone: _____ Fax: _____
Email Address: _____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(2) Respondent

Full Name: _____

Description of Restrained Person

Gender: ☐ Male ☐ Female ☐ Nonbinary
Height: _____ Weight: _____ Date of Birth: _____
Hair Color: _____ Eye Color: _____ Age: _____ Race: _____
Home Address: _____
City: _____ State: _____ Zip: _____

The court will complete the rest of this form.

(3) Expiration Date

This Order expires at the end of the hearing scheduled for the date and time below:

Date: _____ Time: _____ ☐ a.m. ☐ p.m.

This is a Court Order.

4 Findings

☐ Having examined ☐ Petitioner ☐ and other witnesses under oath,

☐ Having considered the declarations of ☐ Petitioner ☐ and other witnesses under penalty of perjury,

a. The court finds that there is a substantial likelihood that both of the following are true:

(1) Respondent poses a significant danger in the near future of causing personal injury to themself or another person by having in their custody or control, owning, purchasing, possessing, or receiving firearms, ammunition, or magazines.

(2) A temporary gun violence restraining order is necessary to prevent personal injury to Respondent or to another person because less restrictive alternatives either have been tried and found to be ineffective, or have been determined to be inadequate or inappropriate for the current circumstances.

b. ☐ The court has received credible information that Respondent owns or possesses one or more firearms, ammunition, or magazines.

c. ☐ The facts as stated in the Petition and supporting documents, which are incorporated here by reference, establish sufficient grounds for the issuance of this Order. And for the reasons stated below.

☐ See the attached *Attachment* (form MC-025).

5 No Fee to Serve (Notify) Restrained Person

If the sheriff or marshal serves this order, service will be free.

This is a Court Order.

6 Order Prohibiting All Firearms, Ammunition, and Magazines

a. You cannot have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearm or ammunition, including magazines (ammunition feeding devices).

b. The court has received credible information that you own or possess one or more firearms, ammunition, or one or more magazines that have not been surrendered or sold. You must:

(1) Surrender all firearms and ammunition, including magazines, in your custody or control or that you possess or own. If a law enforcement officer orders you to surrender all of your firearms and ammunition, including magazines, to the officer, you must do so immediately. If no order to surrender is made by a law enforcement officer, you must surrender all of your firearms and ammunition, including magazines, within 24 hours of being served with this Order. You may do so by:

a. surrendering all of your firearms and ammunition, including magazines, in a safe manner to the local law enforcement agency; or
b. selling all of your firearms and ammunition, including magazines, to a licensed gun dealer; or
c. storing all of your firearms and ammunition, including magazines, with a licensed gun dealer for as long as this Order or any more permanent order granted at the hearing in item 3 is in effect.

(2) Within 48 hours of receiving this Order, file a receipt with the court that proves that your firearms and ammunition have been turned in, sold, or stored. *(You may use* Proof of Firearms, Ammunition, and Magazines Turned In, Sold, or Stored (form GV-800) *for the receipt.)* You must also file a copy of the receipt with the law enforcement agency that served you with this order. **FAILURE TO FILE THIS RECEIPT IS A VIOLATION OF THIS ORDER.**

7 Number of pages attached to this Order, if any: _____

Date: _____ _____

Judicial Officer

Warnings and Notices to the Respondent

To the restrained person: This Order is valid until the expiration date and time noted on page 1. You are required to surrender all firearms, ammunition, and magazines that you own or possess in accordance with section 18120 of the Penal Code and you may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearm, ammunition, or magazines while this order is in effect. A hearing will be held on the date and at the time noted on Page 1 to determine if a more permanent gun violence restraining order should be issued. Failure to appear at the hearing may result in a court making an order against you that is valid for a period between one and five years. You may seek the advice of an attorney as to any matter connected with the order. The attorney should be consulted promptly so that the attorney may assist you in any matter connected with the order.

Violation of this Order is a misdemeanor. If you violate this Order, you will be prohibited from having in your custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm, ammunition, or magazine for a period of five years. This Order must be enforced by any law enforcement officer in the State of California who is aware of or shown a copy of this Order. The Order remains enforceable regardless of the acts of the parties; it may be changed only by an order of the court.

This is a Court Order.

After You Have Been Served With a Temporary Order

- Obey the order by turning in all firearms, ammunition, and magazines to a law enforcement agency or selling them to or storing them with a licensed gun dealer.
- Read *How Can I Respond to a Petition for Gun Violence Restraining Order?* (form GV-120-INFO) to learn how to respond to this Order.
- If you do not oppose the petition, fill out *Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-125) and file it with the court clerk.
- If you disagree with the petition, fill out *Response to Petition for Gun Violence Restraining Order* (form GV-120) and file it with the court clerk.
- You must have form GV-120 served by mail on the Petitioner or the Petitioner's attorney. You cannot do this yourself. The person who does the mailing should complete and sign *Proof of Service of Response by Mail* (form GV-250). File the completed proof of service with the court clerk before the hearing date or bring it with you to the hearing.
- In addition to the response, you may file and have declarations served, signed by you and other persons who have personal knowledge of the facts. You may use *Declaration* (form MC-030) for this purpose. It is available from the clerk's office at the court shown on page 1 of this form or at *www.courts.ca.gov/forms*. If you do not know how to prepare a declaration, you should see a lawyer.
- Whether or not you file a response, you should attend the hearing. If you have any witnesses, they must also go to the hearing.
- At the hearing, the judge can make a gun violence restraining order against you that lasts between one to five years. Tell the judge why you disagree with the order requested.

Instructions for Law Enforcement

Duties of Officer Serving This Order

The officer who serves this order on the Restrained Person must do the following:

- Ask if the Restrained Person is in possession of any firearms, ammunition, or magazines or has custody or control of any that they have not already turned in.
- Order the Restrained Person to immediately surrender to you all firearms, ammunition, and magazines.
- Issue a receipt to the Restrained Person for all firearms, ammunition, and magazines that have been surrendered.
- Complete a proof of personal service and file it with the court. You may use form GV-200 for this purpose.
- Within one business day of service, submit the proof of service directly into the California Restraining and Protective Order System (CARPOS), including the serving officer's name and law enforcement agency.

Duties of Agency on Surrender of Firearms, Ammunition, or Magazines

The law enforcement agency that has received surrendered firearms, ammunition, or magazines must do the following:

- Retain the firearms, ammunition, or magazines until the termination or expiration of this Order or of any other gun violence restraining order issued by the court.
- On the expiration of this Order or of any later gun violence restraining order issued by the court, return the firearms, ammunition, or magazines to the respondent as provided by chapter 2 of division 11 of title 4 of the Penal Code (commencing with section 33850). Firearms, ammunition, or magazines that are not claimed are subject to the requirements of section 34000.

This is a Court Order.

Instructions for Law Enforcement

(continued)

- If someone other than the Respondent claims title to any of the firearms, ammunition, or magazines surrendered, determine whether that person is the lawful owner. If so, return the firearms, ammunition, or magazines to that person as provided by chapter 2 of division 11 of title 4 of the Penal Code (commencing with section 33850).

Enforcing This Order

The law enforcement officer should determine if the Respondent had notice of the order. Consider the Respondent "served" (given notice) if:

- The officer sees a copy of the proof of service or confirms that the proof of service is on file; or
- The Respondent was informed of the order by an officer.

An officer can obtain information about the contents of the order and proof of service in CARPOS. If proof of service on the Respondent cannot be verified, the agency must advise the restrained person of the terms of the order and then enforce it *(see above: Duties of Officer Serving This Order).*

The provisions in this *Temporary Gun Violence Restraining Order* do not affect those of any other protective or restraining order in effect, including a criminal protective order. The provisions in another existing protective order remain in effect.

Clerk's Certificate
[seal]

(Clerk will fill out this part.)

—Clerk's Certificate—

I certify that this *Temporary Gun Violence Restraining Order (CLETS-TGV)* (form GV-110) is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____, Deputy

This is a Court Order.

GV-130

Gun Violence Restraining Order After Hearing or Consent to Gun Violence Restraining Order

Clerk stamps date here when form is filed.

Petitioner must complete items (1) and (2) only.

(1) Petitioner

a. Your Full Name or Name of Law Enforcement Agency:

_____

I am:
- ☐ A family member of the Respondent.
- ☐ An officer of a law enforcement agency *(A petition may be filed in the name of the law enforcement agency in which the officer is employed).*
- ☐ An employer of the Respondent.
- ☐ A coworker of the Respondent.
- ☐ An employee or teacher of a secondary or postsecondary school that the Respondent has attended in the last 6 months.

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

b. Your Lawyer *(if you have one for this case):*
Name: _____ State Bar No.: _____
Firm Name: _____

c. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or email. Law enforcement officer, give agency information.)*
Address: _____
City: _____ State: ____ Zip: _____ Telephone: _____
Email Address: _____ Fax: _____

(2) Respondent

Full Name: _____

Description of Restrained Person

Gender: ☐ Male ☐ Female ☐ Nonbinary
Height: _____ Weight: _____ Date of Birth: _____
Hair Color: _____ Eye Color: _____ Age: _____ Race: _____
Home Address: _____
City: _____ State: _____ Zip: _____

(3) Expiration Date

The court will complete the rest of this form.

This Order expires at:

(Time): _____ ☐ a.m. ☐ p.m. ☐ midnight on *(date):* _____

If no expiration date is written here, this Order expires one year from the date of issuance.

This is a Court Order.

Case Number:

4 Hearing

a. ☐ There was a hearing *(date):* _____ at *(time):* _____ in Dept.: _____ Room: _____.

(Name of judicial officer): _____ made the orders at the hearing.

b. ☐ These people were at the hearing.

(1) ☐ The Petitioner (3) ☐ The lawyer for the Petitioner *(name):* _____

(2) ☐ The Respondent (4) ☐ The lawyer for the Respondent *(name):* _____

c. ☐ There was not a hearing because Respondent filed a *Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-125).

5 Findings

a. The court finds by clear and convincing evidence that the following are true:

(1) Respondent poses a significant danger of causing personal injury to themselves, or another person by having in their custody or control, owning, purchasing, possessing, or receiving firearms, ammunition, or magazines.

(2) A gun violence restraining order is necessary to prevent personal injury to Respondent or to another person because less restrictive alternatives either have been tried and found to be ineffective, or have been determined to be inadequate or inappropriate for the current circumstances.

b. ☐ The court has received credible information that the Respondent owns or possesses one or more firearms, ammunition, or one or more magazines.

c. ☐ The facts as stated in the Petition and supporting documents, which are incorporated here by reference, establish sufficient grounds for the issuance of this Order. And/or for the reasons stated below.

☐ See the attached *Attachment* (form MC-025).

d. ☐ The Respondent filed *Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-125). The court finds that Respondent agreed not to have in Respondent's custody or control, own, purchase, possess, or receive a firearm, ammunition, or magazine or attempt to purchase or receive a firearm, ammunition, or magazine until: *(expiration date)* _____.

This is a Court Order.

6 No Fee to Serve

If the sheriff or marshal serves this order, service will be free.

7 Order Prohibiting All Firearms, Ammunition, and Magazines

a. You cannot have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearm, ammunition, or magazine (any ammunition feeding device).

b. You must:

(1) Surrender all firearms and ammunition, including magazines, in your custody or control or that you possess or own. If a law enforcement officer orders you to surrender all of your firearms and ammunition, including magazines, to the officer, you must do so immediately. If no order to surrender is made by a law enforcement officer, you must surrender all of your firearms and ammunition, including magazines, within 24 hours of being served with this Order. You may do so by:

a. surrendering all of your firearms and ammunition, including magazines, in a safe manner to the local law enforcement agency; or
b. selling all of your firearms and ammunition, including magazines, to a licensed gun dealer; or
c. storing all of your firearms and ammunition, including magazines, with a licensed gun dealer for as long as this Order is in effect.

(2) Within 48 hours of receiving this Order, file a receipt with the court that proves that your firearms and ammunition have been turned in, sold, or stored. *(You may use* Proof of Firearms, Ammunition, and Magazines Turned In, Sold, or Stored (form GV-800) *for the receipt.)* You must also file a copy of the receipt with the law enforcement agency that served you with this order. **FAILURE TO FILE THIS RECEIPT IS A VIOLATION OF THIS ORDER.**

8 Service of Order on Respondent

a. ☐ The Respondent personally attended the hearing. No other proof of service is needed. The clerk has provided the Respondent with a blank copy of *Request to Terminate Gun Violence Restraining Order* (form GV-600).

b. ☐ The Respondent did not attend the hearing. The Respondent must be personally served with a court file-stamped copy of this Order and a blank copy of *Request to Terminate Gun Violence Restraining Order* (form GV-600) by a law enforcement officer or someone age 18 or older, **and not a party to the action.**

c. ☐ This is an order based on the Respondent's filing a *Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-125). The court will provide notice to all parties.

9 Number of pages attached to this Order, if any: _____

Date: _____

_____
Judicial Officer

This is a Court Order.

Warnings and Notices to the Respondent

This Order is valid until the expiration date and time noted on page 1. If you have not done so already, you must surrender all firearms, ammunition, and magazines that you own or possess in accordance with section 18120 of the Penal Code. You may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive, any firearm, ammunition, or magazines while this Order is in effect. Under section 18185, you have the right to request one hearing per year to terminate this Order during its effective period. You may seek the advice of an attorney as to any matter connected with the order.

Violation of this Order is a misdemeanor punishable by a $1,000 fine or imprisonment for six months or both. (Pen. Code, §§ 19, 18205.) If you violate this Order, you will be prohibited from having in your custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, any firearm, ammunition, or magazines for a period of five years. This Order must be enforced by any law enforcement officer in the State of California who is aware of or shown a copy of this Order. The Order remains enforceable regardless of the acts of the parties; it may be terminated only by an order of the court.

Instructions for Law Enforcement

Duties of Officer Serving This Order

The officer who serves this order on the Restrained Person must do the following:

- Ask if the Restrained Person is in possession of any firearms, ammunition, or magazines or has custody or control of any that they have not already turned in.
- Order the Restrained Person to immediately surrender to you all firearms, ammunition, and magazines.
- Issue a receipt to the Restrained Person for all firearms, ammunition, and magazines that have been surrendered.
- Complete a proof of personal service and file it with the court. You may use form GV-200 for this purpose.
- Within one business day of service, submit the proof of service directly into the California Restraining and Protective Order System (CARPOS), including the serving officer's name and law enforcement agency.

Duties of Agency on Surrender of Firearms and Ammunition

The law enforcement agency that has received surrendered firearms, ammunition, or magazines must do the following:

- Retain the firearms, ammunition, or magazines until the expiration of this order or of any other gun violence restraining order issued by the court.
- On the expiration of this order or of any later gun violence restraining Order issued by the court, return the firearms and ammunition to the Respondent as provided by chapter 2 of division 11 of title 4 of the Penal Code (commencing with section 33850). Firearms, ammunition, or magazines that are not claimed are subject to the requirements of section 34000.
- If someone other than the Respondent claims title to any of the firearms, ammunition, or magazines surrendered, determine whether that person is the lawful owner. If so, return the firearms, ammunition, and magazines to him or her as provided by chapter 2 of division 11 of title 4 of the Penal Code (commencing with section 33850).

This is a Court Order.

Case Number:

Instructions for Law Enforcement

(continued)

Enforcing This Order

The law enforcement officer should determine if the Respondent had notice of the order. Consider the Respondent "served" (given notice) if:

- The officer sees a copy of the proof of service or confirms that the proof of service is on file; or
- The respondent was informed of the Order by an officer.
- Item 8a or 8c is checked.

An officer can obtain information about the contents of the order and proof of service in CARPOS. If proof of service on the respondent cannot be verified, the agency must advise the restrained person of the terms of the order and then enforce it *(see above: Duties of Officer Serving This Order)*.

The provisions in this *Gun Violence Restraining Order After Hearing or Consent to Gun Violence Restraining Order* (form GV-130) do not affect those of any other protective or restraining order in effect, including a criminal protective order. The provisions in any other existing protective order(s) remain in effect.

Instructions to Clerk

This order must be served on all parties by the court, if it is made following the filing of a *Consent to Gun Violence Restraining Order and Surrender of Firearms* (form GV-125).

(Clerk will fill out this part.)

—Clerk's Certificate—

Clerk's Certificate
[seal]

I certify that this *Gun Violence Restraining Order After Hearing or Consent to Gun Violence Restraining Order (CLETS-OGV)* (form GV-130) is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____ , Deputy

This is a Court Order.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

W20-10
Protective Orders – GVRO Form Revisions

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Subcommittee Responses
1.	Ruth Borenstein Individual	AM	The name of GV-125 should be changed to "Consent to GVRO Order" to avoid being overly broad.	The committee appreciates your comment and agrees with your suggestion and has incorporated it with a minor change to make the title of GV-125 "Consent to Gun Violence Restraining Order and Surrender of Firearms" to convey the impact of the form.
2.	Brady United By Mattie Scott, CA. State President	AM	SW 125, title should be changed to "Consent to Gun Violence Restraining Order" to protect women, children and families who die every day in our nation in domestic abuse situations. I lost my friend and her daughter last year in Antioch California to gun violence. Too many lives are lost to gun violence in domestic situations.	The committee appreciates your comment and agrees with your suggestion and has incorporated it with a minor change to make the title of GV-125 "Consent to Gun Violence Restraining Order and Surrender of Firearms" to convey the impact of the form.
3.	California Department of Justice By Rebekah Lee Associate Governmental Program Analyst	AM	Suggested changes to verbiage in bold. Other suggested changes in italics. 1. Epo-002 gun violence emergency protective order (p. 12) question #4 up to five years a period of time between one to five years. 2. Gv-020 response to gun violence emergency protective order (p. 15) in the box area: at the hearing, the court may make an order against you for one year a period of time change to between one to five years. 3. Gv-020-info how can i respond to a gun violence emergency protective order	The committee appreciates the comments from the Department of Justice. The committee understands that Penal Code section 18170(a) states that the time frame for a GVRO is between one to five years and will modify the GVRO forms accordingly so that there is no confusion about the time frame. The committee agrees with this suggestion and has modified its proposal.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-10
Protective Orders – GVRO Form Revisions

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Subcommittee Responses
			(p. 17) should i go to the court hearing? : if you do not go to the hearing, the judge can extend the order against you for up to five years a period of time between one to five years without hearing from you.	The committee agrees with this suggestion and has modified its proposal.
			(P. 18) how long does the order last? : the court will decide at the hearing whether to issue a gun violence restraining order that can last for up to five years for a period of time between one to five years.	The committee agrees with this suggestion and has modified its proposal.
			4. Gv-100 petition for gun violence restraining order	
			Pg 4 of 4 (p. 27): question #10 temporary restraining order: suggest changing temporary restraining order to temporary gun violence restraining order, and (tro) to (tgv)	The committee agrees with this suggestion and has modified its proposal.
			5. Gv-100-info can a gun violence restraining order help me?	
			(p. 28) what is a gun violence restraining order? The restrained person respondent also cannot buy any guns, ammunition, or magazines during this time.	The committee will take this suggestion under advisement when it revises the INFO forms in the future.
			Pg 2 of 3 (p. 29): how soon can i get the order? If you don't ask for a temporary restraining order, you will have to wait until the hearing, at which the court will decide whether to make an order that will last for one year a period of time between one to five years.	The committee agrees with this suggestion and has modified its proposal.
			Pg 3 of 3 (p. 30): **suggest to change all areas that read the restrained person to respondent	The committee discussed this suggestion but feels that the forms use consistent language now pre-GVRO and post-GVRO and that restrained person, rather than respondent, is easier for a self-represented litigant to understand.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

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	Commenter	Position	Comment	Subcommittee Responses
			6. Gv-109 notice of court hearing Pg 2 of 3 (p. 32): question #5 suggest to include option for gv-125, relinquishment of firearm rights (blank form)	The committee agrees with this suggestion and has modified its proposal.
			7. Gv-110 temporary GVRO Pg 1 of 5 (p. 34): question #3 **suggest to add guidance regarding 21 day expiration mandated per penal code 18165.	The committee does not choose to adopt this suggestion because this order does not apply in a situation addressed by Penal Code section 18165.
			Pg 2 of 5 (p. 35): question #5 no fee to serve (notify) restrained person respondent	See answer above.
			Pg 3 of 5 (p. 36): question #7 to the restrained person: **suggest to remove to the restrained person (consistent with gv-130 page 4 of 5, warnings and notices to the respondent)	Because this section is directed at the restrained person, the committee opts to leave it in.
			Pg 4 of 5 (p. 37): instructions for law enforcement **suggest to change all areas that read the restrained person to respondent	See answer above.
			Pg 5 of 5 (p. 38): enforcing this order Consider the respondent "served" (given notice) if: **suggest to add a bullet point for relinquishment of firearm rights	The committee agrees with this suggestion and has modified its proposal.
			**Suggest to change all areas that read the restrained person to respondent	See answer above.
			8. Gv-120-info pg 2 of 2 (p. 42) can i agree with the protected person petitioner to terminate the order?	The committee does not choose to adopt this suggestion because the way that the form is drafted is easier to understand.
			9. Gv-130 gun violence restraining order after hearing or on relinquishment of firearm rights	

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	Commenter	Position	Comment	Subcommittee Responses
			Pg 4 of 5 (p. 48): instructions for law enforcement **suggest to change all areas that read the restrained person to respondent Pg 5 of 5 (p. 49): enforcing this order Bullet point 3 item 9a 8a or 8c is checked **suggest to change all areas that read the restrained person to respondent Instructions to clerk **"provide notice" verbiage preferred to "serve". Per pc 18115 (d) relinquishment will constitute proof of service. 10. Gv-600 request to terminate gun violence restraining order Pg 1 of 2 (p. 50): question #2 a. full name or name of law enforcement agency **suggest to capitalize full field name of item #2 (a)	See answer above. The committee agrees with this suggestion and has modified its proposal. See answer above. The committee agrees with this suggestion and has modified its proposal. The committee agrees with this suggestion and has modified its proposal.
4.	Giffords Law Center to Prevent Gun Violence By Julia Weber, JD, MSW, Implementation Director	AM	Thank you for the hard and thoughtful work on these forms. We appreciate the opportunity to contribute to their development and have provided comments in an effort to make the information as accessible and accurate as possible. These forms are an important part of increasing individual and public safety; they are also a critical part of the ongoing effort statewide to decrease the time between a prohibiting event, often during a crisis, and temporary removal of firearms for safety. • EPO-002 o "Permanent order" is a misnomer; consider "longer-term order" (that same language "longer-term order" is currently in the warnings section on	The committee appreciates the comments from the Giffords Law Center to Prevent Gun violence. The committee agrees with this suggestion and has modified its proposal.

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	Commenter	Position	Comment	Subcommittee Responses
			the back of EPO-002 so the consistency would also be helpful here) o Add, "Law enforcement is required to ask for your firearms." This is necessary to remind law enforcement and to avoid a situation where law enforcement does not ask and the subject retains access to firearms unnecessarily, putting themselves and others at risk. o This order lasts for 1 to 5 years o Searched for "at the scene" should be added to address existing confusion about whether "searched for" means searching a database or a physical person or location search. o Warnings section on back: The same information needs to be addressed re: surrendering firearms and ammunition upon request to law enforcement so that the back and the front provide the same, accurate information about the restrained person's obligations. • GV-009 o In number one, please add "and/or Law Enforcement Officer" because the order may be requested under current law by the officer under their name OR under the name of the agency. If the policy is to favor filing under the agency name, that should be addressed through training. Given that the officer's name is a line on the EPO-002, and at the bottom of this form, it is important to include that here, too.	The committee agrees with this suggestion and has modified its proposal. The translation will be added following Judicial Council approval. The committee agrees with this suggestion and has modified its proposal. The committee agrees with this suggestion and has modified its proposal. The committee agrees with this suggestion and has modified its proposal to add "You must surrender them on request to law enforcement." The committee discussed this suggestion where the suggestion is to add "and/or law enforcement officer," the committee included clarifying instructions to the officer that they can file in their name or in the name of the agency that employs them and feels that this language eliminates confusion about filing.

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	Commenter	Position	Comment	Subcommittee Responses
			• GV-020 - Response to Gun Violence Emergency Protective Order o Page 15: "Use this form if you do not want the court to extend the Gun Violence Emergency Protective Order for a longer period." -- "For a longer period" is vague Please indicate that the court can make an order for 1-5 years. We suggest that universally where the forms refer to the duration of the order after hearing. o Page 15: The three points at the top under "Use this form if you do not want the court to extend the Gun Violence Emergency Protective Order for a longer period" should be numbered. Do you have to do all three? Make that clear. □ On the second point ("Fill out this form and take it to the court clerk.") --- • There is significant confusion about which clerk and where to take the forms. Consider clarifying language such as : the filing clerk or the filing window at your local court. □ On the third point ("Have someone age 18 or older - not you - mail a copy of this form and any attached pages to the law enforcement agency that applied for the EPO-002.) --- • Consider replacing "EPO-002" with the name of the form ("Gun Violence Emergency Protective Order") or including the number and the form. In some cases, two EPOs may be issued (EPO-001 and EPO-002) so additional clarification may be particularly helpful.	The committee agrees with this suggestion and has modified its proposal. The committee agrees with this suggestion and has modified its proposal. The committee discussed this suggestion and appreciates the alternate suggestions but decided to leave the language because the committee members did not see this problem in their courts and each court has a different procedure so changing the language could lead to more confusion rather than less. The committee can revise the form to include the form name and form number for clarity for EPO-002. See the answer above regarding law enforcement agency and officer.

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	Commenter	Position	Comment	Subcommittee Responses
			o Page 15: "(1.) Requesting Agency" – Confusing re: who the requesting agency is if the officer is named. Change to "Requesting officer and/or agency listed on the original order." o Page 15: "(2.) Restrained Person… (b.) Your address (If you have a lawyer, give your lawyer's information. You do not have to give telephone, fax, or e-mail address.)" --- Does that last part ("You do not have to give telephone, fax, or e-mail address) apply if they're giving their own information, or just if they're giving their lawyer's information? It's unclear.	The committee appreciates the comment but declines to make changes to this item because the protective order forms have uniform language in this section. The Protective Order Working Group, a joint working group of the Civil and Small Claims Advisory Committee and the Family and Juvenile Law Advisory Committee, is undertaking a redesign of the protective order series of forms. This comment will be incorporated into a future proposal. The committee agrees with this suggestion and has modified its proposal.
			o Page 15: In the box, change the sentence to read, "At the hearing, the court may make an order against you for 1-5 years." o Page 15: "(3.) Gun Violence Restraining Order. I do not agree that a gun violence restraining order should be issued because…" -- It's confusing that this language is different from the language at the very top of the form ("Use this form if you do not want the court to extend the Gun Violence Emergency Protective Order for a longer period"). Consider changing to something like "I do not agree that the gun violence restraining order should be extended for 1-5 years…" Also consider adding "(explain)" at the end (as in (4.)). o Page 16: Delete the checkmark box before "Denial, Justification, or Excuse."	The committee agrees with this suggestion and has modified its proposal. The committee appreciates the comment but declines to make changes to this item because this is an optional item for the respondent and the checkbox indicates that they opt to complete this section or not.

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	Commenter	Position	Comment	Subcommittee Responses
			o Page 16: Under "(5.) Surrender of Guns, Ammunition, and Magazines": ▯ 1st sentence -- Change "A Gun Violence Emergency Protective Order (form EPO-002) was issued" to "A Gun Violence Emergency Protective Order (form EPO-002) was issued against you." ▯ 3rd and 4th sentences are repetitive and therefore confusing. Consider swapping them and/or changing 3rd sentence ("You must surrender any of these items in your possession to law enforcement when they ask you to do so") to "You must surrender any of these items in your possession to law enforcement if and when they ask you to do so." Consider also deleting "immediate" from the 4th sentence. ▯ (b.) "… A copy of the receipt… is attached OR has already been filed with the court" --- consider adding "and the law enforcement agency," so the second option reads, "has already been filed with the court and the law enforcement agency." • GV-020-INFO: How Can I Respond to a Gun Violence Emergency Protective Order? o Page 17: Who should ask for a Gun Violence Emergency Protective Order? Eliminate the word "was" from "and was issued by a judicial officer". o Page 17: Under "Should I go to the court hearing? The sentence should read "Yes. You should go to court on the date listed on the Notice of Court Hearing or Gun Violence Emergency Protective Order (form EPO-002)" (include the name of the form not just the form number)	The committee agrees with this suggestion and has modified its proposal. The committee appreciates the comment but declines to make changes to this item because the existing language is less confusing than the proposed language. The committee agrees with this suggestion and has modified its proposal. The committee agrees with this suggestion and has modified its proposal. The committee agrees with this suggestion and has modified its proposal. The committee agrees with this suggestion and has modified its proposal.

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Protective Orders – GVRO Form Revisions

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	Commenter	Position	Comment	Subcommittee Responses
			o What if I don't obey the emergency protective order should include the following: "You may also be prohibited for a longer period of time from having access to firearms."	The committee agrees with this suggestion and has modified its proposal.
			o What if I don't agree with what the order says? Consider changing it to "What if I don't want the order extended?" Then, "The order cannot be changed until the hearing. If you do not want the court to extend the order for 1-5 years, fill out…."	The committee agrees with this suggestion and has modified its proposal.
			o Should I go to the court hearing? Delete for up to five years and insert for 1-5 years. Same with "How long does the order last?"	
			• GV-030: Gun Violence Restraining Order After Hearing on EPO-002	See the answer above regarding law enforcement agency and officer.
			o Requesting Agency or Officer should be included in #1 and 1.a. should say, "Law enforcement agency or officer"	The committee agrees with this suggestion. But this item is pending change until further policy instructions from the Department of Justice (DOJ).
			o Page 19: Consider adding a box in the Sex category of "Description of Restrained Person" for those who do not identify as male or female.	The committee does not recommend making these changes because they go beyond the scope of the legislation.
			• GV-100: Petition for Gun Violence Restraining Order	
			o Page 24: Add name of administrator	The committee declines to make this change because the forms currently use language that is easier to understand.
			o Add name of employer	
			o It might be good to specify what a respondent is the first time it shows up on each form (person to be restrained).	This comment is outside the scope of this proposal, but will be addressed in the future.
				See the answer above regarding law enforcement agency and officer.

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	Commenter	Position	Comment	Subcommittee Responses
			o Venue: what is the venue requirement for GVROs? Could that be explained on an INFO sheet for pro pers who may not be familiar with the rules?	The committee agrees with this suggestion and has modified its proposal.
			o Law enforcement agency or officer	The committee agrees with this suggestion and has modified its proposal.
			• GV-100-INFO:	
			o What is? Add to "It is a court order that prohibits…for a temporary period of time" or "temporarily."	The committee agrees with this suggestion and has modified its proposal.
			o If you need…refer to the other options for civil restraining orders (workplace, civil harassment, elder abuse)	This information is already included in the form.
			o Add: You may need other local forms. Ask your self-help center or the clerk. (many courts have local cover sheets).	
			o Page 28: It should be noted that any person who regularly resides in the household within the last six months is grouped in under "1. An immediate family member." This might be confusing for those who have roommates or atypical housing arrangements. Making it its own # might fix this.	The committee appreciates the feedback but prefers to leave it in its present form because all of the steps may not be exactly the same for each person and it may create more confusion if it looks like it is mandatory in the form of a checklist.
			o Page 28: Under "What do I need to do to get the order?" this might be better as a checklist.	The Protective Order Working Group, a joint working group of the Civil and Small Claims Advisory Committee and the Family and Juvenile Law Advisory Committee, is undertaking a redesign of the information sheets for the protective order series of forms. This comment will be incorporated into a future proposal.
			o Page 29: Under "How can I convince the judge?", the form lists the kinds of evidence that could work, but it might be useful to also present the various forms this evidence could take (witnesses, text messages, voicemails, photos, etc.). Right now	Same response as above.

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	Commenter	Position	Comment	Subcommittee Responses
			this is listed under "Do I need to bring a witness to the hearing?", but it might fit better when discussing the evidence needed. o It might be beneficial to include how the process affects the respondent since they are often someone the petitioner cares about. It may be important to note that this is a civil action but if the respondent violates the order they could be charged with a crime. • GV-109 Notice of Court Hearing o Add officer or agency o Page 31: l "Court fills in these fields" above all three boxes would be helpful • GV-110 Temporary Gun Violence Restraining Order o Law enforcement agency or officer o Page 34: same issue with court address box as page 31 o Page 37: if you consent to the order and are willing to give up your access to firearms and ammunition for 1-5 years instead to be more accurate, avoid confusion around the duration and what people are consenting to, and to support court efficiency: if people want to agree to the order, they can now but suggesting it is a permanent relinquishment of firearms rights (which it is not) will make it less likely consent to the order will be perceived as a viable option.	See the answer above regarding law enforcement agency and officer. The standards for Judicial Council forms dictate the format that is currently on the form. See the answer above regarding law enforcement agency and officer. Same response as above. The committee agrees with this suggestion and has modified its proposal. The committee agrees with this suggestion and has modified its proposal.

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	Commenter	Position	Comment	Subcommittee Responses
			• GV-120: Response to Petition for Gun Violence Restraining Order o Pg. 39: change “a” to “the” in “if you agree to” at the top of the page o “If you do not agree to THE gun violence restraining order, add “filed against you”, fill out this form and take it to the court clerk.” o Law enforcement agency….and/or OFFICER should be added. o Pg. 39: “If you agree to a gun violence restraining order, use Relinquishment of Firearm Rights (form GV-125)”…add “to tell the court.” o Pg. 40: “You must sell to or store with a licensed gun dealer, or turn in to a law enforcement agency, any guns, other firearms, ammunition, or magazines in your immediate possession or control within 24 hours of being served with form GV-110. You must file a receipt with the court. You may use form GV-800, Proof of Firearms Turned In, Sold, or Stored for the receipt.” ▯ What does “immediate possession or control” mean? ▯ “Other firearms”: What is a firearm other than a gun? ▯ Licensed gun dealer in state of filing? Which law enforcement agency? ▯ Does “may use” indicate that GV-800 is optional? If so, what suffices for an acceptable receipt? ▯ How soon must the respondent file a receipt with the court? Can the receipt be filed concurrently	The committee agrees with this suggestion and has modified its proposal. See the answer above regarding law enforcement agency and officer. The committee does not choose to adopt this edit at this time. The committee appreciates the comments and notes that the chosen language follows the language from Penal Code sections 18100 et seq. to provide the required legal warnings to the parties. Penal Code section 18120(b)(5) specifies that the person shall file a receipt within 48 hours after being served with the order.

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	Commenter	Position	Comment	Subcommittee Responses
			with this form? Must the receipt be attached to this form? o Pg. 40 (check box): "I have turned in my guns, other firearms, ammunition, and magazines to a law enforcement officer or agency, or sold them to or stored them with a licensed gun dealer." ▯ This language mentions the option of turning in to a law enforcement officer--as opposed to agency--for the first time in this form. Preceding paragraph did not include this. Consider adding "officer" above.	The committee agrees with this suggestion and has modified its proposal.
			• GV-120-INFO o Pg. 41: "It is a court order that prohibits someone from having any guns, ammunition, or magazines (any ammunition feeding device). ▯ Consider defining all three terms, esp. given the potential confusion over a non-gun firearm as noted above.	The Protective Order Working Group is redesigning the information sheets for the protective order series of forms. This comment will be incorporated into a future proposal. The committee agrees with this suggestion and has modified its proposal.
			o Add "temporarily" at the end of the first sentence or else it reads as though it is a permanent order. o Pg. 41: "a coworker who has had regular interactions with you for at least a year…" ▯ How is the phrase "regular interactions" defined? Consider putting it in quotes so that people might know it is in the law.	The committee agrees with this suggestion and has modified its proposal. The committee agrees with this suggestion and has modified its proposal. The committee agrees with this suggestion and has modified its proposal.

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			o Pg. 41: "What if I don't obey the temporary order? The police can arrest you. You can go to jail and pay a fine." ▯ Add "You could lose access to firearms for a longer period of time." ▯ Under "What if I don't oppose the Petition"? Change the sentence for clarity and to avoid being inaccurately broad to, "If you agree to give up your access to firearms and ammunition, for the time period…" o Pg. 42: Delete "Yes." Under, "Yes", and just start with, "Assume that the person who is asking for the order will attend the hearing. It is probably best not to talk to him or her [replace with "them" unless the judge or that person's attorney says that you can." ▯ Would replace "him or her" with "them"	The committee agrees with this suggestion and has modified its proposal. The committee agrees with this suggestion and has modified its proposal. The committee appreciates this comment and agrees with your suggestion and has incorporated it with a minor change to make the title of GV-125 "Consent to Gun Violence Restraining Order and Surrender of Firearms" to convey the impact of the form.
			• GV-125 Change name to "Consent to Gun Violence Restraining Order" for plain language accessibility and understanding and to avoid being unnecessarily broad.	The committee agrees with this suggestion and has modified its proposal. See answer above.
			- Change first sentence to "…and you want to to agree to the order without a court hearing." - Use "filing clerk" instead of court clerk (people may get confused with courtroom clerk otherwise) - Petitioner needs to include officer in addition to agency since it can be filed by either	See the answer above regarding law enforcement agency and officer. See answer above. See answer above.

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	Commenter	Position	Comment	Subcommittee Responses
			- • GV-130 Gun Violence Restraining Order After Hearing or [change to "On Consent to Order"] o Add option for those not using Male or Female o Page 2: On c and d, change name of form to Consent to Order. • GV-610-Notice of Hearing on Request to Terminate Gun Violence Restraining Order o Pg. 52- Does the court fill in the middle box for the court name and address(same with case number box below) or does the petitioner need to? Unclear if it is part of Section 1 and 2 that must be filled out petitioner, especially with the box above which is to be filled out by the clerk. Additionally, if needs to be filled out by petitioner, where can case number be found? • GV-620 o Add officer at top line (not just agency) – same with GV-630 and GV-700 and everywhere agency is without officer as it can still be filed under officer or agency name. o Pg. 54-2. Does the petitioner use the address provided by the respondent on form GV-610? Maybe state this explicitly, "Address provided by the respondent in form GV-610 Section 1c."	The current instructions are consistent with Judicial Council form standards. The Protective Order Working Group, a joint working group of the Civil and Small Claims Advisory Committee and the Family and Juvenile Law Advisory Committee, is undertaking a redesign of the protective order forms. This comment will be incorporated into that discussion. See the answer above regarding law enforcement agency and officer. The committee chooses to keep the current item as is. This item seeks to obtain information from the Petitioner if they have a different address for the Respondent.
5.	Joint Rules Subcommittee (JRS), on behalf of the Trial Court Presiding Judges Advisory Committee (TCPJAC) and the	AM	EPO-002-include form number on bottom right corner. GV-020-In the hearing box, remove "one year" and replace with "up to five years."	The committee agrees with this suggestion and has modified its proposal. The forms have been revised to state between one to five years.

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	Commenter	Position	Comment	Subcommittee Responses
	Court Executives Advisory Committee (CEAC)		GV020 INFO under "What if I don't obey the emergency protective order?" Recommend "You can go to jail and/or pay a fine."	Other changes have been made to this section to add more information.
			GV-020-INFO paragraph starting "The person who serves the form must fill out a Proof"	The committee agrees with this suggestion and has modified its proposal.
			GV-020-INFO page 2, first paragraph, remove "But." Sentence should start "If possible, you…"	The committee agrees with this suggestion and has modified its proposal.
			GV-030-Since courts are leaning toward gender neutrality, should the M and F in the box be removed, or should we include a box for "non-binary."	See answer above regarding DOJ policy.
			GV-030 page 4, first paragraph, should read "firearm, ammunition, or magazine for a period of up to five years."	The committee agrees with this suggestion and has modified its proposal.
			GV-100-page 1, #1a-Your full name… Page 1, "I am… 4 and 5 boxes are asking for approval of the employer/school to file, what must be submitted showing "approval?"	Assembly Bill 61 (Stats. 2019, ch. 725) did not dictate what must be submitted to show "approval" for filing by an employer or a school. This is up to judicial discretion.
			Page 1, #2, since the "gender" is on the GV-130, should be include an option for male, female and non-binary?	See answer above regarding DOJ policy.
			GV-100 INFO-page 1, 2nd paragraph, we recommend changing language to "You can ask for one if you regularly have contact with the parson you think is dangerous as:"	The committee does not recommend this change because it does not exactly track the language of the statute.

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	Commenter	Position	Comment	Subcommittee Responses
			GV-100 INFO page 2, 2nd paragraph, "…make an order that will last one to five years."	The committee agrees with this suggestion and has modified its proposal.
			GV-100 INFO page 2, 8th paragraph, remove "Then…" Paragraph should start You will also need to …"	The committee agrees with this suggestion and has modified its proposal.
			GV-110-page 1, #2, either remove the gender options or add an option for "non-binary."	See answer above regarding DOJ policy.
			GV-110 page 2, #4c, move "and/or for the…" should be moved up a line for continuous flow.	The committee agrees with this suggestion and has modified its proposal.
			GV-110, page 3, add a space between the 2 paragraphs at the bottom. Add in last paragraph "….firearm, ammunition, or magazine for a period up to five years."	The committee agrees with this suggestion and has modified its proposal.
			GV-110, page 5 last paragraph, we recommend should read "The provisions in any other existing protective order(s) remain in effect."	The committee agrees with this suggestion and has modified its proposal.
			GV-120, page 1 in hearing box, we recommend changing sentence to "Be prepared to tell the court at the hearing why you don't agree."	The committee agrees with this suggestion and has modified its proposal.
			GV-120-INFO, page 1 paragraph 1, remove "he or she" and replace with "they."	This is already revised on the form.
			GV-120-INFO, we recommend changing language from What if I don't oppose the Petition? To What if I don't agree with the Petition?	The committee prefers the language that is on the form.
			GV-120-INFO, page 2, 3rd paragraph, should read "for up to five years without…."	This language has been changed to be consistent with the statutory language.

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			GV-120-INFO, page 2, first paragraph in 2nd column, remove "him or her" and replace with "them."	The committee agrees with this suggestion and has modified its proposal.
			GV-125 page 1, bullet 3, remove "to oppose a gun violence restraining order." And replace with "to tell the court why."	The committee agrees to add the suggested language because it is more descriptive but also opts to keep the current language.
			GV-130, page 1, #2, remove options for gender or include "non-binary."	See answer above regarding DOJ policy.
			GV-130, page 2, #5c, move "and/or for the reasons…" to follow this Order (line above)	The committee agrees with this suggestion and has modified its proposal.
			Page 12 of 12 GV-130, page 5, last paragraph, we recommend removing last line and replacing with "The provisions in any other existing protective order(s) remain in effect."	The committee agrees with this suggestion and has modified its proposal.
			GV-610, page 2 last paragraph before Judicial Officer signature line, third sentence, "Take the completed proof of service form…"	The committee agrees with this suggestion and has modified its proposal.
			GV-630, page 1, because #4 is broken up on 2 pages, we recommend putting the entire "Findings" on one page. Having the last paragraph end with "and" and then continue on to the 2nd page reads awkwardly.	The committee agrees with the commenter's reasoning, but space constraints prevent making this edit.
			GV-710, page 2, for consistency, #4, last box, remove "attorney" and replace with "lawyer."	The committee agrees with this suggestion and has modified its proposal.

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			Request for Specific Comment **In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:** **1. Does the proposal appropriately address the stated purpose?** • Yes. **2. Are the forms easy for users, especially self-represented litigants, to understand?** • Yes. **3. Do you have any suggestions for improving their usability or readability?** • No additional comments beyond our recommendations above. **The advisory committee also seeks comments from courts on the following cost and implementation matters:** **4. 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?** • Update procedure, update case management codes, training for clerical, supervisors, Judicial Assistants and Judicial Officers. Training estimate is 8 hours. **5. Would three months from Judicial Council approval of this proposal until its effective**	The committee appreciates the responses to the specific questions below. No response required. No response required. No response required. No response required.

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W20-10
Protective Orders – GVRO Form Revisions

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Subcommittee Responses
			date provide sufficient time for implementation? • Yes, this would be adequate.	No response required.
6.	Geri Lafferty Individual	NI	Thank you for considering my comments. I am concerned that Relinquishment of Firearm Rights will set off an explosion of people citing that this encroaches on their Second Amendment rights. How about: Consent to Gun Violence Restraining Order? It more realistically describes the order.	The committee appreciates this comment and agrees with your suggestion and has incorporated it with a minor change to make the title of GV-125 “Consent to Gun Violence Restraining Order and Surrender of Firearms” to convey the impact of the form.
7.	Los Angeles City Attorney’s Office By Amanda Wong, Deputy City Attorney	A	Generally agree with changes with a few comments: GV-110 Item 6(b)(1) - recommend changing proposed language "If a law enforcement officer orders you to surrender all of your firearms and ammunition, including magazines, to the officer, you must do so immediately" to "If a law enforcement officer orders you to surrender all your firearms and ammunition, including magazines, you must immediately surrender them to the officer." The current language is slightly ambiguous and open to interpretation as law enforcement officers may interpret the language as currently phrased to permit them to: (1) serve but do not request surrender of firearms; (2) serve and request surrender, but when subject refuses, they advise them to surrender to law enforcement or firearms dealer within 24 hours; or (3) serve but never request immediate surrender of firearms and inform the subject they may surrender firearms within 24 hours to law enforcement or firearms dealer.	The committee agrees with this suggestion and has modified its proposal.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-10
Protective Orders – GVRO Form Revisions

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	Commenter	Position	Comment	Subcommittee Responses
			GV-100 and GV-110 Items 8 and 5 - What is the legal authority for sheriff serving for free? Have had some feedback that sheriff can charge $35 service fee.	Senate Bill 1200 (Stats. 2018, ch. 898), amended Government Code section 6103.2 to add GVRO's to the list types of orders that are served without a fee. This service is added to the types of service for which sheriffs are to be reimbursed by the court.
8.	Los Angeles County Counsel By Alyssa Skolnick Deputy County Counsel	AM	On behalf of the Los Angeles Department of Children and Family Services Our only suggestion would be to modify the term "Restrained Person" to "Person to be Restrained". It's thought that some of our clients who might be applying for GVRO might find the form to be confusing. If an individual is just starting the process of applying for a GVRO, they might get confused by the term "Restrained Person" as no one has been restrained yet. As such, changing the term "Restrained Person" to "Person to be Restrained" might make it easier for an applicant to understand the form.	"Person to be Restrained" is currently used on all forms that are prior to a restraining order. After an order is issued, then the forms refer to "Restrained Person."
9.	Orange County Bar Association By Scott B. Garner, President	A	* The commenter indicates agreement.	No response required.
10.	Orange County Superior Court Civil and Appellate Division Management and Analyst Team, Superior Court of California, County of Orange	AM	**Does the proposal appropriately address the stated purpose?** The proposal does appropriately address the stated purpose. It is clear that these forms are being used to comply with Assembly Bills 61 and 1493. However, there is a typo that states "effective September 1, 2010," when the forms state "2020." This should be addressed.	The committee appreciates the responses to the specific questions below. No response required.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-10
Protective Orders – GVRO Form Revisions

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	Commenter	Position	Comment	Subcommittee Responses
			As for the proposal itself, the categorization of the new forms and what assembly bill the category is addressing makes the proposal very clear and organized. **Are the forms easy for users, especially self-represented litigants, to understand?** Yes, the forms are at an appropriate reading level. **Do you have any suggestions for improving their usability or readability?** Yes. Page 3 of the GV-100-INFO shows an image of the GV-109. The line coming down across the page makes it seem like it should be disregarded. I would instead circle or draw an arrow where the date is entered for clarity. Yes, for GV-120-INFO, the included questions would indeed help a litigant or party in understanding what a restraining order is. However, there should be an additional sheet detailing the case flow of the order. Both parties (the respondent and petitioner) should know the steps of the filed protective order, and the subsequent hearings that will potentially follow. **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 committee appreciates this feedback. The Protective Order Working Group is undertaking a redesign of the information sheets for the protective order series of forms. This comment will be incorporated into a future proposal. Same answer as above.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-10
Protective Orders – GVRO Form Revisions

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	Commenter	Position	Comment	Subcommittee Responses
			The implementation requirements for the court include training of courtroom clerks and case processing staff. Procedures would need to be revised to reflect the new titles. New filings would need to be added to the case management system and tested for validation prior to deployment. The approximate level of effort is estimated at 8 hours FTE by a Program Coordinator Specialist over approximately one month to test filing types, revise procedures, approve through workflow, train and implement. Implementation requirements of these new forms would be training for Legal Processing Specialists and Courtroom Clerks. Staff would need to be familiar with the new filing type (a new type would also need to be created in our case management system) and be informed of the revisions. Aside from the new filing type, courtroom staff would simply need to be notified of the minor changes regarding who are qualified petitioners/filers. Also, procedures would need to be changed reflecting the new file type and filing form names. **Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?** Because of the multiple forms being revised, multiple procedures would be affected. Moreover, reference sheets and informational packets to the public will need to be created. A minimum of 3 months would be needed for needed development and supervisor approval. More time would be preferable for implementation of this proposal, if that were possible.	The committee appreciates this useful information about implementation procedures. The committee appreciates the information about implementation. The timeframe from Judicial Council approval until the effective date will provide three months of time for implementation.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-10
Protective Orders – GVRO Form Revisions

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	Commenter	Position	Comment	Subcommittee Responses
			How well would this proposal work in courts of different sizes? The revised protective order forms would have an equal impact for courts of all sizes.	The committee appreciates the useful feedback.
11.	Superior Court of California, County of Los Angeles By Bryan Borys	AM	EPO-002-include form number on bottom right corner. GV-020-In the hearing box, remove "one year" and replace with "up to five years." GV020 INFO under "What if I don't obey the emergency protective order?" Recommend "You can go to jail and/or pay a fine." GV-020-INFO paragraph starting "The person who serves the form must fill out a Proof" GV-020-INFO page 2, first paragraph, remove "But." Sentence should start "If possible, you…" GV-030-Since courts are leaning toward gender neutrality, should the M and F in the box be removed, or should we include a box for "non-binary." GV-030 page 4, first paragraph, should read "firearm, ammunition, or magazine for a period of up to five years." GV-100-page 1, #1a-Your full name…	The committee agrees with this suggestion and has modified its proposal. The committee agrees with this suggestion and has modified its proposal. Other changes have been made to this section to add more information. The committee agrees with this suggestion and has modified its proposal. The committee agrees with this suggestion and has modified its proposal. See answer above regarding DOJ policy. The committee agrees with this suggestion and has modified its proposal.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-10
Protective Orders – GVRO Form Revisions

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Subcommittee Responses
			Page 1, "I am… 4 and 5 boxes are asking for approval of the employer/school to file, what must be submitted showing "approval?"	Assembly Bill 61 (Stats. 2019, ch. 725) did not dictate what must be submitted to show "approval" for filing by an employer or a school.
			Page 1, #2, since the "gender" is on the GV-130, should be include an option for male, female and non-binary?	See answer above regarding DOJ policy.
			GV-100 INFO-page 1, 2nd paragraph, we recommend changing language to "You can ask for one if you regularly have contact with the person you think is dangerous as:"	The committee does not recommend making this revision because it does not exactly track the statute.
			GV-100 INFO page 2, 2nd paragraph, "…make an order that will last one to five years."	The committee agrees with this suggestion and has modified its proposal.
			GV-100 INFO page 2, 8th paragraph, remove "Then…" Paragraph should start You will also need to …"	The committee agrees with this suggestion and has modified its proposal.
			GV-110-page 1, #2, either remove the gender options or add an option for "non-binary."	See answer above regarding DOJ policy.
			GV-110 page 2, #4c, move "and/or for the…" should be moved up a line for continuous flow.	The committee agrees with this suggestion and has modified its proposal.
			GV-110, page 3, add a space between the 2 paragraphs at the bottom. Add in last paragraph "…firearm, ammunition, or magazine for a period up to five years."	The committee agrees with this suggestion and has modified its proposal.
			GV-110, page 5 last paragraph, we recommend should read "The provisions in any other existing protective order(s) remain in effect."	The committee agrees with this suggestion and has modified its proposal.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-10
Protective Orders – GVRO Form Revisions

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Subcommittee Responses
			GV-120, page 1 in hearing box, we recommend changing sentence to "Be prepared to tell the court at the hearing why you don't agree."	The committee agrees with this suggestion and has modified its proposal. The same instructions appear on GV-020 and the committee has made the same revision on that form.
			GV-120-INFO, page 1 paragraph 1, remove "he or she" and replace with "they."	This is already revised on the form.
			GV-120-INFO, we recommend changing language from What if I don't oppose the Petition? To What if I don't agree with the Petition?	The committee prefers the language that is on the form.
			GV-120-INFO, page 2, 3rd paragraph, should read "for up to five years without…."	This language has been changed to be consistent with the statutory language.
			GV-120-INFO, page 2, first paragraph in 2nd column, remove "him or her" and replace with "them."	The committee agrees with this suggestion and has modified its proposal.
			GV-125 page 1, bullet 3, remove "to oppose a gun violence restraining order." And replace with "to tell the court why."	The committee agrees to add the suggested language to read, "If you do not agree to a gun violence restraining order, use *Response to Petition for Gun Violence Restraining Order* (form GV-120) to tell the court you oppose a gun violence restraining order."
			GV-130, page 1, #2, remove options for gender or include "non-binary."	See answer above regarding DOJ policy.
			GV-130, page 2, #5c, move "and/or for the reasons…." to follow this Order (line above)	The committee agrees with this suggestion and has modified its proposal.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-10
Protective Orders – GVRO Form Revisions

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Subcommittee Responses
			GV-130, page 5, last paragraph, we recommend removing last line and replacing with "The provisions in any other existing protective order(s) remain in effect."	The committee agrees with this suggestion and has modified its proposal.
			GV-610, page 2 last paragraph before Judicial Officer signature line, third sentence, "Take the completed proof of service form…"	The committee agrees with this suggestion and has modified its proposal.
			GV-630, page 1, because #4 is broken up on 2 pages, we recommend putting the entire "Findings" on one page. Having the last paragraph end with "and" and then continue on to the 2nd page reads awkwardly.	The committee agrees with the commenter's reasoning, but space constraints prevent making this edit.
			GV-710, page 2, for consistency, #4, last box, remove "attorney" and replace with "lawyer."	The committee agrees with this suggestion and has modified its proposal.
			Request for Specific Comment In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:	The committee appreciates the responses to the specific questions below.
			• Does the proposal appropriately address the stated purpose? Yes.	No response required.
			• Are the forms easy for users, especially self-represented litigants, to understand? Yes.	No response required.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-10
Protective Orders – GVRO Form Revisions

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Subcommittee Responses
			• Do you have any suggestions for improving their usability or readability? No additional comments beyond our recommendations above. The advisory committee also seeks comments from *courts* on the following cost and implementation matters: **• 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?** Update procedure, update case management codes, training for clerical, supervisors, Judicial Assistants and Judicial Officers. Training estimate is 8 hours. **• Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?** Yes, this would be adequate.	No response required. No response required. No response required.
12.	Superior Court of California, County of San Diego By Mike Roddy, Executive Officer	AM	**Does the proposal appropriately address the stated purpose?** Yes.	The committee appreciates the comments to this proposal. No response required.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-10
Protective Orders – GVRO Form Revisions

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Subcommittee Responses
			Are the forms easy for users, especially self-represented litigants, to understand? Yes.	No response required.
			Do you have any suggestions for improving their usability or readability? See General Comments.	No response required.
			What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? Updating internal procedures, training staff, and adding filing for new GV-125 form to case management system.	No response required.
			Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes, provided the final version of the forms are provided to the courts at least 30 days prior to the effective date. This will give courts sufficient time to update their procedures, configure local packets, order printed stock, and distribute revised EPO-002s, which are printed in triplicate, to local law enforcement agencies.	Thank you for the response. This is useful information for the Judicial Council to understand about implementation.
			How well would this proposal work in courts of different sizes? It appears that the proposal would work for courts of all sizes.	No response required.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

W20-10
Protective Orders – GVRO Form Revisions

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Subcommittee Responses
			GENERAL COMMENTS: **GV-130, page 5 Enforcing This Order:** The third bullet should refer to item 8a. The form does not contain an item 9a. **EPO-002**: Request to make address of restrained party a mandatory field and require a mailing address if no physical address. Add additional line for the address of the law enforcement agency—this is to ensure a complete address is given so, the clerk can accurately complete service of hearing date.	The committee agrees with this suggestion and has modified its proposal. The committee agrees with this suggestion and has modified its proposal.
13.	Mrs. Kath Tsakalakis	N	The proposal for GV-125 title should be changed to "Consent to Gun Violence Restraining Order." It should not refer to "Relinquishment of Firearm Rights." The person is only consenting to a restraining order that would apply for a limited time - they are not giving up their firearm rights, this makes it sound like a sweeping statement, in perpetuity. Thank you.	The committee appreciates your comment and agrees with your suggestion and has incorporated it with a minor change to make the title of GV-125 "Consent to Gun Violence Restraining Order and Surrender of Firearms" to convey the impact of the form.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

Item number: 41

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: 4/9/2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Protective Orders: Elder or Dependent Adult Abuse Prevention Forms. Revise forms EA-100, EA-120, and EA-130

Committee or other entity submitting the proposal:
Civil and Small Claims

Staff contact (name, phone and e-mail): Kristi Morioka, 916-643-7056, kristi.morioka@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 10/28/2019
Project description from annual agenda: Assembly Bill 1396 provides that when issuing a protective order after notice and hearing to prohibit certain types of abuse against an elder or dependent adult, the court may also issue an order requiring the restrained party to participate in counseling or anger management courses. The bill provides that the council is to revise or adopt forms to implements this new provision if appropriate.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue . San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-26

Title Protective Orders: Elder or Dependent Adult Abuse Prevention Forms	Action Requested Review and submit comments by June 9, 2020
Proposed Rules, Forms, Standards, or Statutes Revise forms EA-100, EA-120, and EA-130	Proposed Effective Date January 1, 2021
Proposed by Civil and Small Claims Advisory Committee Hon. Ann I. Jones, Chair	Contact Kristi Morioka, Attorney, 916-643-7056, kristi.morioka@jud.ca.gov

Executive Summary and Origin

Assembly Bill 1396 (Obernolte; Stats. 2019, ch. 628) provides that a court, when issuing an order for elder or dependent adult abuse prevention, may, if appropriate, also issue an order requiring the restrained party to attend mandatory clinical counseling or anger management courses. The legislation also requires the Judicial Council to revise or adopt forms to do so. The Civil and Small Claims Advisory Committee recommends revising three mandatory elder or dependent adult abuse prevention forms to implement this legislation.

Background

Elder or dependent adult abuse is a significant problem for a large portion of the population in California. In 2009, the California Senate Office of Oversight and Outcomes reported that 13 percent of all complaints to the California Office of the State Long-Term Care Ombudsman involved abuse, gross neglect, or exploitation—over twice the national rate of 5 percent.[1] A bill to create a civil action for elder or dependent adult abuse prevention was passed in 1992 (Sen. Bill 679 (Mello); Stats. 1991, ch. 774). The author of AB 1396, Assembly Member Jay Obernolte (R-Hesperia), states that elder or dependent adult abuse prevention (elder abuse) cases and domestic violence prevention cases are similar "in that almost 60% of elder and dependent adult abuse and neglect incidents, the perpetrator is a family member. However, in domestic violence cases more tools are available to prevent reoccurrence of the abuse."[2]

[1] California Senate Office of Oversight and Outcomes, *California's Elder Abuse Investigators: Ombudsmen Shackled by Conflicting Laws and Duties* (Nov. 3, 2009), p. 7.

[2] Jay Obernolte, *Fact Sheet Assembly Bill 1396—Elder Abuse Prevention Programs* (no date), p. 1.

The goal of AB 1396 is to help prevent ongoing elder and dependent adult abuse by giving judges the ability to order the restrained person to attend clinical counseling or to enroll in anger management courses.[3]

Different prevention tool provided in domestic violence restraining order cases

In domestic violence restraining order (DVRO) cases, a court may order that the restrained person complete a certified 52-week batterer intervention program that has been approved by the probation department.[4] Batterer intervention programs (BIPs) were created to address the unique challenges of domestic violence cases. Courts can order a restrained person to attend a BIP in a civil DVRO case and that person is required as a condition of probation to complete a BIP if convicted of domestic violence in criminal court. Until recently, the required length of certified programs was at least 52 weeks. Currently, there are six counties piloting alternative lengths of programming.[5]

AB 1396 does not include BIPs as a treatment option. Anger management courses generally do not address coercive behaviors and power dynamics. Instead, the focus is on preventing loss of control. AB 1396 also authorizes the court to order the restrained party to participate in clinical counseling, which could address other issues such as mental health issues or substance use disorders.

The Proposal

This proposal would add items to the elder or dependent adult abuse prevention forms to reflect the new types of orders a judge may consider under AB 1396. The following forms are proposed to be revised:

- *Request for Elder or Dependent Adult Abuse Restraining Orders* (form EA-100);
- *Response to Request for Elder or Dependent Adult Abuse Restraining Orders* (form EA-120); and
- *Elder or Dependent Adult Abuse Restraining Order After Hearing* (CLETS-EAR or EAF) (form EA-130).

The recommended revisions are discussed below.

Request for Elder or Dependent Adult Abuse Restraining Orders (form EA-100) would be revised to add an item that allows the protected person to request that the restrained party be ordered to attend clinical counseling or anger management courses (item 14). The statute requires specific provider types to deliver the clinical counseling or anger management courses, which are listed in the item. The description of abuse would be moved from item 10 to item 8 so the relevant information the judge considers when reviewing the petition is grouped together.

---

[3] *Id.* at p. 1.

[4] Fam. Code, § 6343.

[5] Assembly Bill 372 (Stats. 2018, ch. 290) authorized the creation of alternative pilot programs.

And the items following would be renumbered accordingly. The committee also would revise the order of the items to move the description of abuse higher on the form because it is important information to have closer to the beginning of the form.

Response to Request for Elder or Dependent Adult Abuse Restraining Orders (form EA-120) would be revised to add an item with check boxes (item 7) for the party responding to the petition to respond to these orders requested by the protected person on form EA-100. This item is modeled after existing items on form EA-120 that allow the respondent to indicate whether the respondent agrees or disagrees with the orders requested or agrees to other orders that are specified.

Elder or Dependent Adult Abuse Restraining Order After Hearing (CLETS-EAR or EAF) (form EA-130) would be revised to include an option (item 9) for the judge to order clinical counseling or an anger management course and a required date of enrollment or a default of 30 days if there is no date specified. In addition, there is an option to allow a judge to order a person to submit proof of completion of clinical counseling or an anger management course or appear for a hearing on a specified date.

Alternatives Considered

The committee considered including on form EA-100 the option for the petitioner to request either clinical counseling or anger management, and to provide lines for the petitioner to explain why they made the specific request. However, the committee thought that the petitioner might not understand the distinction between clinical counseling and anger management courses or know what is appropriate in the circumstances. The committee requests comments on whether the petitioner should be able to request either clinical counseling or anger management courses, and whether there should be a line asking for more information.

The committee also considered revising two information sheets, *Can a Restraining Order to Prevent Elder or Dependent Adult Abuse Help Me?* (form EA-100-INFO) and *How Can I Respond to a Request for Elder or Dependent Adult Abuse Restraining Orders*? (form EA-120-INFO), to add information about the new types of orders, but determined that it is not necessary, as the current information on the information sheets will remain accurate without these revisions. In addition, the elder abuse forms are proposed to be redesigned next year with special attention to the information sheets. Making changes to these forms during this rule-making cycle would not be an efficient use of time or resources.

Fiscal and Operational Impacts

The cost and operational impacts from this proposal would be minimal. The forms are currently in existence and there are no requirements for enforcement or additional court hearings as a result of the changes to the forms. Courts may incur minimal costs and operational impacts in training staff and adding the new forms to case management systems.

Request for Specific Comments

The advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Should form EA-100, new item 14, include an option for the petitioner to request either clinical counseling or anger management?
- Should form EA-100, new item 14, include lines asking for the reasons why the petitioner is requesting clinical counseling or an anger management course?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments

1. Forms EA-100, EA-120, and EA-130, at pages XX–XX

EA-100 Request for Elder or Dependent Adult Abuse Restraining Orders

Clerk stamps date here when form is filed.

Read *Can an Elder or Dependent Adult Abuse Restraining Order Help Me?* (form EA-100-INFO) before completing this form. Also fill out *Confidential CLETS Information* (form CLETS-001) with as much information as you know.

1 Elder or Dependent Adult in Need of Protection

Full Name: _____

Sex: ☐ M ☐ F Age: _____

2 Person From Whom Protection Is Sought

Full Name: _____

Address *(if known):* _____

City: _____ State: ____ Zip: _____

3 Person Requesting Order

Who is asking the court for protection? *(Check a, b, or c):*

a. ☐ The elder or dependent adult named in 1.

b. ☐ Name: _____

conservator of the ☐ person ☐ estate ☐ person and estate of the person named in 1, appointed by *(name of court):* _____

Case No.:

c. ☐ Other *(name)* _____

(Show this person's legal authority to make this request on an attached sheet of paper. Write "Attachment 3c—Information About Person Requesting Protective Order" for a title. You may use form MC-025, Attachment*.)*

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

4 Contact Information

Contact information for the person asking the court for protection

a. Your Lawyer *(if you have one for this case)*

Name: _____ State Bar No.: _____

Firm Name: _____

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. The person in 1 does not have to give telephone, fax, or e-mail.)*

Address: _____

City: _____ State: ____ Zip: _____

Telephone: _____ Fax: _____

E-Mail Address: _____

This is not a Court Order.

Case Number:

5 Description of Protected Person

The person named in 1 *(check a or b):*

a. ☐ Is age 65 or older and a resident of California.

b. ☐ Is a resident of California and an adult under age 65. This person has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights. *(Briefly describe limitations on the attached sheet of paper or form MC-025. Write "Attachment 5b—Description of Protected Person" for a title.)*

6 Additional Protected Persons

a. Are you asking for protection for any other family or household members or for the conservator of the elder or dependent adult listed in 1? ☐ Yes ☐ No *(If yes, list them):*

Full Name	Sex	Age	Lives with you?	How are they related to you?
			☐ Yes ☐ No	
			☐ Yes ☐ No	
			☐ Yes ☐ No	
			☐ Yes ☐ No	

☐ *Check here if there are more persons. Attach a sheet of paper and write "Attachment 6a—Additional Protected Persons" for a title. You may use form MC-025, Attachment.*

b. Why do these people need protection? *(Explain below):*

☐ *Check here if there is not enough space for your answer. Put your complete answer on the attached sheet of paper or form MC-025 and write "Attachment 6b—Why Others Need Protection" for a title.*

7 Relationship of Parties

How does the person in 1 know the person in 2 ? *(Explain below):*

☐ *Check here if there is not enough space for your answer. Put your complete answer on the attached sheet of paper or form MC-025 and write "Attachment 7—Relationship of Parties" for a title.*

This is not a Court Order.

Case Number:

8 Description of Abuse

a. Abuse means either:

(1) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering; or

(2) The withholding by a caretaker of goods or services that are necessary to avoid physical harm or mental suffering.

b. Tell the court about the last time the person in (2) abused the person in (1).

(1) When did it happen? *(Provide date or estimated date):* _____

(2) Who else was there?

_____

(3) Describe what happened below.

☐ *Check here if there is not enough space for your answer. Put your complete answer on the attached sheet of paper or form MC-025 and write "Attachment 8b(3)—Describe Abuse" for a title.*

_____

_____

_____

_____

(4) Was the abuse **solely financial abuse** unaccompanied by force, threat, harassment, intimidation, or any other form of abuse?

☐ Yes, only financial abuse. ☐ No, the abuse included other forms of abuse described above.

(5) Did the person in (2) use or threaten to use a gun or any other weapon?

☐ Yes ☐ No *(If yes, explain below):*

☐ *Check here if there is not enough space for your answer. Put your complete answer on the attached sheet of paper or form MC-025 and write "Attachment 8b(5)—Use of Weapons" for a title.*

_____

_____

_____

_____

(6) Was the person in (1) harmed or injured as a result of the acts of abuse described above?

☐ Yes ☐ No *(If yes, explain below):*

☐ *Check here if there is not enough space for your answer. Put your complete answer on the attached sheet of paper or form MC-025 and write "Attachment 8b(6)—Harm or Injury" for a title.*

_____

_____

_____

_____

(7) Did the police come? ☐ Yes ☐ No

If yes, did they give the person in (1) or the person in (2) an Emergency Protective Order? ☐ Yes ☐ No

If yes, the order protects *(check all that apply):*

☐ the person in (1) ☐ the person in (2) ☐ the persons in (6).

(Attach a copy of the order if you have one.)

This is not a Court Order.

Case Number:

8 c. Is the person in (2) a care custodian who deprived the person in (1) of (kept from him or her, did not allow him or her to have or receive, or did not provide him or her with) goods or services that the person needed to avoid physical harm or mental suffering? ☐ Yes ☐ No
(If yes, describe below what the person was deprived of and how that affected him or her):

☐ *Check here if there is not enough space for your answer. Put your complete answer on the attached sheet of paper or form MC-025 and write "Attachment 8c—Deprivation by Care Custodian" for a title.*

d. Has the person in (2) abused the person in (1) at other times?
☐ Yes ☐ No *(If yes, describe prior incidents and provide dates below):*

☐ *Check here if there is not enough space for your answer. Put your complete answer on the attached sheet of paper or form MC-025 and write "Attachment 8d—Previous Abuse" for a title.*

9 Venue

Why are you filing in this county? *(Check all that apply):*

a. ☐ The person in (2) lives in this county.
b. ☐ The person in (1) was abused by the person in (2) in this county.
c. ☐ Other *(specify):*

10 Other Court Cases

a. Has the person in (1) or any of the persons named in (6) been involved in another court case with the person in (2)? ☐ No ☐ Yes *(If yes, specify the kind of each case and indicate where and when each was filed):*

	Kind of Case	Filed in *(County/State)*	Year Filed	Case Number *(if known)*
(1)	☐ Elder or Dependent Adult Abuse			
(2)	☐ Civil Harassment			
(3)	☐ Domestic Violence			
(4)	☐ Divorce, Nullity, Legal Separation			
(5)	☐ Paternity, Parentage, Child Custody			
(6)	☐ Eviction			
(7)	☐ Guardianship			
(8)	☐ Workplace Violence			
(9)	☐ Small Claims			
(10)	☐ Criminal			
(11)	☐ Other *(specify):*			

b. Are there now any protective or restraining orders in effect relating to the person in (1) or any of the persons named in (6) and the person in (2)? ☐ No ☐ Yes *(If yes, attach a copy if you have one.)*

This is not a Court Order.

Check the orders you want. ☑

11 ☐ Personal Conduct Orders

I ask the court to order the person in (2) **not** to do any of the following things to the person in (1) or to any person to be protected listed in (6):

a. ☐ Physically abuse, financially abuse, intimidate, molest, attack, strike, stalk, threaten, assault (sexually or otherwise), hit, harass, destroy the personal property of, or disturb the peace of the person.

b. ☐ Contact the person, either directly or indirectly, in **any** way, including, but not limited to, in person, by telephone, in writing, by public or private mail, by interoffice mail, by e-mail, by text message, by fax, or by other electronic means.

c. ☐ Other (*specify):*

☐ *Check here if there is not enough space for your answer. Put your complete answer on the attached sheet of paper or form MC-025 and write "Attachment 11c—Other Personal Conduct Orders" for a title.*

The person in (2) will be ordered not to take any action to get the addresses or locations of any protected person unless the court finds good cause not to make the order.

12 ☐ Stay-Away Orders

a. I ask the court to order the person in (2) to stay at least _____ yards away from *(check all that apply):*

(1) ☐ The elder or dependent adult in (1) .

(2) ☐ The persons in (6).

(3) ☐ The home of the elder or dependent adult.

(4) ☐ The job or workplace of the elder or dependent adult.

(5) ☐ The vehicle of the elder or dependent adult.

(6) ☐ Other *(specify):* _____

b. If the court orders the person in (2) to stay away from all the places listed above, will he or she still be able to get to his or her home, school, or job? ☐ Yes ☐ No *(If no, explain below):*

☐ *Check here if there is not enough space for your answer. Put your complete answer on the attached sheet of paper or form MC-025 and write "Attachment 12b—Stay-Away Orders" for a title.*

This is not a Court Order.

Case Number:

13 ☐ Move-Out Order

I ask the court to order the person in (2) to move out from and not return to the residence at *(address):*

The person in (1) will suffer physical or emotional harm if the person in (2) does not leave the residence. The person in (2) is not named in the title or lease of the residence, either alone or with others beside the person in (1).

☐ I ask for this move-out order right away to last until the hearing, because:

a. The person in (2) assaulted or threatened the person in (1) ; and

b. The person in (1) has the right to live at the above residence. *(Explain below):*

☐ *Check here if there is not enough space for your answer. Put your complete answer on the attached sheet of paper or form MC-025 and write "Attachment 13b—My Right to Residence" for a title.*

14 ☐ Order for Counseling or Anger Management Courses

I request the person in item (2) be ordered by the court to attend clinical counseling or anger management courses provided by a professional (a counselor, psychologist, psychiatrist, therapist, clinical social worker, or mental or behavioral health professional licensed in the state of California to provide counseling or anger management courses).

15 Guns or Other Firearms and Ammunition

Does the person in (2) own or possess any guns or other firearms? ☐ Yes ☐ No ☐ I don't know

Unless the abuse is only financial, if the judge grants a protective order, the person in (2) will be prohibited from owning, possessing, purchasing, receiving, or attempting to purchase or receive a gun, other firearm, and ammunition while the protective order is in effect. The person in (2) will also be ordered to turn in to law enforcement, or sell to or store with a gun dealer, any guns or firearms within his or her immediate possession or control.

16 ☐ Temporary Restraining Order

I request that a Temporary Restraining Order (TRO) be issued against the person in (2) to last until the hearing. I am presenting form EA-110, *Temporary Restraining Order,* for the court's signature together with this *Request*.

Has the person in (2) been told that you were going to go to court to seek a TRO against them?

☐ Yes ☐ No *(If you answered no, explain why below):*

☐ *Check here if there is not enough space for your answer. Put your complete answer on the attached sheet of paper or form MC-025 and write "Attachment 16—Temporary Restraining Order" for a title.*

This is not a Court Order.

Case Number:

17 ☐ Request to Give Less Than Five Days' Notice of Hearing

You must have your papers personally served on the person in (2) at least five days before the hearing, unless the court orders a shorter time for service. (Read form EA-200-INFO, What Is "Proof of Personal Service"?, to learn about serving legal papers. *Form EA-200,* Proof of Personal Service*, may be used to show the court that the papers have been served.)*

If you want there to be less than five days between service and the hearing, explain why:

☐ *Check here if there is not enough space for your answer. Put your complete answer on the attached sheet of paper or form MC-025 and write "Attachment 17—Request to Give Less Than Five Days' Notice" for a title.*

18 ☐ Lawyer's Fees and Costs

I ask the court to order payment of my ☐ lawyer's fees ☐ court costs.

The amounts requested are:

Item	Amount	Item	Amount
	$		$
	$		$
	$		$

☐ *Check here if there are more items. Put the items and amounts on the attached sheet of paper or form MC-025 and write "Attachment 18—Lawyer's Fees and Costs" for a title.*

19 ☐ Possession and Protection of Animals

I ask the court to order the following:

a. ☐ That the person in (1) be given the sole possession, care, and control of the animals listed below, which they own, possess, lease, keep, or hold, or which reside in their household.
(Identify animals by, e.g., type, breed, name, color, sex.)

I request sole possession of the animals because *(specify good cause for granting order)*:

☐ *Check here if there is not enough space for your answer. Put your complete answer on the attached sheet of paper or form MC-025 and write "Attachment 19a—Possession of Animals" for a title.*

b. ☐ That the person in (2) must stay at least _____ yards away from, and not take, sell, transfer, encumber, conceal, molest, attack, strike, threaten, harm, or otherwise dispose of, the animals listed above.

This is not a Court Order.

Case Number:

20 **No Fee to Serve Orders** *If you want the sheriff or marshal to serve (notify) the person in* (2) *about the orders for free, ask the court clerk what you need to do.*

21 ☐ **Additional Orders Requested**

I ask the court to make the following additional orders *(specify)*:

☐ *Check here if there is not enough space for your answer. Put your complete answer on the attached sheet of paper or form MC-025 and write "Attachment 21—Additional Orders Requested" for a title.*

22 Number of pages attached to this form, if any: _____

Date: _____

_____ ▶ _____

Lawyer's name (if any) *Lawyer's signature*

I declare under penalty of perjury under the laws of the State of California that the information above and on all attachments is true and correct.

Date: _____

_____ ▶ _____

Type or print your name *Signature of person filling out this request*

This is not a Court Order.

EA-120

Response to Request for Elder or Dependent Adult Abuse Restraining Orders

Clerk stamps date here when form is filed.

Use this form to respond to the *Request* (form EA-100)

- Read *How Can I Respond to a Request for Elder or Dependent Adult Abuse Restraining Orders?* (form EA-120-INFO) to protect your rights.
- Fill out this form and take it to the court clerk.
- Have someone age 18 or older—**not you**—serve the person requesting protection in (1) by mail with a copy of this form and any attached pages. *(Use form EA-250,* Proof of Service of Response by Mail.*)*

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(1) Elder or Dependent Adult Seeking Protection

Name: _____

☐ Name of person asking for the protection, if different *(This is the person named in item (3) of the request (form EA-100).)*

_____

(2) Person From Whom Protection Is Sought

a. Your Name: _____

Your Lawyer *(if you have one for this case)*

Name: _____ State Bar No.: _____

Firm Name: _____

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____

E-Mail Address: _____

Present your response and any opposition at the hearing. Write your hearing date, time, and place from form EA-109, item (3), here:

Hearing Date → Date: _____ Time: _____

Dept.: _____ Room: _____

If you were served with a Temporary Restraining Order, you must obey it until the hearing. At the hearing, the court may make orders against you that last for up to five years.

(3) ☐ Personal Conduct Orders

a. ☐ I agree to the orders requested.

b. ☐ I do not agree to the orders requested. *(Specify why you disagree in item (13) on page 4.)*

c. ☐ I agree to the following orders *(specify below or in item (13) on page 4):*

_____

_____

(4) ☐ Stay-Away Orders

a. ☐ I agree to the orders requested.

b. ☐ I do not agree to the orders requested. *(Specify why you disagree in item (13) on page 4.)*

c. ☐ I agree to the following orders *(specify below or in item (13) on page 4):*

_____

_____

Case Number:

5 ☐ Move-Out Orders

a. ☐ I agree to the orders requested.

b. ☐ I do not agree to the orders requested. *(Specify why you disagree in item 13 on page 4.)*

c. ☐ I agree to the following orders *(specify below or in item 13 on page 4):*

6 ☐ Additional Protected Persons

a. ☐ I agree that the persons listed in item 6 of form EA-100 may be protected by the order requested.

b. ☐ I do not agree that the persons listed in item 6 of form EA-100 may be protected by the order requested.

7 ☐ Order for Counseling or Anger Management Courses

a. ☐ I agree to the orders requested.

b. ☐ I do not agree to the orders requested. *(Specify why you disagree in item 13 on page 4.)*

c. ☐ I agree to the following orders *(specify below or in item 13 on page 4):*

8 Guns or Other Firearms and Ammunition

If you were served with form EA-110, *Temporary Restraining Order,* you cannot own or possess any guns, other firearms, or ammunition. (See item 8 of form EA-110.) You must sell to or store with a licensed gun dealer, or turn in to a law enforcement agency, any guns or other firearms in your immediate possession or control within 24 hours of being served with form EA-110. You must file a receipt with the court. You may use form EA-800, *Proof of Firearms Turned In, Sold, or Stored,* for the receipt.

a. ☐ I do not own or control any guns, firearms, magazines or ammunition.

b. ☐ I ask for an exemption from the firearms prohibition under Code of Civil Procedure section 527.9(f) because carrying a firearm is a condition of my employment, and my employer is unable to reassign me to another position where a firearm is unnecessary. *(Explain):*

☐ *Check here if there is not enough space below for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 8b—Firearms Surrender Exemption" as a title. You may use form MC-025,* Attachment.

c. ☐ I have turned in my guns and firearms to the police or sold them to or stored them with a licensed gun dealer.

A copy of the receipt ☐ is attached. ☐ has already been filed with the court.

Case Number:

9 ☐ Possession and Protection of Animals

a. ☐ I agree to the orders requested.
b. ☐ I do not agree to the orders requested. *(Specify why you disagree in item 13 on page 4.)*
c. ☐ I agree to the following orders *(specify below or in item 13 on page 4):*

10 ☐ Other Orders

a. ☐ I agree to the orders requested.
b. ☐ I do not agree to the orders requested. *(Specify why you disagree in item 13 on page 4.)*
c. ☐ I agree to the following orders *(specify below or in item 13 on page 4):*

11 ☐ Denial

I did not do anything described in item 10 of form EA-100. *(Skip to 13.)*

12 ☐ Justification or Excuse

If I did some or all of the things that the person in 1 has accused me of, my actions were justified or excused for the following reasons *(explain):*

☐ *Check here if there is not enough space below for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 12–Justification or Excuse" as a title. You may use form MC-025,* Attachment.

Case Number:

13 ☐ Reasons I Do Not Agree to the Orders Requested

Explain your answers to each order requested that you do not agree with.

☐ *Check here if there is not enough space below for your answer. Put your complete answer on an attached sheet of paper and write "Attachment 13—Reasons I Disagree" as a title. You may use form MC-025,* Attachment.

14 ☐ Lawyer's Fees and Costs

a. ☐ I ask the court to order payment of my ☐ lawyer's fees ☐ court costs. The amounts requested are:

Item	Amount	Item	Amount
	$		$
	$		$
	$		$

☐ *Check here if there are more items. Put the items and amounts on the attached sheet of paper and write "Attachment 14—Lawyer's Fees and Costs" for a title. You may use form MC-025,* Attachment.

b. ☐ I ask the court to deny the request of the person asking for protection named in (1) that I pay his or her lawyer's fees and costs.

15 Number of pages attached to this form, if any: _____

Date: _____

_____ ▶ _____

Lawyer's name (if any) *Lawyer's signature*

I declare under penalty of perjury under the laws of the State of California that the information above and on all attachments is true and correct.

Date: _____

_____ ▶ _____

Type or print your name *Sign your name*

EA-130 Elder or Dependent Adult Abuse Restraining Order After Hearing

Clerk stamps date here when form is filed.

Person in (1) must complete items (1), (2), and (3) only.

(1) Elder or Dependent Adult Seeking Protection

a. Full Name: _____

☐ Name of person asking for the protection, if different *(This is the person named in item (3) of the request (form EA-100).)*

Full Name: _____

Lawyer for person named above *(if any for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____

E-Mail Address: _____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(2) Restrained Person

Full Name: _____

Description

Sex: ☐ M ☐ F Height: _____ Weight: _____ Date of Birth: _____

Hair Color: _____ Eye Color: _____ Age: _____ Race: _____

Home Address *(if known)*: _____

City: _____ State: _____ Zip: _____

Relationship to Protected Person: _____

(3) ☐ Additional Protected Persons

In addition to the elder or dependent adult named in (1), the following family or household members or conservator of the elder or dependent adult named in (1) are protected by the orders indicated below:

Full Name	Sex	Age	Lives with you?	Relation to Protected Person
_____	_____	_____	☐ Yes ☐ No	_____
_____	_____	_____	☐ Yes ☐ No	_____

☐ *Check here if there are additional protected persons. List them on an attached sheet of paper and write "Attachment 3—Additional Protected Persons" as a title. You may use form MC-025,* Attachment.

(4) Expiration Date

This Order, except for any award of lawyer's fees, expires at

Time: _____ ☐ a.m. ☐ p.m. ☐ midnight on *(date):* _____

If no expiration date is written here, this Order expires three years from the date of issuance.

This is a Court Order.

Case Number:

5 Hearing

a. There was a hearing on *(date):* _____ *at (time):* _____ in Dept.: _____ Room: _____
(Name of judicial officer): _____ made the orders at the hearing.

b. These people were at the hearing:
(1) ☐ The elder or dependent adult in need of protection
(2) ☐ The lawyer for the elder or dependent adult *(name):* _____
(3) ☐ The person in (1) asking for protection (if not the elder or dependent adult)
(4) ☐ The lawyer for the person in (1) asking for protection *(name):* _____
(5) ☐ The person in (2)
(6) ☐ The lawyer for the person in (2) *(name):* _____
☐ Additional persons present are listed at the end of this Order on Attachment 5.

c. ☐ The hearing is continued. The parties must return to court on *(date):* _____ at *(time):* _____.

To the Person in (2):

The court has granted the orders checked below. If you do not obey these orders, you can be arrested and charged with a crime. You may be sent to jail for up to one year, pay a fine of up to $1,000, or both.

6 ☐ Personal Conduct Orders

a. You must **not** do the following things to the elder or dependent adult named in (1)
☐ and to the other protected persons listed in (3):
(1) ☐ Physically abuse, financially abuse, intimidate, molest, attack, strike, stalk, threaten, assault (sexually or otherwise), hit, harass, destroy personal property of, or disturb the peace of the person.
(2) ☐ Contact the person, either directly or indirectly, in **any** way, including, but not limited to, in person, by telephone, in writing, by public or private mail, by interoffice mail, by e-mail, by text message, by fax, or by other electronic means.
(3) ☐ Take any action to obtain the person's address or location. If this item (3) is not checked, the court has found good cause not to make this order.
(4) ☐ Other *(specify):*
☐ Other personal conduct orders are attached at the end of this Order on Attachment 6a(4).

b. Peaceful written contact through a lawyer or a process server or other person for service of legal papers related to a court case is allowed and does not violate this order.

7 ☐ Stay-Away Orders

a. You **must** stay at least _____ yards away from *(check all that apply):*
(1) ☐ The elder or dependent adult in (1).
(2) ☐ Each person in (3).
(3) ☐ The home of the elder or dependent adult.
(4) ☐ The job or workplace of the elder or dependent adult.
(5) ☐ The vehicle of the elder or dependent adult.
(6) ☐ Other *(specify):*
_____
_____
_____
_____

b. This stay-away order does not prevent you from going to or from your home or place of employment.

This is a Court Order.

Case Number:

8 ☐ Move-Out Order

You must immediately move out from and not return to *(address):*

_____

_____

and must take only the personal clothing and belongings you need.

9 ☐ Order for Counseling or Anger Management

a. The person in item 2 is ordered to attend:
☐ clinical counseling for _____ *(specify number)* sessions; or
☐ an anger management course
provided by a professional (a counselor, psychologist, psychiatrist, therapist, clinical social worker, or mental or behavioral health professional licensed in the state of California to provide counseling or anger management courses).

b. The person in item 2 must enroll in clinical counseling or an anger management course by *(date)*: _____, or if no date is listed, within 30 days after this order is made. The person in item 2 is ordered to file written proof of scheduling or enrollment with the court.

c. ☐ Written proof of completion of the ordered number of clinical counseling sessions or written proof of completion of the court-ordered anger management course must be filed with the court by _____ *(date)* or the person in item 2 must appear for a court date on _____ *(date)* at _____ *(time)* in _____ Dept./ Room.

10 ☐ No Guns or Other Firearms and Ammunition

This Order must be granted unless the abuse is financial only.

a. **You cannot own, possess, have, buy or try to buy, receive or try to receive, or in any other way get guns, other firearms, or ammunition.**

b. If you have not already done so, you must:
- Sell to or store with a licensed gun dealer, or turn in to a law enforcement agency, any guns or other firearms in your immediate possession or control. This must be done within 24 hours of being served with this Order.
- File a receipt with the court within 48 hours of receiving this Order that proves that your guns or firearms have been turned in, sold, or stored. *(You may use form EA-800,* Proof of Firearms Turned In, Sold, or Stored, *for the receipt.)*

c. ☐ The court has received information that you own or possess a firearm.

d. ☐ The court has made the necessary findings and applies the firearm relinquishment exemption under Code of Civil Procedure section 527.9(f). Under California law, the person in 2 is not required to relinquish this firearm *(specify make, model, and serial number of firearm):* _____

_____

The firearm must be in his or her physical possession only during scheduled work hours and during travel to and from his or her place of employment. Even if exempt under California law, the person in 2 may be subject to federal prosecution for possessing or controlling a firearm.

This is a Court Order.

11 Financial Abuse

This case ☐ does **not** ☐ does involve **solely financial abuse** unaccompanied by force, threat, harassment, intimidation, or any other form of abuse.

12 ☐ Possession and Protection of Animals

a. ☐ The person in (1) is given the sole possession, care, and control of the animals listed below, which are owned, possessed, leased, kept, or held by him or her, or reside in his or her household.
(Identify animals by, e.g., type, breed, name, color, sex.)

_____
_____
_____

b. ☐ The person in (2) must stay at least _____ yards away from, and not take, sell, transfer, encumber, conceal, molest, attack, strike, threaten, harm, or otherwise dispose of, the animals listed above.

13 ☐ Lawyer's Fees and Costs

You must pay to the person in (1) the following amounts for ☐ lawyer's fees ☐ costs:

Item	Amount	Item	Amount
_____	$ _____	_____	$ _____
_____	$ _____	_____	$ _____

☐ Additional amounts are attached at the end of this Order on Attachment 13.

14 ☐ Other Orders *(specify):*

_____
_____
_____
_____
_____
_____
_____
_____

☐ Additional orders are attached at the end of this Order on Attachment 14.

This is a Court Order.

To the Person in (1):

15 Mandatory Entry of Order Into CARPOS Through CLETS

This Order must be entered into the California Restraining and Protective Order System (CARPOS) through the California Law Enforcement Telecommunications System (CLETS). *(Check one):*

a. ☐ The clerk will enter this Order and its proof-of-service form into CARPOS.

b. ☐ The clerk will transmit this Order and its proof-of-service form to a law enforcement agency to be entered into CARPOS.

c. ☐ By the close of business on the date that this Order is made, you or your lawyer should deliver a copy of the Order and its proof-of-service form to the law enforcement agency listed below to enter into CARPOS:

Name of Law Enforcement Agency	Address *(City, State, Zip)*

☐ Additional law enforcement agencies are listed at the end of this Order on Attachment 15.

16 Service of Order on Restrained Person

a. ☐ The person in (2) personally attended the hearing. No other proof of service is needed.

b. ☐ The person in (1) was at the hearing. The person in (2) was not.

(1) ☐ Proof of service of form EA-110, *Temporary Restraining Order,* was presented to the court. The judge's orders in this form are the same as in form EA-110 except for the end date. The person in (2) must be served with this Order. Service may be by mail.

(2) ☐ Proof of service of form EA-110, *Temporary Restraining Order,* was presented to the court. The judge's orders in this form are different from the orders in form EA-110. Someone—but not anyone in (1) or (3)—must personally serve a copy of this Order on the person in (2).

17 No Fee to Serve (Notify) Restrained Person

If the sheriff or marshal serves this Order, they will do so for free.

18 Number of pages attached to this Order, if any: _____

Date: _____

▶ _____

Judicial Officer

This is a Court Order.

Warning and Notice to the Restrained Person in 2:

You Cannot Have Guns or Firearms

If the court grants the orders in item 10 on page 3 (unless item 10d is checked), you cannot own, have, possess, buy or try to buy, receive or try to receive, or otherwise get guns, other firearms, or ammunition while this Order is in effect. If you do, you can go to jail and pay a $1,000 fine. You must sell to or store with a licensed gun dealer, or turn in to a law enforcement agency, any guns or other firearms that you have or control as stated in item 10. The court will require you to prove that you did so.

Instructions for Law Enforcement

Enforcing the Restraining Order

This order is enforceable by any law enforcement agency that has received the order, is shown a copy of the order, or has verified its existence on the California Restraining and Protective Order System (CARPOS). If the law enforcement agency has not received proof of service on the restrained person, the agency must advise the restrained person of the terms of the order and then must enforce it. Violations of this order are subject to criminal penalties.

Start Date and End Date of Order

This order *starts* on the date next to the judge's signature on page 5. The order *ends* on the expiration date in item 4 on page 1.

Arrest Required if Order Is Violated

If an officer has probable cause to believe that the restrained person had notice of the order and has disobeyed the order, the officer must arrest the restrained person. (Pen. Code, §§ 836(c)(1), 13701(b).) A violation of the order may be a violation of Penal Code section 166 or 273.6. Agencies are encouraged to enter violation messages into CARPOS.

Notice/Proof of Service

The law enforcement agency must first determine if the restrained person had notice of the order. Consider the restrained person "served" (given notice) if (Pen. Code, § 836(c)(2)):

- The officer sees a copy of the *Proof of Service* or confirms that the *Proof of Service* is on file; or
- The restrained person was informed of the order by an officer.

An officer can obtain information about the contents of the order and proof of service in CARPOS. If proof of service on the restrained person cannot be verified, the agency must advise the restrained person of the terms of the order and then enforce it.

If the Protected Person Contacts the Restrained Person

Even if the protected person invites or consents to contact with the restrained person, this order remains in effect and must be enforced. The protected person cannot be arrested for inviting or consenting to contact with the restrained person. The order can be changed only by another court order. (Pen. Code, § 13710(b).)

This is a Court Order.

Instructions for Law Enforcement

Conflicting Orders—Priority of Enforcement

If more than one restraining order has been issued, the orders must be enforced in the following order of precedence: *(See Pen. Code, § 136.2; Fam. Code, §§ 6383(h)(2), 6405(b).)*

1. *EPO:* If one of the orders is an *Emergency Protective Order* (form EPO-001) and is more restrictive than other restraining or protective orders, it has precedence in enforcement over all other orders.
2. *No-Contact Order:* If there is no EPO, a no-contact order that is included in a restraining or protective order has precedence over any other restraining or protective order.
3. *Criminal Order:* If none of the orders includes a no-contact order, a domestic violence protective order issued in a criminal case takes precedence in enforcement over any conflicting civil court order. Any nonconflicting terms of the civil restraining order remain in effect and enforceable.
4. *Family, Juvenile, or Civil Order:* If more than one family, juvenile, or other civil restraining or protective order has been issued, the one that was issued last must be enforced.

Clerk's Certificate
[seal]

(Clerk will fill out this part.)

—Clerk's Certificate—

I certify that this *Elder or Dependent Adult Abuse Restraining Order After Hearing* is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____ , Deputy

Item number: 42

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Rules and Forms: Request for Disability Accommodations

Committee or other entity submitting the proposal:
Advisory Committee on Providing Access and Fairness

Staff contact (name, phone and e-mail): Diana Glick, 916-643-7012, diana.glick@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: Approved by E&P May 15, 2019
Project description from annual agenda:
Project Title: Form MC-410: Request for Accommodations by Persons with Disabilities Priority 2(b)

Project Summary: Redesign Judicial Council form MC-410 to make it more user-friendly and in plain language. This will make it easier for court-users to understand the form and correctly complete it. This will also make it easier to translate the form into multiple languages.

If requesting July 1 or out of cycle, explain:
N/A

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue . San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-27

Title
Rules and Forms: Request for Disability Accommodations

Proposed Rules, Forms, Standards, or Statutes
Approve form MC-410-INFO; revise form MC-410

Proposed by
Advisory Committee on Providing Access and Fairness
Hon. Kevin C. Brazile, Cochair
Hon. Luis A. Lavin, Cochair

Action Requested
Review and submit comments by Tuesday, June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Diana Glick, 916-643-7012
diana.glick@jud.ca.gov

Linda McCulloh, 415-865-7746
linda.mcculloh@jud.ca.gov

Executive Summary and Origin

The Advisory Committee on Providing Access and Fairness recommends the revision of the *Disability Accommodation Request* (form MC-410) and the approval of a new information sheet titled *How to Request a Disability Accommodation for Court* (form MC-410-INFO) to accompany the request form. The request form would be edited for plain language, and redesigned to include visual elements, additional white space to increase readability, an increased font size, and screen reader accessibility to comply with Web Content Accessibility Guidelines 2.0. The new information sheet would include a description of the process for requesting an accommodation, instructions to accompany form MC-410 questions, and help with understanding the court's response.

Background

The Judicial Council initially set forth the process for requesting an accommodation for disability in rule 989.3 of the California Rules of Court and developed the *Request for Accommodations by Persons with Disabilities and Response* (form MC-410), both of which were effective on January 1, 1996. The rule was amended in 2006, amended and renumbered as rule 1.100 in 2007, and amended again in 2010 and 2017. The most recent amendments, effective July 1, 2017, removed references to the term "impairment" from the rule and the form in response to legislation (Assem. Bill 1709; (Gallagher) Stats. 2016, ch. 94). In the rule and on the

form, the term "impairment" was replaced with "medical condition." In the rule, the term "hearing impaired" was replaced with "deaf or hard of hearing."

Section 508 of the federal Rehabilitation Act of 1973 sets forth requirements for digital access that federal agencies must follow in order to ensure access to online resources by those who are blind or have vision loss. One such requirement is the enabling of digital content for use with screen readers, which provide an auditory version of displayed written information. Other requirements address screen displays, the use of colors, and limits on flashing images.

The State of California has developed accessibility standards for state-controlled websites that include compliance with

- Section 508 of the Rehabilitation Act;
- Web Content Accessibility Guidelines 2.0 (WCAG 2.0) at the AA conformance level;[1] and
- Best practices recommended by the California Department of Rehabilitation.[2]

The Proposal

This proposal recommends the redesign of form MC-410, used to request accommodation for disability, and the adoption of a new information sheet, form MC-410-INFO, to accompany and explain the process to request an accommodation.

Form MC-410

Form MC-410 is proposed to be revised as follows:

- Change from standard form caption format to plain language format;
- Change the title of the form to *Disability Accommodation Request*;
- Remove statement across the top of the form in capital letters reading "APPLICANT'S INFORMATION TO BE KEPT CONFIDENTIAL" and add the standard "CONFIDENTIAL" statement, in accordance with plain language format;
- Use a single, sans serif font (Arial) throughout (from 14 pt. to 18 pt.);
- On the fillable version of the form, ensure that the font used in narrative answer fields is also a sans serif font of appropriate size;
- Remove the following items:
  - Judge (in the caption)
  - Type of proceeding (item 1)
  - Proceedings to be covered (item 2)

[1] The World Wide Web Consortium (W3C) provides information about conformance levels at *www.w3.org/TR/UNDERSTANDING-WCAG20/conformance.html*.

[2] More information about the state government's process for developing web accessibility standards can be found at *https://webstandards.ca.gov/accessibility/*.

    - Special requests or anticipated problems (item 6)

- Convert field for “Case Title” to “Case Name (if you know it)”;
- Convert field for “Case Number” to “Case Number (if you know it)”;
- Remove all italics from the form;
- Add calendar icon and language explaining the importance of making the request at least five court business days before the accommodation is needed;
- Remove statement requiring applicant to sign the form under penalty of perjury;
- Add name, relationship, and contact information as optional fields for someone who helped the applicant fill out the form;
- Perform plain language editing of substantive questions regarding the accommodation sought and why the accommodation is needed for the requester’s disability or limitation;
- Add check box to allow a requester to attach additional information;
- Expand the form from one to two pages;
- Add a warning with an icon at the top of page 2 asking applicants to notify the court if the date or time of their court event changes;
- Reorganize the response options for the request to be either “GRANTED” or “DENIED IN WHOLE OR IN PART”;
- Remove “Indefinite period” as an option for the duration of the accommodation; and
- Include space for the court to optionally explain the reason for denial or to include information about partial denials.

These changes have been extensively tested by both users and consumers of the form and adhere to current best practices for plain language, usability, and readability in legal content and forms.

User testing: ADA Coordinators

Court ADA Coordinators were asked to provide their feedback on the revisions to this form through a statewide webinar in August 2019, a small focus group that met several times in fall 2019 to review drafts, and by email in February 2020. The current proposed language was specifically designed to meet the needs of ADA Coordinators who regularly fill out or receive this form to process requests for accommodation.

User testing: Court users with disabilities

During December 2019, revised form MC-410 was tested by the Center for Accessible Technology. The interface was tested for plain language, readability, and usability by users with disabilities and by experts in web accessibility features. A number of changes in wording, flow, and organization were made based on the results of testing. The Center for Accessible Technology also performed some remediation work on the form to enable accessibility features and, once the revised substantive content of the form is approved, the committee will ensure that

it is in compliance with WCAG 2.0 at the AA conformance level before posting to the California Courts website.

Form MC-410-INFO

The new information sheet developed to accompany form MC-410 is titled *How to Request a Disability Accommodation for Court*. The form begins with a brief introduction and an explicit statement that it is meant to help the applicant use form MC-410 to request an accommodation.

The form describes the process for requesting an accommodation under rule 1.100, including that the use of form MC-410 is not required and that there are other ways to make the request.

Based on ADA Coordinator feedback, the information sheet also contains a caution to litigants filing electronically that they should not electronically file the MC-410.

After this introduction, the rest of page 1 and page 2 of the information sheet carefully track each item on page 1 of form MC-410 and provide an explanation of what is expected to be included in each field, including the court name and address, applicant contact information, and information on the accommodation requested and the disability or limitation supporting the need for the accommodation.

Page 3 of the information sheet also attempts to mirror the structure of the court's response provided on form MC-410 and explains the meaning of a "grant" or "denial" of the request. There is also a reference to the link to information about a possible reconsideration of the court's decision and a link to a webpage to help litigants find their court's website and ADA coordinator if they need additional assistance.

Alternatives Considered

A redesign of the form is not statutorily required, although it is important to ensure compliance with WCAG 2.0 with respect to web accessibility of documents and content available on the internet, particularly with regard to documentation that is explicitly intended for use by court users with disabilities. The committee anticipates that the redesigned version of the form will provide a clearer path for court users with disabilities to make requests and understand the court's response to their request. The addition of an information sheet to accompany the request form is also not statutorily required but is intended to facilitate the use of form MC-410.

Fiscal and Operational Impacts

This proposal will not result in the need for additional training for court personnel because there have been no substantive changes to the process or the form itself. To the contrary, it is anticipated that this streamlined and redesigned version of the form with accessibility features will make it easier for form users to request accommodations and for form consumers in the courts to process the request and make an appropriate response. Courts that maintain paper versions of the forms will incur the costs of replacing old forms with the revised forms.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Does the form accurately reflect the process established in California Rules of Court, rule 1.100?
- Will a two-page form create any issues with local case management systems or existing processes for receiving and responding to requests for accommodations?
- Are there any concerns about the optional collection of information about a person—either a member of court staff or a personal helper—who may have helped a court user fill out the form?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Forms MC-410 and MC-410-INFO, at pages 6–10
2. Link A: Cal. Rules of Court, rule 1.100, *www.courts.ca.gov/cms/rules/index.cfm?title=one&linkid=rule1_100*

MC-410 Disability Accommodation Request

CONFIDENTIAL

Clerk receives and date stamps here.

DRAFT
Not Approved by the Judicial Council

If you have a disability and need an accommodation while you are at court, you can use this form to make your request. For more information see form MC-410-INFO.

Make this request at least **5 days** (when court is open) before you need the accommodation.

Court Name and Address:

1 Your information

Name: _____

Address: _____

_____

Phone: _____

Email: _____

Case Number (if you know it):

Case Name/Type (if you know it):

2 How are you involved in the case?

☐ Juror ☐ Party ☐ Witness ☐ Lawyer

☐ Other (explain): _____

3 When and where do you need the accommodation? [date(s), time(s) and court location] _____

_____

4 What accommodation do you need at the court?

_____

5 Why do you need this accommodation to assist you in court?

_____

_____

☐ More information on this request is attached.

Date: _____

_____ ▶ _____

Type or print name *Signature*

(Optional) Complete if someone helped you fill out this form:

Name: _____ Relationship: _____

Email: _____ Phone: _____

Name: _____ | Case Number (if you know it):

Court fills out below

(Optional)

Important! Sometimes a case is delayed or dismissed after you make your request. If you do not need the accommodation for the date you specified under 3, please contact the court at:

Phone: _____ Email: _____

☐ Your Request is **GRANTED.** The court will provide the accommodation:

☐ For the date(s) and time(s) requested ☐ On date(s): _____

☐ Your Request is **DENIED IN WHOLE OR IN PART.** Your request:

☐ Does not meet the requirements of Cal. Rules of Court, rule 1.100.

☐ Creates an undue financial or administrative burden for the court.

☐ Changes the basic nature of the court's service, program, or activity.

Reasons supporting the box(es) checked above:

_____

_____

☐ The court **will provide** the following accommodation(s):

_____

_____

☐ For the date(s) and time(s) requested ☐ On date(s): _____

☐ More information on this decision is attached.

Date: _____

_____ ▶ _____

Type or print name *Signature*

The court responded in person, by phone, or mail/email on: _____

Note: You may be able to ask for a review of this decision. Cal. Rules of Court, rule 1.100(g) explains how to do this.

Disability Accommodation Request

MC-410-INFO How to Request a Disability Accommodation for Court

This information sheet is for the MC-410 *Disability Accommodation Request*.

The purpose of this information sheet is to help you:

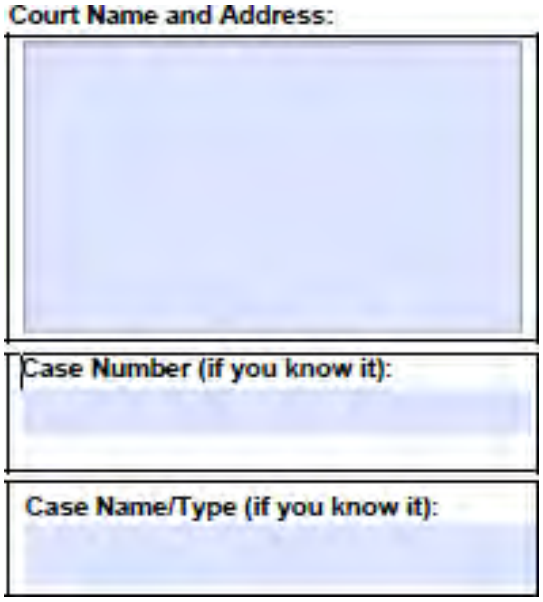
- Ask the court for an accommodation on page 1 of form MC-410.
- Understand the court's response on page 2.

If you have a disability or limitation and need an accommodation while you are at court, one way to ask for an accommodation is to fill out form MC-410 and give it to the ADA Coordinator or designated person (this could be a court clerk, a jury commissioner, or another person). Other ways to ask include calling the court or going in person to ask the ADA Coordinator or designated person for an accommodation.

Please note: If you are submitting papers to the court electronically, through electronic filing, you **must not** include form MC-410 with your filing. Form MC-410 is a confidential form that is not part of the case file. The form must be given to the ADA Coordinator or designated person in your court.

Deadline: If possible, make this request at least **5 days** (when court is open) before you need the accommodation.

Page 1 of form MC-410 asks for the information the court needs to understand and make a decision about your request.



Court Name and Address:

Write the name and address of your court. If you do not know the court address, ask the ADA Coordinator for help.

Case Number (if you know it):

If you have a case number, write it here.

Case Name/Type (if you know it):

If you know the name of your case, write it here.

Example: *Guardianship of Jane Doe*

1 Your information

Write your name, address, telephone number, and email address where the court can reach you in the near future.

2 How are you involved in the case?

Check the box that describes who you are: a juror, party, witness, or lawyer. If you are someone else, mark "Other" and explain on the line.

3 When and where do you need the accommodation?

Tell the court the dates and times when you will need the accommodation in court and where in the courthouse you will be.

4 What accommodation do you need at the court?

Write down the accommodation you are requesting.
Example: *ASL Interpreter*

5 Why do you need this accommodation to assist you in court?

Explain to the court what you cannot do and how the accommodation you are requesting will help you participate in court.

Example: *I am hard of hearing and can't hear like everybody else. I need an assistive listening device to hear what is going on in court.*

There is a check box under this question that you can check if you plan to attach additional information about your request to the form.

Signatures

- Write today's date, type or print your name, and sign on the signature line next to the arrow.
- If someone helped you fill out the form and is willing to answer questions about the request, they can print their name, indicate their relationship to you, and provide a phone number and email address where the court can reach them. This is optional.

The court will respond to your request by telling you in person, calling you on the phone, or sending you a letter or an email.

Page 2 of form MC-410 is where the court responds to your request.

Important! If your case is delayed or dismissed after you make your request, please contact the court at the phone number or email address provided.

- The court will check one of two boxes. Either:

  ✓ Your Request is **GRANTED**

  If your request is granted, the court will tell you when the accommodation will be provided in the line below.

  -OR-

  ✓ Your Request is **DENIED IN WHOLE OR IN PART**

  If your request is denied in whole or in part, the court will tell you **why** it is being denied. If the court offers you a different accommodation, it will tell you **what accommodation** will be provided and **when** the accommodation will be provided.

- If the court provides additional information about the decision, it will check that box and attach the information to the form.

- Underneath the court's signature line, the court enters a date telling you **when** the court responded to the request. The court may respond by telling you in person, calling you on the phone, or by sending you a letter or an email.

- At the bottom of the page, there is a link to information about how to ask for a review of the court's decision.

Need More Help?

For help finding your court: www.courts.ca.gov/find-my-court.htm

Visit your court's website to find the ADA Coordinator.

Item number: 43

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Judicial Branch Technology: Electronic Filer Need Not Consent to Electronic Service
Amend Cal. Rules of Court, rule 2.255

Committee or other entity submitting the proposal:
Information Technology Advisory Committee

Staff contact (name, phone and e-mail): Andrea Jaramillo, 916-263-0991, andrea.jaramillo@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: N/A. Approved by JCTC January 16, 2020
Project description from annual agenda: IAmend the California Rules of Court to indicate that an electronic filing service provider must allow the party to proceed with an electronic filing even if the party does not consent to receive electronic service.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SPR20-28

Title Judicial Branch Technology: Electronic Filer Need Not Consent to Electronic Service	Action Requested Review and submit comments by June 9, 2020
Proposed Rules, Forms, Standards, or Statutes Amend Cal. Rules of Court, rule 2.255	Proposed Effective Date January 1, 2021
Proposed by Information Technology Advisory Committee Hon. Sheila F. Hanson, Chair	Contact Andrea L. Jaramillo, 916-263-0991 andrea.jaramillo@jud.ca.gov

Executive Summary and Origin

The Information Technology Advisory Committee recommends the Judicial Council amend rule 2.255 of the California Rules of Court. The purpose of the proposed amendment is to require an electronic filing service provider to allow an electronic filer to proceed with an electronic filing even if the electronic filer does not consent to receive electronic service. The proposal originated with comments received from the Superior Court of Orange County and the Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and Court Executives Advisory Committee.

Background

Code of Civil Procedure section 1010.6 (§ 1010.6) provides statutory authority for electronic filing and service. Courts may (1) permit electronic service by local rule, or (2) require electronic service by local rule or court order. (§ 1010.6(b)–(d).)

In 2017, the Legislature amended section 1010.6 to state that for cases filed on or after January 1, 2019, electronic service was "not authorized unless a party or other person has expressly consented to receive electronic service in that specific action" unless electronic service was required by local rule or court order. Rule 2.251(b) of the California Rules of Court[1] had previously allowed the act of electronic filing alone to be evidence of consent to receive electronic service for represented persons, but the amendments to section 1010.6 eliminated this option. Section 1010.6 does, however, allow a person to provide express consent electronically

[1] All further references to rules are to the California Rules of Court.

by "manifesting affirmative consent through electronic means with the court or the court's electronic filing service provider, and concurrently providing the party's electronic address with that consent for the purpose of receiving electronic service." (§ 1010.6(a)(2)(A)(ii).)

The Legislature did not provide a definition or meaning for "manifest affirmative consent through electronic means." To fill this gap, the Judicial Council amended rule 2.251(b) to allow an electronic filer to consent by either filing a form or agreeing to a term with an electronic filing service provider (EFSP) that "clearly states that agreement constitutes consent" to receive electronic service. (Cal. Rules of Court, rule 2.251(b)(1)(B)(i).) The rules allow, but do not require, an EFSP to include such a term.

The Proposal

The proposed rule would require an EFSP that includes a term for the electronic filer's consent to electronic service to allow an electronic filer to proceed with an electronic filing even if the electronic filer does not agree to that term. For example, if an EFSP had a check box that an electronic filer could click to agree to electronic service, the proposed rule would require the EFSP to allow the electronic filer to proceed with the electronic filing even if the electronic filer did not click on the check box. The proposal may improve access to electronic filing by ensuring that filers are able to file electronically even if they choose not to receive electronic service.

The proposed rule would apply only to electronic service by express consent. Accordingly, it would not apply to electronic service *required* by local rule or court order.

Alternatives Considered

The committee considered the alternative of making no change, but found the proposal preferable as it may reduce barriers to electronic filing by ensuring electronic filers are able to opt out of electronic service when electronic service is not otherwise required by the court. In considering the options, the committee agreed with comments from the Superior Court of Orange County and the Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and Court Executives Advisory Committee that clarification was needed on the ability of electronic filers to opt out.

Fiscal and Operational Impacts

It is not expected that the proposal will have significant impact on the courts different from any impacts that may exist as a result of the statutory requirement for persons to provide express consent to electronic service. It is expected that the proposal will ensure litigants always have the option to electronically file at courts where electronic filing is permitted. EFSPs may be impacted, but they are not required to include a term allowing electronic filers to consent to electronic service through the EFSP.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Should electronic filers be able to opt out of electronic service? Why or why not?
- For EFSPs, is the proposal feasible?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- Would there be implementation requirements for courts? If so, what would they be—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), or modifying case management systems?

Attachments and Links

1. Cal. Rules of Court, rule 2.255, at page 4
2. Link A: Cal. Rules of Court, rule 2.251, *https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_251*
3. Link B: Cal. Rules of Court, rule 2.255, *https://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_255*

Rule 2.255 of the California Rules of Court would be amended, effective January 1, 2021, to read:

Rule 2.255. Contracts with and responsibilities of electronic filing service providers and electronic filing managers

(a)–(f) * * *

(g) Electronic filer not required to consent to electronic service

(1) An electronic filing service provider must allow an electronic filer to proceed with an electronic filing even if the electronic filer does not consent to receive electronic service.

(2) This provision applies only to electronic service by express consent under rule 2.251(b).

Item number: 44

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child. Amend rule 5.514 and Adopt form ICWA 101

Committee or other entity submitting the proposal:
Tribal Court - State Court Forum & the Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Ann Gilmour, 415-865-4207 ann.gilmour@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Indian Child Welfare Act Legal Updates: Monitor implementation of rules and forms created pursuant to AB 3176 (Waldron) Indian children. Assembly Bill 3176 updates the Indian Child Welfare Act provisions in the Welfare and Institutions Code to comply with recent Federal Bureau of Indian Affairs regulations (Item 3 ongoing projects, pg. 13 of the Family and Juvenile Law Advisory Committee Annual Agenda)
E & P approval of Forum Agenda: March 13, 2019. Project Description from annual agenda: Implement Assembly Bill 3176 Indian Children (Waldron; Stats. 2018, ch. 833) AB 3176 Indian Children, amends provisions of the Welfare and Institutions Code to conform California law to the requirements of the federal Indian Child Welfare Act Regulations and Guidelines adopted in 2016. The legislation directs the Judicial Council to enact rules and forms necessary to implement the legislation.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue . San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-29

Title
Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child

Proposed Rules, Forms, Standards, or Statutes
Amend rule 5.514 and Adopt form ICWA-101

Proposed by
Tribal Court–State Court Forum
Hon. Abby Abinanti, Cochair
Hon. Suzanne N. Kingsbury, Cochair
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Ann Gilmour, 415-865-4207
ann.gilmour@jud.ca.gov

Executive Summary and Origin

The Tribal Court–State Court Forum and the Family and Juvenile Law Advisory Committee recommend effective January 1, 2021, amending rule 5.514 and adopting a new mandatory form to be used to have a judge witness the consent of an Indian parent or custodian to the temporary custodial placement of an Indian child in accordance with section 1913 of title 25 of the United States Code, 25 Code of Federal Regulations parts 23.125–23.127, and Welfare and Institutions Code section 16507.4(b)(3).

Background

The Indian Child Welfare Act (ICWA) sets out certain requirements for the validity of an Indian parent or custodian's consent to the foster care placement of or termination of parental rights to an Indian child.[1] Prior to the enactment of comprehensive federal ICWA regulations in 2016, it had been understood that there was no actual "foster care placement" being made for the purposes of ICWA until the court made an order granting care and custody of the child to someone other than the child's Indian parent or custodian. Thus, the voluntary consent

[1] Set out in 25 U.S.C. § 1913.

provisions of ICWA had only been implemented in relation to the termination of parental rights in the *Parent of Indian Child Agrees to End Parental Rights* (form ADOPT-225). In 2018 the California Legislature adopted Assembly Bill 3176[2], which amended various provisions of the Welfare and Institutions Code to align California law with the requirements of the federal ICWA regulations. AB 3176 included various revisions to section 16507.4(b)(3) of the Welfare and Institutions Code governing voluntary out-of-home placements of a minor that have not been adjudicated by the juvenile court. In particular, AB 3176 confirmed that voluntary out-of-home placements under section 16507.4(b)(3) must comply with the consent requirements of ICWA whenever an Indian child is involved.

The Proposal

Due to the legal developments discussed above, there is a need to create a process and form for a judge to witness the consent of the parent of an Indian child to the child's temporary custody in accordance with the requirements of ICWA. Tribal advocates have indicated that the lack of a form for the consent of an Indian parent or custodian to the temporary custody of an Indian child—that could be used in guardianship proceedings under the Probate Code—is also a problem. Tribal advocates have been asked to draft forms that meet the ICWA requirements but are uncomfortable doing so as they are not always familiar with California law. A form that could be used across all case types governed by ICWA would be useful to litigants and the courts.

The proposal would amend rule 5.514(b) of the California Rules of Court, which requires courts to establish intake procedures in juvenile cases that include a program for informal supervision by requiring these procedures to include a process for a judge to witness the consent of an Indian parent or custodian consistent with the requirements of ICWA, and adopt a new form, *Parent or Custodian of Indian Child Agrees to Temporary Custody* (form ICWA-101).

Alternatives Considered

The forum and committees considered limiting the proposal only to juvenile cases governed by Welfare and Institutions Code section 16507.4(b)(3) but determined that a form applicable across all case types governed by ICWA would be useful to litigants and the courts.

Fiscal and Operational Impacts

There may be some fiscal impact in implementing the new rule and form; however, it is required to comply with the law.

[2] Waldron: Stats. 2018, ch. 833

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committees and forum are interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Does the proposed form cover all of the topics that should be covered?
- In the context of a juvenile case, would the completed form be retained in the agency file or by the court? Should this be clarified in the rule itself?
- If the form is retained by the court, would it be discoverable under rule 10.500?
- How can the judge certify (as required by federal law) that the form is fully understood by the parent or Indian custodian? Does an attorney need to be appointed for the parent?
- The federal law states that the judge's certification include that the document was "executed in writing and recorded before a judge." Is the term "recorded" appropriate in the California context, or is it sufficient that the form be executed before the judge?
- Should the specific procedures of the process for taking the consent be set out in detail in the rule, or should each court retain discretion to establish its own process?

The advisory committees and forum also seek comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 5.514, at pages 4–5
2. Form ICWA-101, at pages 6–7

Rule 5.514 of the California Rules of Court would be amended, effective January 1, 2021, to read:

Rule 5.514. Intake; guidelines

(a) Role of juvenile court

It is the duty of the presiding judge of the juvenile court to initiate meetings and cooperate with the probation department, welfare department, prosecuting attorney, law enforcement, and other persons and agencies performing an intake function. The goal of the intake meetings is to establish and maintain a fair and efficient intake program designed to promote swift and objective evaluation of the circumstances of any referral and to pursue an appropriate course of action.

(b) Purpose of intake program

The intake program must be designed to:

(1) Provide for settlement at intake of:

(A) Matters over which the juvenile court has no jurisdiction;

(B) Matters in which there is insufficient evidence to support a petition; and

(C) Matters that are suitable for referral to a nonjudicial agency or program available in the community;

(2) Provide for a program of informal supervision of the child under sections 301 and 654;

(3) Establish a process for a judge to witness the consent of an Indian parent or custodian to a placement of an Indian child under section 16507.4(b) before a judge in accordance with section 16507.4(b)(3) that ensures that the placement is consistent with the federal Indian Child Welfare Act and corresponding state law and that all of the rights and protections of the Indian parent are respected, using *Parent or Custodian of Indian Child Agrees to Temporary Custody* (form ICWA-101); and

(~~3~~4) Provide for the commencement of proceedings in the juvenile court only when necessary for the welfare of the child or protection of the public.

(c) * * *

(d) * * *

(e) * * *

ICWA-101 Parent or Custodian of Indian Child Agrees to Temporary Custody

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(1) I want the child to be temporarily placed in the custody of *(name(s)):*

a. _____

b. _____

Their relationship to Indian child *(check all that apply):*

☐ Related to child *(specify):* _____

☐ Member of child's tribe ☐ Indian parents

☐ None of the above

(2) The placement in (1) ☐ meets ☐ does not meet the placement preference requirements of the Indian Child Welfare Act.

(3) Indian child *(name):* _____

Date of birth: _____ Age: _____

Child's tribe(s): _____

Enrollment: _____

☐ *Check here if you do not know the enrollment number.*

(4) Your name: _____

☐ Parent ☐ Indian Custodian *(Check only one. Each fills out a separate form.)*

Your address *(skip this if you have a lawyer):*

_____

City: _____ State: _____ Zip: _____

Phone: _____ Your tribe(s): _____ Enrollment #: _____

☐ *Check here if you do not know the enrollment number.*

Your lawyer *(if you have one): (Name, address, phone number, and State Bar number):*

_____

_____

(5) I am the person in (4) and I say:

a. That I am presently unable to care for the child and prefer that the child be placed with the person listed in (1).

b. I agree to the temporary custody of my child by the person(s) listed in (1).

c. No one has threatened me, including the threat of removing the child from my custody, or made promises to me to get me to sign this form.

d. I understand that I can change my mind and that the child will be returned to me.

e. I do not give up any of my rights under the Indian Child Welfare Act by signing this form.

f. My child was at least 10 days old when I signed this form.

6 At the time of signing this form, neither I nor the child live or are domiciled on an Indian reservation of a tribe that exercises exclusive jurisdiction over child custody proceedings.

Date: _____ _____ ▶ _____

Type or print your name *Signature of Indian parent or custodian*

Judge's Certification

I, Judge _____

Superior Court of California, County of _____, certify:

- This form was completed in writing and executed before me.
- I fully explained the terms and consequences to the parent including (if applicable) the terms of any written agreement under section 16507.4 of the Welfare and Institutions Code, and they had no questions I could not answer *(name of parent):* _____
- The parent fully understood the terms and consequences.
- The parent speaks English or used an interpreter at the hearing.

Certified:

Date: _____ _____

Judge (or Judicial Officer)

Item number: 45

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Indian Child Welfare Act (ICWA): Tribal Information Form. Amend Cal. Rules of Court, rule 5.522; approve forms ICWA 100 and ICWA-100-Info

Committee or other entity submitting the proposal:
Tribal Court - State Court Forum & the Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Ann Gilmour, 415-865-4207 ann.gilmour@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Indian Child Welfare Act Legal Updates: Monitor implementation of rules and forms created pursuant to AB 3176 (Waldron) Indian children. Assembly Bill 3176 updates the Indian Child Welfare Act provisions in the Welfare and Institutions Code to comply with recent Federal Bureau of Indian Affairs regulations (Item 3 ongoing projects, pg. 13 of the Family and Juvenile Law Advisory Committee Annual Agenda)
E & P approval of Forum Agenda: March 13, 2019. Project Description from annual agenda: Implement Assembly Bill 3176 Indian Children (Waldron; Stats. 2018, ch. 833) AB 3176 Indian Children, amends provisions of the Welfare and Institutions Code to conform California law to the requirements of the federal Indian Child Welfare Act Regulations and Guidelines adopted in 2016. The legislation directs the Judicial Council to enact rules and forms necessary to implement the legislation.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-30

Title
Indian Child Welfare Act (ICWA): Tribal Information Form

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 5.522; approve forms ICWA-100 and ICWA-100-Info

Proposed by
Tribal Court–State Court Forum
Hon. Abby Abinanti, Cochair
Hon. Suzanne N. Kingsbury, Cochair
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Ann Gilmour, 415-865-4207
ann.gilmour@jud.ca.gov

Executive Summary and Origin

The Tribal Court–State Court Forum and the Family and Juvenile Law Advisory Committee recommend revising rule 5.522 of the California Rules of Court and approving a new optional form and instructions sheet for that form, effective January 1, 2021, to be used by an Indian child's tribe to provide information to the court on issues where consultation with the child's tribe is required by the Indian Child Welfare Act, and the tribe's position on these issues in cases governed by the Indian Child Welfare Act. This proposal originated with comments from tribal advocates and attorneys.

Background

Tribal Information Sheet

California is home to more people of Indian ancestry than any other state in the nation. Currently, 109 tribes are federally recognized in California, a number second only to the number of tribes in the state of Alaska. California's Indian population includes a large number of people affiliated with out-of-state tribes or tribes whose territories and primary headquarters are based in neighboring states, such as the Washoe, Fort Mojave, Chemehuevi, Colorado River, and

Quechan tribes.[1] Tribes within California are often located in remote areas, often making travel to court locations burdensome. Tribal resources and staffing vary greatly, but many tribes have only one full-time staff person devoted to child welfare cases, and that individual may have active cases in multiple counties and states. Under the federal Indian Child Welfare Act and corresponding California statutes, an Indian child's tribe has a right to participate in cases governed by ICWA, and proper implementation of and compliance with ICWA involves tribal input on a number of key issues. However, as noted in *ICWA Compliance Task Force: Report to the California Attorney General's Bureau of Children's Justice* (2017), many tribes find it difficult to exercise their right to fully participate in ICWA cases. [2] Of particular concern are the rights of "lower-income tribes, as they often do not have resources to retain legal counsel, travel and be present at all hearings or even pay fees associated with telephonic appearances." If a tribe intervenes in a case, the tribe becomes a full party. Rule 5.534(e) recognizes various rights of a tribal representative, including the right to submit written reports and recommendations to the court even if the tribe does not intervene in the case; however, tribes located out of state or unrepresented by counsel may be unfamiliar with California court procedures, and an optional form may encourage them to exercise their right to submit information more often.

If the tribe's position on key ICWA issues is unknown as a case progresses, this lack of clarity can have negative consequences on the case. For instance, if the court is unaware of the tribe's position on permanency planning until after reunification services have been terminated, unnecessary conflicts and disruptions may occur during placement.

California has a high number of appeals related to the Indian Child Welfare Act.[3] Some of these appeals might be avoided if tribal input could be consistently obtained throughout the life of a case.

The Proposal

The proposal seeks to remedy the problem created by these barriers to tribal input on key ICWA issues by establishing the optional *Tribal Information Form* (form ICWA-100) and its corresponding instruction sheet for optional use by an Indian child's tribe to submit information to the court on key issues and amending rule 5.552 to authorize an Indian tribe to file this form and other documents by fax. The form is similar to the existing *Caregiver Information Form* (form JV-290).

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[1] Judicial Council of Cal., Center for Families, Children & Cts., "Native American Statistical Abstract: Population Characteristics" *Research Update* (Mar. 2012), *www.courts.ca.gov/documents/Tribal-ResearchUpdate-NAStats.pdf*; California Indian Tribal Homelands and Trust Land Map, https://www3.epa.gov/region9/air/maps/ca_tribe.html.

[2] Cal. ICWA Compliance Task Force, *Report to the California Attorney General's Bureau of Children's Justice* (2017), p. 41, *www.caltribalfamilies.org/wp-content/uploads/2019/06/ICWAComplianceTaskForceFinalReport2017-1.pdf*.

[3] In 2016, California had 114 appeals related to ICWA. (Prof. Kathryn E. Fort, "2016 ICWA Appellate Cases by the Numbers" *Turtle Talk* [Indigenous Law and Policy Center blog], Michigan State University College of Law, Jan. 4, 2017, *https://turtletalk.wordpress.com/2017/01/04/2016-icwa-appellate-cases-by-the-numbers/*).

Tribes would not be required to use this form. However, by removing barriers to tribal participation in ICWA cases and facilitating tribal input on key issues, the proposal should reduce delays and appeals in ICWA cases and improve ICWA compliance.

Alternatives Considered

The committees and forum considered taking no action but determined that the creation of the optional *Tribal Information Form* would be of significant benefit to the courts, tribes, and justice partners. Education, training, guidelines, or best practices are not viable alternatives to the creation of an optional form because ICWA not only applies in different case types, but it often involves out-of-state tribes that may have limited familiarity with California law and practice. Tribes may be involved in cases in different counties arising in probate, family, or juvenile court. A consistent, simple form for statewide use will facilitate tribal participation in all these cases.

Fiscal and Operational Impacts

Incorporating a new form into court and justice partner systems may cause a fiscal impact. Any such impact will likely be outweighed by a reduction in delays, continuances, and appeals by improving tribal participation throughout the life of an ICWA case.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committees and forum are interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Does the proposed form address all the issues that should be covered in a way that will facilitate tribal input?

The advisory committees and form also seek comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 5.552, at pages 5–6
2. Forms ICWA-100 and ICWA-100-INFO, at pages 7–9

Rule 5.522 of the California Rules of Court would be amended, effective January 1, 2021, to read:

Rule 5.522. Remote filing

(a)–(b) * * *

(c) Fax filing

(1) *Juvenile court documents that may be filed by fax*

The following documents may be filed in juvenile court by the use of a fax machine: petitions filed under sections 300, 342, 387, 388, 601, 602, 777, and 778; *Tribal Information Form* (ICWA-100); and other documents, ~~may be filed by the use of a fax machine~~ if permitted by local rule as specified in (a).

(2) *Persons and agencies that may file by fax*

Only the following persons and agencies may file documents by the use of a fax machine, as stated in (c)(1):

(A) Any named party to the proceeding;

(B) Any attorney of record in the proceeding;

(C) The county child welfare department;

(D) The probation department;

(E) The office of the district attorney;

(F) The office of the county counsel; ~~and~~

(G) A Court Appointed Special Advocate (CASA) volunteer appointed in the case~~.~~; and

(H) An Indian tribe.

(3)–(6) * * *

INSTRUCTION SHEET FOR TRIBAL INFORMATION FORM

Background

1. **What is the Tribal Information Form?** The *Tribal Information Form*, (form ICWA-100), is intended to provide an easily accessible way for an Indian child's tribe to provide information to the court about the case and the tribe's views on the case.
2. **When does it need to be filled out and filed?** The *Tribal Information Form* is an optional form. If you choose to use it, fill it out and file it with the court, along with eight copies, at least five calendar days before the hearing, or mail it and eight copies to the court for filing at least seven calendar days before the hearing. Follow the instructions below. Do not wait until the day of the court hearing to file the form.

How to Fill Out Form ICWA-100

1. **Complete the caption.** These are the boxes at the top of the page.
   - *Court name, street address, and mailing address.* Write the name of the county where the court is located and the street and mailing address of the court. If you do not know the name and address of the court, look on the notice of the court hearing you received in the mail or go to *www.courts.ca.gov/find-my-court.htm* to find the local court in your county. For branch name, write "Juvenile".
   - *Child's Name.* Write the child's first and last names.
   - *Hearing Date and Time*. Write the hearing date and time. Ask the social worker, if you do not have this information.
   - *Case Number.* This number is on the notice of the court hearing you received in the mail. If you do not have the number, ask the child's social worker or attorney for the number. If the case involves brothers and sisters (siblings), there may be more than one case number. Be sure to use a separate form and the correct number for each child.
2. **Complete the information about the child and about the tribe and tribal representative.**
   - *Item 1.* Fill in the child's first and last names, date of birth, and age.
   - *Item 2.* Complete the information about the tribe.
3. **Complete items 4–9 about the case.** For each question, check the box to indicate whether there is new information since the last hearing. Briefly write new information in the appropriate section of the form.
   - *Item 4.* Provide information on the communication between the agency/petitioner and the tribe since the last hearing.
   - *Item 5.* Provide information about case planning, services and active efforts.
   - *Item 6.* Provide information about the child's placement.
   - *Item 7.* Provide information about the appropriate concurrent and permanent plan for the child.
   - *Item 8.* Provide other information the tribe wants to convey to the court.
4. **Add any attachments.** Check the box in item 9 to add additional pages.
5. **Sign and date the form.** On the bottom of page 2, write the date, type or print your name, and sign your name.

What to Do With the Form After You Have Filled It Out

1. **Make copies.** Tribal representatives should make eight or more copies of completed form ICWA-100 and any attachments.
2. **If you choose to file the form in person.** At least **five** calendar days before the hearing date, bring the original form and the recommended eight copies to the court clerk's office at the courthouse where the hearing will be held. Ask the clerk to file the form for you. Keep one copy of the date-stamped form for yourself. The clerk is responsible for providing the form to all parties and completing and filing the proof of service form.
3. **If you choose to file the form by mail.** At least **seven** calendar days before the hearing date, mail the original form and all but one of the copies to the court clerk's office at the courthouse where the hearing will be held. Put two stamps on the envelope. Include a note indicating "For filing and service" and including the case number. The clerk is responsible for providing the form to all parties and completing and filing the proof of service form.
4. **Confirm the hearing date, time, and place.** If you plan to attend the hearing, call the social worker to confirm the hearing date, time, and courtroom.

What to Do on the Hearing Day

1. **Bring extra copies of the form.** If you decide to attend the hearing, it is suggested that you make additional copies of the form and any attachments to provide to anyone at the hearing who did not receive them.
2. **Comments in court.** If you choose to attend the hearing, any comments you make should be short, factual, and based on your own observations. You may raise your hand to let the judge know you would like to speak, or let the courtroom clerk, deputy or bailiff know before the hearing.

Form Approved for Optional Use
Judicial Council of California
ICWA-100-INFO [New January 1, 2021]

Cal. Rules of Court, rule 5.534(e)
www.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY* **DRAFT** **Not approved by the Judicial Council**
CHILD'S NAME: HEARING DATE AND TIME:	
TRIBAL INFORMATION FORM	CASE NUMBER:

To the representative of the Indian Child's Tribe: You may submit written information to the court and you may attend hearings. You may use this optional form to provide written information to the court. Please type or print clearly in ink and submit the original and eight copies of the form to the court clerk's office at least five calendar days (or seven calendar days if filing by mail) before the hearing. Be aware that other individuals involved in the case have access to this information.

1. **Child's Information**
   a. Child's name:
   b. Child's date of birth:
   c. Child's age:
2. **Tribal Information**
   a. Name of tribe:
   b. Name of tribe's representatives authorized to represent the tribe in this case:
   c. Contact information
      Address:
      Telephone:
      Fax:
      Email:
   d. Notices, reports, orders, and other documents concerning this case ☐ may ☐ may not be served by email at the above address.
3. **Hearing Information**
   This *Tribal Information Form* is submitted for the *(insert type of hearing):*
   scheduled for *(insert date of hearing):*
4. **Communication**
   a. ☐ In the last six months, or since the last hearing, there ☐ has ☐ has not been ongoing consultation and communication between the agency or other petitioner and the tribe.
   b. ☐ Further comments:
5. **Case Planning, Services and Active Efforts**
   a. ☐ In the last six months, or since the last hearing, the tribe ☐ has ☐ has not been consulted on the appropriate services to be provided to the parents and child.
   b. ☐ The tribe submits the following information and comments with regard to case planning, services and active efforts for the parents and child:

CHILD'S NAME:	CASE NUMBER:

5. c. ☐ The tribe recommends that the following programs and services be integrated into the parents and child's case plan:

   d. ☐ Further comments:

6. ☐ **Placement (where the child is in out-of-home placement)**
   a. ☐ The tribe ☐ has ☐ has not been consulted on the child's placement.
   b. ☐ The tribe ☐ is ☐ is not aware of where the child is currently placed.
   c. ☐ The tribe ☐ is ☐ is not in agreement with the child's current placement.
   d. ☐ The tribe requests that the child be placed with *(insert name)*: . This placement is preferable because: .
   e. ☐ Further comments:

7. ☐ **Permanency Planning (where the child is in out-of-home placement)**
   a. The tribe ☐ has ☐ has not been consulted regarding the appropriate permanent plan for the child should reunification with the parents, or Indian custodian fail.
   b. The agency ☐ has ☐ has not discussed with the tribe tribal customary adoption as a permanency option should reunification with the parents, or Indian custodian fail.

   c. ☐ Further comments:

8. Other information:

9. ☐ If you need more space to respond to any section on this form or have other information that you wish to share with the court, please check this box and attach additional pages.

   Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF TRIBAL REPRESENTATIVE WHO HAS COMPLETED THIS FORM)

Item number: 46

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (January 1 cycle)**

RUPRO Meeting: April 9, 2020

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Indian Child Welfare Act (ICWA): Remote Appearance by an Indian Child's Tribe in ICWA Proceedings. Amend Cal. Rules of Court, rules 5.9, 5.482, and 5.531

Committee or other entity submitting the proposal:
Tribal Court - State Court Forum & the Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Ann Gilmour, 415-865-4207 ann.gilmour@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 28, 2019
Project description from annual agenda: Indian Child Welfare Act Legal Updates: Monitor implementation of rules and forms created pursuant to AB 3176 (Waldron) Indian children. Assembly Bill 3176 updates the Indian Child Welfare Act provisions in the Welfare and Institutions Code to comply with recent Federal Bureau of Indian Affairs regulations (Item 3 ongoing projects, pg. 13 of the Family and Juvenile Law Advisory Committee Annual Agenda)
E & P approval of Forum Agenda: March 13, 2019. Project Description from annual agenda: Implement Assembly Bill 3176 Indian Children (Waldron; Stats. 2018, ch. 833) AB 3176 Indian Children, amends provisions of the Welfare and Institutions Code to conform California law to the requirements of the federal Indian Child Welfare Act Regulations and Guidelines adopted in 2016. The legislation directs the Judicial Council to enact rules and forms necessary to implement the legislation.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue . San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR20-32

Title
Indian Child Welfare Act (ICWA): Remote Appearance by an Indian Child's Tribe in ICWA Proceedings

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 5.9, 5.482, and 5.531

Proposed by
Tribal Court–State Court Forum
Hon. Abby Abinanti, Cochair
Hon. Suzanne N. Kingsbury, Cochair
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Ann Gilmour, 415-865-4207
ann.gilmour@jud.ca.gov

Executive Summary and Origin

The Tribal Court–State Court Forum and the Family and Juvenile Law Advisory Committee recommend that the Judicial Council amend rules 5.9, 5.482, and 5.531 of the California Rules of Court, effective January 1, 2021, to permit an Indian child's tribe to participate by telephone or other computerized remote means in any hearing in a proceeding governed by the Indian Child Welfare Act, as required by section 224.2(k) of the Welfare and Institutions Code.

Background

On October 2, 2019, Governor Newsom signed Assembly Bill No. 686.[1] This bill amended section 224.2 of the Welfare and Institutions Code by adding subdivision (k), as follows:

> (k) The Judicial Council, by July 1, 2021, shall adopt rules of court to allow for telephonic or other remote appearance options by an Indian child's tribe in proceedings where the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec.

[1] Waldron; Stats. 2019, ch. 434 available at: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB686

1901 et seq.) may apply. Telephonic or other computerized remote access for court appearances established under this subdivision shall not be subject to fees.

The Proposal

The proposal would implement the requirements of AB 686 by amending rules 5.9, 5.482, and 5.531 to require courts to permit an Indian child's tribe to appear at any hearing by telephone or other computerized remote means in any proceeding governed by ICWA and further stipulating that no fee could be charged to the tribe for this remote appearance.

Specifically, the proposal would adopt new subdivision (g) of rule 5.482 and amend rules 5.9(a) and 5.531(b) (governing appearances by telephone in juvenile cases) to cross-reference rule 5.482(g).

The proposed amendments would allow courts flexibility to implement the remote appearance requirements in the manner consistent with court capacity and contractual obligations (such as court call). It does not require courts to adopt any specific technology so long as some form of remote option for effective tribal participation is provided.

Alternatives Considered

The forum and committee considered whether the requirements of new Welfare and Institutions Code section 224.2(k) applied only in juvenile cases or more broadly to all case types governed by ICWA. They concluded that broad application to all ICWA case types was appropriate. The provisions in Welfare and Institutions Code sections 224.2 through 224.6 are of general application to all ICWA case types and are incorporated by reference in the Family and Probate Codes. The forum and committee also noted that the legislative counsel's digest for AB 686 states that the bill "…would require the Judicial Council to establish a rule of court that would authorize the use of telephonic or other remote access by an Indian child's tribe in proceedings where ICWA applies."

Fiscal and Operational Impacts

There may be fiscal and operational impacts. Nevertheless, the Legislature has mandated that tribes be permitted to appear remotely at no charge in ICWA cases. The proposed language of rule 5.531 allows courts flexibility in meeting the requirements. The method of appearance may be determined by the court consistent with court capacity and contractual obligation, as long as some method of effective remote appearance and participation is provided.

Request for Specific Comments

In addition to comments on the proposal as a whole, the forum and advisory committees are interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The forum and advisory committees also seek comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, proposed rules 5.9, 5.482 and 5.531, at pages 4–5

Rules 5.9, 5.482, and 5.531 of the California Rules of Court would be revised, effective January 1, 2021, to read:

Rule 5.9. Appearance by telephone

(a) Application

This rule applies to all family law cases, except for actions for child support involving a local child support agency and cases governed by the Indian Child Welfare Act. Rule 5.324 governs telephone appearances in governmental child support cases. Rule 5.482(g) governs telephone appearances in cases governed by the Indian Child Welfare Act.

(b)–(d) * * *

Rule 5.482. Proceedings after notice

(a)–(f) * * *

(g) Tribal appearance by telephone or other remote means

In any proceeding governed by the Indian Child Welfare Act involving an Indian child, the child's tribe may, on request, appear at any hearing by telephone or other computerized remote means. The method of appearance may be determined by the court consistent with court capacity and contractual obligations, as long as some method of effective remote appearance and participation is provided. No fee may be charged to the tribe for such telephonic or other remote appearance.

Rule 5.531. Appearance by telephone (§§ 224.2(k), 388; Pen. Code § 2625)

(a) Application

The standards in (b) apply to any appearance or participation in court by telephone, videoconference, or other digital or electronic means authorized by law.

(b) Standards for local procedures or protocols

Local procedures or protocols must be developed to ensure the fairness and confidentiality of any proceeding in which a party is permitted by statute, rule of court, or judicial discretion to appear by telephone. These procedures or protocols must, at a minimum:

(1) Allow an Indian child's tribe to appear by telephone or other computerized remote means at no charge in accordance with rule 5.482(g). The method of

Rules 5.9, 5.482 and 5.531 are revised effective January 1, 2021 to read:

appearance may be determined by the court consistent with court capacity and contractual obligations, as long as some method of effective remote appearance and participation is provided;

(2) * * *

~~(2) (9)~~ (3)–(10) * * *

(c) * * *