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INVITATION TO COMMENT

CACI16-02

Title
Civil Jury Instructions (CACI) Revisions

Proposed Rules, Forms, Standards, or Statutes
Add and revise jury instructions and verdict forms

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

Action Requested
Review and submit comments by August 26, 2016

Proposed Effective Date
December 16, 2016

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Executive Summary and Origin

The Judicial Council Advisory Committee on Civil Jury Instructions has posted proposed revisions and additions to the Judicial Council civil jury instructions (CACI). Under Rule 10.58 of the California Rules of Court, the advisory committee is responsible for regularly reviewing case law and statutes affecting jury instructions and making recommendations to the Judicial Council for updating, revising, and adding topics to the council's civil jury instructions. On approval by the Judicial Council, all changes will be published in the 2017 edition of the official LexisNexis CACI publication.

Attachments

Proposed revised and new instructions and verdict forms: pp. 2–xx

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

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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 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 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 has ~~deliberately testified untruthfully~~lied about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness ~~testified untruthfully~~lied 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

Directions for Use

This instruction may be given as an introductory instruction or as a concluding instruction after trial. (See CACI No. 5003, *Witnesses*.)

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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)

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303. Breach of Contract—Essential Factual Elements

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

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

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

[or]

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

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

[or]

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

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

[*or*]

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

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

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

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

Directions for Use

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

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

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

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

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

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

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

Sources and Authority

- Contract Defined. Civil Code section 1549.

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- "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.)

- "Whether breach of the agreement not to molest bars [plaintiff]'s recovery of agreed support payments raises the question whether the two covenants are dependent or independent. If the covenants are independent, breach of one does not excuse performance of the other. (*Verdier, supra,* 133 Cal.App.2d at p. 334.)

- "The determination of whether a promise is an independent covenant, so that breach of that promise by one party does not excuse performance by the other party, is based on the intention of the parties as deduced from the agreement. The trial court relied upon parol evidence to determine the content and interpretation of the fee-sharing agreement between the parties. Accordingly, that determination is a question of fact that must be upheld if based on substantial evidence." (*Brown, supra,* 192 Cal.App.4th at p. 279, internal citation omitted.)

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

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

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

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

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

Secondary Sources

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

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

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

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

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706. Basic Speed Law (Veh. Code, § 22350)

A person must drive at a reasonable speed. Whether a particular speed is reasonable depends on the circumstances such as traffic, weather, visibility, and road conditions. Drivers must not drive so fast that they create a danger to people or property.

If [*name of plaintiff/defendant***] has proved that [***name of defendant/plaintiff***] was not driving at a reasonable speed at the time of the accident, then [***name of defendant/plaintiff***] was negligent.**

New September 2003; Revised December 2016

Directions for Use

Driving at an unreasonable speed is negligence per se, (see *Hert v. Firestone Tire & Rubber Co.* (1935) 4 Cal.App.2d 598, 599 [41 P.2d 369].) which establishes the first element of CACI No. 400, *Negligence—Essential Factual Elements.* Plaintiff must still prove the other two elements of harm and causation. (See CACI No.430, *Causation: Substantial Factor*.)

Sources and Authority

- Speeding. Vehicle Code section 22350.
- "The so-called basic speed law is primarily a regulation of the conduct of the operators of vehicles. They are bound to know the conditions which dictate the speeds at which they can drive with a reasonable degree of safety. They know, or should know, their cars and their own ability to handle them, and especially their ability to come to a stop at different speeds and under different conditions of the surface of the highway." (*Wilding v. Norton* (1957) 156 Cal.App.2d 374, 379 [319 P.2d 440].)
- "Whether Vehicle Code section 22350 has been violated is a question of fact." (*Leighton v. Dodge* (1965) 236 Cal.App.2d 54, 57 [45 Cal.Rptr. 820], internal citation omitted.)
- "A number of cases have held that it is proper to give an instruction in the terms of this section and to inform the jury that a violation of the statute is negligence." (*Hardin v. San Jose City Lines, Inc.* (1953) 41 Cal.2d 432, 438 [260 P.2d 63].)
- ~~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].)~~
- ~~Compliance with the posted speed law does not negate negligence as a matter of law. (*Maxwell v. Colburn* (1980) 105 Cal.App.3d 180, 186 [163 Cal.Rptr. 912].)~~
- ~~Drivers who are driving at the maximum speed limit on a multi-lane freeway are not under a duty to~~

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~~move their vehicles to the right into the next slower lane when another vehicle approaches them from behind in the same lane at a speed in excess of the posted maximum speed limit. (*Monreal v. Tobin* (1998) 61 Cal.App.4th 1337, 1354-1355 [72 Cal.Rptr.2d 168].)~~

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 878

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.16

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.63[3][a] (Matthew Bender)

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710. Duties of Care for Pedestrians and Drivers in Crosswalk (Veh. Code, § 21950)

~~The duty to use reasonable care does not require the same amount of caution from drivers and pedestrians. While both drivers and pedestrians must be aware that motor vehicles can cause serious injuries, drivers must use more care than pedestrians.~~

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 speed or take any other action necessary to ensure the safety of the pedestrian.

A pedestrian must also use reasonable care for his or her own safety. A pedestrian 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 pedestrian 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

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.

- ~~Driving is not considered a highly dangerous activity, though it may require a specific instruction:~~ "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

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pedestrian." (*Spann v. Ballesty* (1969) 276 Cal.App.2d 754, 761 [81 Cal.Rptr. 229].)

- "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.)

- ~~Failure to give an instruction upon request on the relative duties of the driver and the pedestrian has been held to be error. (*Cucinella v. Weston Biscuit Co.* (1954) 42 Cal.2d 71, 81 [265 P.2d 513] [error not prejudicial in this case].)~~

- ~~In *Dawson v. Lalanne* (1937) 22 Cal.App.2d 314, 315 [70 P.2d 1002], the court held it was error to refuse to instruct the jury that "the plaintiff and the defendant were both chargeable only with the exercise of ordinary care, but a greater amount of such care was required of the defendant at the time of the accident in question by reason of the fact that he was driving and operating an automobile, which is an instrumentality capable of inflicting serious and often fatal injuries upon others using the highway."~~

- ~~The purpose of instructions concerning the relative standards of care for pedestrians and drivers is "to inform the jury that the elements of action constituting conduct which qualifies as ordinary care are those commensurable with the responsibility involved and depend upon the character of the instrumentality being used or the nature of the act which is being performed, all as related to the surrounding circumstances." (*Cucinella, supra,* 42 Cal.2d at p. 80.)~~

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 881, 882, 885

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)

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

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

1. **That [***name of plaintiff***] [***describe protected activity***];**

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

   [**or**]

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

   [**or**]

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

3. **That [***name of plaintiff***]'s [***describe protected activity***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/demote/[***specify other adverse employment action***]] [***name of plaintiff***]/conduct];**

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

5. **That [***name of defendant***]'s [decision to [discharge/demote/[***specify other adverse employment action***] [***name of plaintiff***] was a substantial factor in causing [him/her] harm.**

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

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

Directions for Use

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

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

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

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

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

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

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

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

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

Sources and Authority

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

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- "Clearly, section 12940, subdivision (h) encompasses a broad range of protected activity. An employee need not use specific legal terms or buzzwords in opposing discrimination. Nor is it necessary for an employee to file a formal charge. The protected activity element may be established by evidence that the plaintiff threatened to file a discrimination charge, by a showing that the plaintiff mistakenly, but reasonably and sincerely believed he was opposing discrimination, or by evidence an employer believed the plaintiff was a potential witness in another employee's FEHA action." (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 652 [163 Cal.Rptr.3d 392], internal citations and footnote omitted.)

- "Moreover, [defendant]'s actions had a substantial and material impact on the conditions of employment. The refusal to promote [plaintiff] is an adverse employment action under FEHA. There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm." (*Wysinger, supra,* 157 Cal.App.4th at p. 424, internal citations omitted.)

- "A long period between an employer's adverse employment action and the employee's earlier protected activity may lead to the inference that the two events are not causally connected. But if between these events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection." (*Wysinger, supra,* 157 Cal.App.4th at p. 421, internal citation omitted.)

- "Both direct and circumstantial evidence can be used to show an employer's intent to retaliate. 'Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive.' Circumstantial evidence typically relates to such factors as the plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison to other workers." (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153 [119 Cal.Rptr.2d 131], internal citations omitted.)

- "The retaliatory motive is 'proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.' 'The causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision." ' " (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615 [262 Cal.Rptr. 842], internal citations omitted.)

- "[A]n employer generally can be held liable for the retaliatory actions of its supervisors." (*Wysinger, supra,* 157 Cal.App.4th at p. 420.)

- "Plaintiff, although a partner, is a person whom section 12940, subdivision (h) protects from retaliation for opposing the partnership-employer's harassment against those employees." (*Fitzsimons v. California Emergency Physicians Medical Group* (2012) 205 Cal.App.4th 1423, 1429 [141 Cal.Rptr.3d 265].)

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- "[A]n employer may be found to have engaged in an adverse employment action, and thus liable for retaliation under section 12940(h), 'by permitting … fellow employees to punish [him] for invoking [his] rights.' We therefore hold that an employer may be held liable for coworker retaliatory conduct if the employer knew or should have known of coworker retaliatory conduct and either participated and encouraged the conduct, or failed to take reasonable actions to end the retaliatory conduct." (*Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 213 [126 Cal.Rptr.3d 651], internal citation omitted.)

- "[T]he employer is liable for retaliation under section 12940, subdivision (h), but nonemployer individuals are not personally liable for their role in that retaliation." (*Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173 [72 Cal.Rptr.3d 624, 177 P.3d 232].)

- "[U]nder certain circumstances, a retaliation claim may be brought by an employee who has complained of or opposed conduct, even when a court or jury subsequently determines the conduct actually was not prohibited by the FEHA. Indeed, this precept is well settled. An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination." (*Miller v. Department of Corr.* (2005) 36 Cal.4th 446,. 473–474 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

  - "Standing alone, an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee's opposition was based upon a reasonable belief that the employer was engaging in discrimination. [C]omplaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct. [¶] But employees need not explicitly and directly inform their employer that they believe the employer's conduct was discriminatory or otherwise forbidden by FEHA." (*Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 246 Cal.App.4th 180, 202 [-- Cal.Rptr.3d --], internal citations omitted.)

- " 'The legislative purpose underlying FEHA's prohibition against retaliation is to prevent employers from deterring employees from asserting good faith discrimination complaints … .' Employer retaliation against employees who are believed to be prospective complainants or witnesses for complainants undermines this legislative purpose just as effectively as retaliation after the filing of a complaint. To limit FEHA in such a way would be to condone 'an absurd result' that is contrary to legislative intent. We agree with the trial court that FEHA protects employees against preemptive retaliation by the employer." (*Steele, supra,* 162 Cal.App.4th at p. 1255, internal citations omitted.)

- " 'The plaintiff's burden is to prove, by competent evidence, that the employer's proffered justification is mere pretext; i.e., that the presumptively valid reason for the employer's action was in fact a coverup. … In responding to the employer's showing of a legitimate reason for the complained-of action, the plaintiff cannot " 'simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee '"must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence," … and hence infer "that the employer did not act for the [asserted] non-discriminatory reasons." ' " ' " (*Jumaane v. City of Los*

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Angeles (2015) 241 Cal.App.4th 1390, 1409 [194 Cal.Rptr.3d 689].)

- "Government Code section 12940, subdivision (h), does not shield an employee against termination or lesser discipline for either lying or withholding information during an employer's internal investigation of a discrimination claim. In other words, public policy does not protect deceptive activity during an internal investigation. Such conduct is a legitimate reason to terminate an at-will employee." (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1528 [152 Cal.Rptr.3d 154], footnotes omitted.)

- "Although appellant does not argue she was constructively discharged, such a claim is not necessary to find unlawful retaliation." (*McCoy, supra,* 216 Cal.App.4th at p. 301.)

- The phrase 'because of' [in Gov. Code, § 12940(a)] is ambiguous as to the type or level of intent (i.e., motivation) and the connection between that motivation and the decision to treat the disabled person differently. This ambiguity is closely related to [defendant]'s argument that it is liable only if motivated by discriminatory animus. [¶] The statutory ambiguity in the phrase 'because of"' was resolved by our Supreme Court about six months after the first jury trial [in *Harris, supra,* 56 Cal.4th at p. 203]." (*Wallace, supra,* 245 Cal.App.4th at p. 127.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 922, 940, 941

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

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

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

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

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

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2506. Limitation on Remedies—After-Acquired Evidence

[*Name of defendant*] claims that [he/she/it] would have discharged [*name of plaintiff*] anyway if [he/she/it] had known that [*name of plaintiff*] [*describe misconduct*]. You must decide whether [*name of defendant*] has proved all of the following:

1. **That [*name of plaintiff*] [*describe misconduct*];**

2. **That [*name of plaintiff*]'s misconduct was sufficiently severe that [*name of defendant*] would have discharged [him/her] because of that misconduct alone had [*name of defendant*] known of it; and**

3. **That [*name of defendant*] would have discharged [*name of plaintiff*] for [his/her] misconduct as a matter of settled company policy.**

New September 2003; Revised June 2016, December 2016

Directions for Use

The doctrine of after-acquired evidence refers to an employer's discovery, after an allegedly wrongful termination of employment or refusal to hire, of information that would have justified a lawful termination or refusal to hire. (*Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 428 [173 Cal.Rptr.3d 689, 327 P.3d 797].) ~~The after-acquired-evidence doctrine is an equitable defense that is determined by the court based on the facts of the case.~~

There is some uncertainty as to whether or not it is an equitable defense. (Compare *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1173 [104 Cal.Rptr.2d 95] [doctrine is the basis for an *equitable defense* related to the traditional defense of "unclean hands," italics added] with *Salas, supra,* 59 Cal.4th at p. 428 [omitting "equitable"].) If it is an equitable defense, then the fact finding in the elements of the instruction would be only advisory to the court, or the elements could be found be the court itself as the trier of fact. (See *Thompson, supra,* 86 Cal.App. 4th at p. 1173; see also *Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156 [85 Cal.Rptr.3d 337] [jury's factual findings are purely advisory because, on equitable causes of action, the judge is the proper fact finder].) ~~This instruction assists the judge if the facts are in dispute. (See, e.g., *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1173 [104 Cal.Rptr.2d 95].)~~

~~-~~After-acquired evidence is not a complete defense to liability, but may foreclose otherwise available remedies. (*Salas, supra, ~~v. Sierra Chemical Co.~~* (2014) 59 Cal.4th at pp. ~~407,~~ 430–431 ~~[173 Cal.Rptr.3d 689, 327 P.3d 797]~~.) ~~It is not clear if there is a role for the jury in deciding what remedies are available.~~

After-acquired evidence cases must be distinguished from mixed motive cases in which the employer at the time of the employment action has two or more motives, at least one of which is unlawful. (See *Salas supra,* 59 Cal.4th at p. 430; CACI No. 2512, *Limitation on Remedies—Same Decision*.)

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Sources and Authority

- "In general, the after-acquired-evidence doctrine shields an employer from liability or limits available relief where, after a termination, the employer learns for the first time about employee wrongdoing that would have led to the discharge in any event. Employee wrongdoing in after-acquired-evidence cases generally falls into one of two categories: (1) misrepresentations on a resume or job application; or (2) posthire, on-the-job misconduct." (*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 632 [41 Cal.Rptr.2d 329].)

- "The after-acquired-evidence doctrine serves as a complete or partial defense to an employee's claim of wrongful discharge ... To invoke this doctrine, '... the employer must establish "that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it" ... [T]he employer ... must show that such a firing would have taken place as a matter of "settled" company policy.' " (*Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 842, 845-846 [77 Cal.Rptr.2d 12], internal citations omitted.)

- "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." (*McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352, 362-363 [115 S.Ct. 879, 130 L.Ed.2d 852].)

- "Courts must tread carefully in applying the after-acquired-evidence doctrine to discrimination claims ... . Where, as here, the discriminatory conduct was pervasive during the term of employment, therefore, it would not be sound public policy to bar recovery for injuries suffered while employed. In applying the after-acquired-evidence doctrine, the equities between employer and employee can be balanced by barring all portions of the employment discrimination claim tied to the employee's discharge." (*Murillo*, *supra*, 65 Cal.App.4th at pp. 849–850.)

- "As the Supreme Court recognized in *McKennon*, the use of after-acquired evidence must 'take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing.' We appreciate that the facts in *McKennon* ... presented a situation where balancing the equities should permit a finding of employer liability-to reinforce the importance of antidiscrimination laws-while limiting an employee's damages-to take account of an employer's business prerogatives. However, the equities compel a different result where an employee who is disqualified from employment by government-imposed requirements nevertheless obtains a job by misrepresenting the pertinent qualifications. In such a situation, the employee should have no recourse for an alleged wrongful termination of employment." (*Camp*, *supra*, 35 Cal.App.4th at pp. 637-638, internal citation omitted.)

- "We decline to adopt a blanket rule that material falsification of an employment application is a complete defense to a claim that the employer, while still unaware of the falsification, terminated the employment in violation of the employee's legal rights." (*Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal.App.4th 614, 617 [29 Cal.Rptr.2d 642].)

- "The doctrine [of after-acquired evidence] is the basis for an equitable defense related to the traditional defense of 'unclean hands' ... [¶] In the present case, there were conflicts in the evidence

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concerning respondent's actions, her motivations, and the possible consequences of her actions within appellant's disciplinary system. The trial court submitted those factual questions to the jury for resolution and then used the resulting special verdict as the basis for concluding appellant was not entitled to equitable reduction of the damages award." (*Thompson, supra,* 86 Cal.App.4th at p. 1173.)

- "By definition, after-acquired evidence is not known to the employer at the time of the allegedly unlawful termination or refusal to hire. In after-acquired evidence cases, the employer's alleged wrongful act in violation of the FEHA's strong public policy precedes the employer's discovery of information that would have justified the employer's decision. To allow such after-acquired evidence to be a complete defense would eviscerate the public policies embodied in the FEHA by allowing an employer to engage in invidious employment discrimination with total impunity." (*Salas, supra,* 59 Cal.4th at p. 430.)

- "In after-acquired evidence cases, therefore, both the employee's rights and the employer's prerogatives deserve recognition. The relative equities will vary from case to case, depending on the nature and consequences of any wrongdoing on either side, a circumstance that counsels against rigidity in fashioning appropriate remedies in those actions where an employer relies on after-acquired evidence to defeat an employee's FEHA claims." (*Salas, supra,* 59 Cal.4th at p. 430.)

- "Generally, the employee's remedies should not afford compensation for loss of employment during the period after the employer's discovery of the evidence relating to the employee's wrongdoing. When the employer shows that information acquired after the employee's claim has been made would have led to a lawful discharge or other employment action, remedies such as reinstatement, promotion, and pay for periods after the employer learned of such information would be 'inequitable and pointless,' as they grant remedial relief for a period during which the plaintiff employee was no longer in the defendant's employment and had no right to such employment." (*Salas, supra,* 59 Cal.4th at pp. 430−431.)

- The remedial relief generally should compensate the employee for loss of employment from the date of wrongful discharge or refusal to hire to the date on which the employer acquired information of the employee's wrongdoing or ineligibility for employment. Fashioning remedies based on the relative equities of the parties prevents the employer from violating California's FEHA with impunity while also preventing an employee or job applicant from obtaining lost wages compensation for a period during which the employee or applicant would not in any event have been employed by the employer. In an appropriate case, it would also prevent an employee from recovering any lost wages when the employee's wrongdoing is particularly egregious." (*Salas, supra,* 59 Cal.4th at p. 431, footnote omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 211

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 7:930–7:932, 16:615–16:616, 16:625, 16:635–16:637, 16:647

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.107

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2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.92 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.54[2] (Matthew Bender)

California Civil Practice: Employment Litigation § 2:88 (Thomson Reuters)

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2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] based on [his/her] [history of [a]] [***select term to describe basis of limitations, e.g., physical condition***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That [***name of defendant***] knew that [***name of plaintiff***] had [a history of having] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];**

4. **That [***name of plaintiff***] was able to perform the essential job duties [with reasonable accommodation for [his/her] [***e.g., physical condition***]];**

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

   [or]

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

   [or]

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

6. **That [***name of plaintiff***]'s [history of [a]] [***e.g., physical condition***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];**

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

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

It is not necessary for [*name of plaintiff***] to prove that [***name of defendant***] held any ill will or animosity toward [him/her] personally because [he/she] was [perceived to be] disabled. [On the other hand, if you find that [***name of defendant***] did hold ill will or animosity toward [***name of plaintiff***] because [he/she] was [perceived to be] disabled, you may consider this fact, along with all the other evidence, in determining whether [***name of plaintiff***]'s [history of [a]] [***e.g. physical condition***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct].]**

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New September 2003; Revised June 2006, December 2007, April 2009, December 2009, June 2010, June 2012, June 2013, December 2014, December 2016

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

In the introductory paragraph and in elements 3 and 6, select the bracketed language on "history" of disability if the claim of discrimination is based on a history of disability rather than a current actual disability.

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Modify elements 3 and 6 if plaintiff was not actually disabled or had a history of disability, but alleges discrimination because he or she was perceived to be disabled. (See Gov. Code, § 12926(o); see also Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) This can be done with language in element 3 that the employer "treated [*name of plaintiff*] as if [he/she] ..." and with language in element 6 "That [*name of employer*]'s belief that … ."

If the plaintiff alleges discrimination on the basis of his or her association with someone who was or was perceived to be disabled, give CACI No. 2547, *Disability-Based Associational Discrimination—Essential Factual Elements.* (See *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655−660 [163 Cal.Rptr.3d 392] [claim for "disability based associational discrimination" adequately pled].)

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit "that limited [*insert major life activity*]" in element 3. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

Regarding element 4, it is now settled that the ability to perform the essential duties of the job is an element of the plaintiff's burden of proof. (See *Green v. State of California* (2007) 42 Cal.4th 254, 257–258 [64 Cal.Rptr.3d 390, 165 P.3d 118].)

Read the first option for element 5 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 5 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 6 if either the second or third option is included for element 5.

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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 last optional sentence if there is evidence that the defendant harbored personal animus against the plaintiff because of his or her disability.

If the existence of a qualifying disability is disputed, additional instructions defining "physical disability," "mental disability," and "medical condition" may be required. (See Gov. Code, § 12926(i), (j), (m).)

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Inability to Perform Essential Job Duties. Government Code section 12940(a)(1).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Perception of Disability and Association With Disabled Person Protected. Government Code section 12926(o).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "[T]he plaintiff initially has the burden to establish a prima facie case of discrimination. The plaintiff can meet this burden by presenting evidence that demonstrates, even circumstantially or by inference, that he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability. To establish a prima facie case, a plaintiff must show ' " ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a [prohibited] discriminatory criterion … ." ' " …' The prima facie burden is light; the evidence necessary to sustain the burden is minimal. As noted above, while the elements of a plaintiff's prima facie case can vary considerably, generally an employee need only offer sufficient circumstantial evidence to give rise to a reasonable *inference* of discrimination." (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310 [115 Cal.Rptr.3d 453], original italics, internal citations omitted.)
- "The distinction between cases involving direct evidence of the employer's motive for the adverse employment action and cases where there is only circumstantial evidence of the employer's

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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* [*supra*]. (*Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 123 [199 Cal.Rptr.3d 462]. 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, footnote and internal citations omitted.)

- "If the employee meets this [prima facie] burden, it is then incumbent on the employer to show that it had a legitimate, nondiscriminatory reason for its employment decision. When this showing is made, the burden shifts back to the employee to produce substantial evidence that employer's given reason was either 'untrue or pretextual,' or that the employer acted with discriminatory animus, in order to raise an inference of discrimination." (*Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 744 [151 Cal.Rptr.3d 292], internal citations omitted.)

- "Although the same statutory language that prohibits disability discrimination also prohibits discrimination based on race, age, sex, and other factors, we conclude that disability discrimination claims are fundamentally different from the discrimination claims based on the other factors listed in section 12940, subdivision (a). These differences arise because (1) additional statutory provisions apply to disability discrimination claims, (2) the Legislature made separate findings and declarations about protections given to disabled persons, and (3) discrimination cases involving race, religion, national origin, age and sex, often involve pretexts for the adverse employment action—an issue about motivation that appears less frequently in disability discrimination cases." (*Wallace, supra,* 245 Cal.App.4th at p. 122.)

- "Summary adjudication of the section 12940(a) claim … turns on … whether [plaintiff] could perform the essential functions of the relevant job with or without accommodation. [Plaintiff] does not dispute that she was unable to perform the essential functions of her *former* position as a clothes fitter with or without accommodation. Under federal law, however, when an employee seeks accommodation by being reassigned to a vacant position in the company, the employee satisfies the 'qualified individual with a disability' requirement by showing he or she can perform the essential

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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

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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.)

- " 'An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer. Thus, in order to prove [a discrimination] claim, a plaintiff must prove the employer had knowledge of the employee's disability when the adverse employment decision was made. … While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations … ." … ' " (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008 [93 Cal.Rptr.2d 338].)

- "[W]e interpret FEHA as authorizing an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against coworkers. If employers are not permitted to make this distinction, they are caught on the horns of a dilemma. They may not discriminate against an employee based on a disability but, at the same time, must provide all employees with a safe work environment free from threats and violence." (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 166 [125 Cal.Rptr.3d 1], internal citations omitted.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra,* 56 Cal.4th at p. 232, original italics.)

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

- "We note that the court in *Harris* discussed the employer's motivation and the link between the employer's consideration of the plaintiff's physical condition and the adverse employment action without using the terms "animus," "animosity," or "ill will." The absence of a discussion of these terms necessarily implies an employer can violate section 12940, subdivision (a) by taking an adverse employment action against an employee "because of" the employee's physical disability even if the employer harbored no animosity or ill will against the employee or the class of persons with that disability." (*Wallace, supra,* 245 Cal.App.4th at p. 128.)

- Based on *Harris,* we conclude that an employer has treated an employee differently 'because of' a disability when the disability is a substantial motivating reason for the employer's decision to subject the employer 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.)

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- "We conclude that where, as here, an employee is found to be able to safely perform the essential duties of the job, a plaintiff alleging disability discrimination can establish the requisite employer intent to discriminate by proving (1) the employer knew that plaintiff had a physical condition that limited a major life activity, or perceived him to have such a condition, and (2) the plaintiff's actual or perceived physical condition was a substantial motivating reason for the defendant's decision to subject the plaintiff to an adverse employment action. … [T]his conclusion is based on (1) the interpretation of section 12940's term 'because of' adopted in *Harris*; (2) our discussion of the meaning of the statutory phrase 'to discriminate against'; and (3) the guidance provided by the current versions of CACI Nos. 2540 and 2507. [¶] Therefore, the jury instruction that [plaintiff] was required to prove that [defendant] 'regarded or treated [him] as having a disability in order to discriminate' was erroneous." (*Wallace, supra,* 245 Cal.App.4th at p. 129.)

- "The word 'animus' is ambiguous because it can be interpreted narrowly to mean 'ill will' or 'animosity' or can be interpreted broadly to mean 'intention.' In this case, it appears [defendant] uses 'animus' to mean something more than the intent described by the substantial-motivating-reason test adopted in *Harris*. (*Wallace, supra,* 245 Cal.App.4th at p. 130 fn. 14, internal citation omitted.)

- "Being unable to work during pregnancy is a disability for the purposes of section 12940." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1340 [153 Cal.Rptr.3d 367].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 936, 937

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)

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3061. Discrimination in Business Dealings—Essential Factual Elements (Civ. Code, § 51.5)

[*Name of plaintiff***] claims that [***name of defendant***] denied [him/her] full and equal rights to conduct business because of [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [discriminated against/boycotted/blacklisted/refused to buy from/refused to contract with/refused to sell to/refused to trade with] [***name of plaintiff***];**

2. **[That a substantial motivating reason for [***name of defendant***]'s conduct was [its perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/ disability/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[***insert other actionable characteristic***]];]**

   [*or***]**

   [That a substantial motivating reason for [*name of defendant***]'s conduct was [its perception of] the [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[***insert other actionable characteristic***]] of [***name of plaintiff***]'s [partners/members/stockholders/directors/officers/managers/superintendents/agents/ employees/business associates/suppliers/customers];]**

   [*or***]**

   [That a substantial motivating reason for [*name of defendant***]'s conduct was [its perception of] the [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[***insert other actionable characteristic***]] of a person with whom [***name of plaintiff***] was associated;]**

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 June 2012; Renumbered from CACI No. 3021 and Revised December 2012; Revised June 2013, December 2016

Directions for Use

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Select the bracketed option from element 2 that is most appropriate to the facts of the case.

Under the Unruh Civil Rights Act (see CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements*), the California Supreme Court has held that intentional discrimination is required. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159–1162 [278 Cal.Rptr. 614, 805 P.2d 873].) While there is no similar California case imposing an intent requirement under Civil Code section 51.5, Civil Code section 51.5 requires that the discrimination be *on account of* the protected category. (Civ. Code, § 51.5(a).) The kinds of prohibited conduct would all seem to involve intentional acts. (See *Nicole M. v. Martinez Unified Sch. Dist.* (N.D. Cal. 1997) 964 F.Supp. 1369, 1389, superseded by statute on other grounds as stated in *Sandoval v. Merced Union High Sch.* (E.D. Cal. 2006) 2006 U.S. Dist. LEXIS 28446.) The intent requirement is encompassed within the motivating-reason element (element 2).

There is an exception to the intent requirement under the Unruh Act for conduct that violates the Americans With Disabilities Act. (See *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 [94 Cal.Rptr.3d 685, 208 P.3d 623].). Because this exception is based on statutory construction of the Unruh Act (see Civ. Code, § 51(f)), the committee does not believe that it applies to section 51.5, which contains no similar language.

Note that there are two causation elements. There must be a causal link between the discriminatory intent and the adverse action (see element 2), and there must be a causal link between the adverse action and the harm (see element 4).

Element 2 uses the term "substantial motivating reason" to express causation between the protected classification and the defendant's conduct. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under Civil Code section 51.5 has not been addressed by the courts.

For an instruction on damages under Civil Code section 51.5, see CACI No. 3067, *Unruh Civil Rights Act—Damages*. Note that the jury may award a successful plaintiff up to three times actual damages but not less than $4,000. (Civ. Code, § 52(a).); see also Civ. Code, § 52(h) ["actual damages" means special and general damages].)

It is possible that elements 3 and 4 are not needed if only the statutory minimum $4,000 award is sought. With regard to the Unruh Act (Civ. Code, § 51), which is also governed by Civil Code section 52(a), the California Supreme Court has held that a violation is per se injurious, and that section 52 provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

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Conceptually, this instruction has some overlap with CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements.* For a discussion of the basis of this instruction, see *Jackson v. Superior Court* (1994) 30 Cal.App.4th 936, 941 [36 Cal.Rptr.2d 207].

Sources and Authority

- Discrimination in Business Dealings. Civil Code section 51.5.

- "In 1976 the Legislature added Civil Code section 51.5 to the Unruh Civil Rights Act and amended Civil Code section 52 (which provides penalties for those who violate the Unruh Civil Rights Act), in order to, inter alia, include section 51.5 in its provisions." (*Pines v. Tomson* (1984) 160 Cal.App.3d 370, 384 [206 Cal.Rptr. 866], footnote omitted.)

- "[I]t is clear from the cases under section 51 that the Legislature did not intend in enacting section 51.5 to limit the broad language of section 51 to include only selling, buying or trading. Both sections 51 and 51.5 have been liberally applied to all types of business activities. Furthermore, section 51.5 forbids a business to 'discriminate against' 'any person' and does not just forbid a business to 'boycott or blacklist, refuse to buy from, sell to, or trade with any person.' " (*Jackson, supra,* 30 Cal.App.4th at p. 941, internal citation and footnote omitted.)

- "Although the phrase 'business establishment of every kind whatsoever' has been interpreted by the Supreme Court and the Court of Appeal in the context of section 51, we are aware of no case which interprets that term in the context of section 51.5. We believe, however, that the Legislature meant the identical language in both sections to have the identical meaning." (*Pines, supra,* 160 Cal.App.3d at p. 384, internal citations omitted.)

- "[T]he classifications specified in section 51.5, which are identical to those of section 51, are likewise not exclusive and encompass other personal characteristics identified in earlier cases." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 538 [30 Cal.Rptr.2d 706], internal citations omitted.)

- "[T]he analysis under Civil Code section 51.5 is the same as the analysis we have already set forth for purposes of the [Unruh Civil Rights] Act." (*Semler v. General Electric Capital Corp*. (2011) 196 Cal.App.4th 1380, 1404 [127 Cal.Rptr.3d 794].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 898–914

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10–116.13 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act,* § 35.20 (Matthew Bender)

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3063. Acts of Violence—Ralph Act—Essential Factual Elements (Civ. Code, § 51.7)

[*Name of plaintiff*] claims that [*name of defendant*] committed an act of violence against [him/her] because of [his/her] [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/citizenship/primary language/immigration status/[*insert other actionable characteristic*]]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] committed a violent act against [*name of plaintiff*] [or [his/her] property];**

2. **That a substantial motivating reason for [*name of defendant*]'s conduct was [[his/her] perception of] [*name of plaintiff*]'s [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/citizenship/primary language/immigration status/[*insert other actionable characteristic*]];**

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

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

Derived from former CACI No. 3023 December 2009; Renumbered from CACI No. 3023A December 2012; Revised June 2013, December 2016

Directions for Use

Use this instruction for a cause of action under the Ralph Act involving actual acts of violence alleged to have been committed by the defendant against the plaintiff. For an instruction involving only threats of violence, see CACI No. 3064, *Threats of Violence—Ralph Act—Essential Factual Elements*.

Note that element 2 uses the term "substantial motivating reason" to express both intent and causation between the protected classification and the defendant's acts. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under the Ralph Act has not been addressed by the courts.

Liability may also be found if a defendant "aids, incites, or conspires" in the denial of a right protected under Civil Code section 51.7. (Civ. Code, § 52(b).) This instruction should be modified if aiding, inciting, or conspiring is asserted as theories of liability. See also instructions in the Conspiracy series (CACI No. 3600 et seq.).

Sources and Authority

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- Ralph Act. Civil Code section 51.7.

- Remedies Under Ralph Act. Civil Code section 52(b).

- "The unambiguous language of this section gives rise to a cause of action in favor of a person against whom violence or intimidation has been committed or threatened." (*Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1277 [237 Cal.Rptr. 873].)

- "Nor do we agree with defendants that 'because of' logically means 'hatred.' Section 51.7 provides that all persons 'have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of …' specified characteristics, including sex, and provides for a civil remedy for violation of that right. Nothing in the statute requires that a plaintiff prove that the offending act was motivated by hate." (*Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 269 [150 Cal.Rptr.3d 861].)

- "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195].)

Secondary Sources

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.80 (Matthew Bender)

California Civil Practice: Civil Rights Litigation §§ 3:1–3:15 (Thomson Reuters)

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3064. Threats of Violence—Ralph Act—Essential Factual Elements (Civ. Code, § 51.7)

[*Name of plaintiff***] claims that [***name of defendant***] intimidated [him/her] by threat of violence because of [his/her] [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/citizenship/primary language/immigration status/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] intentionally threatened violence against [***name of plaintiff***] [or [his/her] property], [whether or not [***name of defendant***] actually intended to carry out the threat];**

2. **That a substantial motivating reason for [***name of defendant***]'s conduct was [[his/her] perception of] [***name of plaintiff***]'s [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/citizenship/primary language/immigration status/[***insert other actionable characteristic***]];**

3. **That a reasonable person in [***name of plaintiff***]'s position would have believed that [***name of defendant***] would carry out [his/her] threat;**

4. **That a reasonable person in [***name of plaintiff***]'s position would have been intimidated by [***name of defendant***]'s conduct;**

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

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

Derived from former CACI No. 3023 December 2009; Renumbered from CACI No. 3023B December 2012; Revised June 2013, December 2016

Directions for Use

Use this instruction for a cause of action under the Ralph Act involving threats of violence alleged to have been directed by the defendant toward the plaintiff. For an instruction involving actual acts of violence, see CACI No. 3063, *Acts of Violence—Ralph Act—Essential Factual Elements*.

Note that element 2 uses the term "substantial motivating reason" to express both intent and causation between the protected classification and the defendant's threats. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under the Ralph Act has not been addressed by the courts.

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No published California appellate opinion establishes elements 3 and 4. However, the Ninth Circuit Court of Appeals and the California Fair Employment and Housing Commission have held that a reasonable person in the plaintiff's position must have been intimidated by the actions of the defendant and have perceived a threat of violence. (See *Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1289–1290; *Dept. Fair Empl. & Hous. v. Lake Co. Dept. of Health Serv.* (July 22, 1998) 1998 CAFEHC LEXIS 16, 55–56.)

Liability may also be found if a defendant "aids, incites, or conspires" in the denial of a right protected under Civil Code section 51.7. (Civ. Code, § 52(b).) This instruction should be modified if aiding, inciting, or conspiring is asserted as theories of liability. See also instructions in the Conspiracy series (CACI No. 3600 et seq.).

Sources and Authority

- Ralph Act. Civil Code section 51.7.
- Remedies Under Ralph Act. Civil Code section 52(b).
- "The unambiguous language of this section gives rise to a cause of action in favor of a person against whom violence or intimidation has been committed or threatened." (*Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1277 [237 Cal.Rptr. 873].)
- "Nor do we agree with defendants that 'because of' logically means 'hatred.' Section 51.7 provides that all persons 'have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of …' specified characteristics, including sex, and provides for a civil remedy for violation of that right. Nothing in the statute requires that a plaintiff prove that the offending act was motivated by hate." (*Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 269 [150 Cal.Rptr.3d 861].)
- "The test is: 'would a reasonable person, standing in the shoes of the plaintiff, have been intimidated by the actions of the defendant and have perceived a threat of violence?' " (*Winarto, supra,* 274 F.3d at pp. 1289–1290, internal citation omitted.)
- "When a threat of violence would lead a reasonable person to believe that the threat will be carried out, in light of the 'entire factual context,' including the surrounding circumstances and the listeners' reactions, then the threat does not receive First Amendment protection, and may be actionable under the Ralph Act. The only intent requirement is that respondent 'intentionally or knowingly communicates his [or her] threat, not that he intended or was able to carry out his threat.' A threat exists if the 'target of the speaker reasonably believes that the speaker has the ability to act him or herself or to influence others. . . . It is the perception of a reasonable person that is dispositive, not the actual intent of the speaker.' " (*Dept. Fair Empl. & Hous., supra,* 1998 CAFEHC LEXIS at pp. 55–56, internal citations omitted.)
- "Section 51 by its express language applies only within California. It cannot (with its companion

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penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶ 5:892.11, ¶¶ 7:1528–7:1529

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.80 (Matthew Bender)

California Civil Practice: Civil Rights Litigation §§ 3:1–3:15 (Thomson Reuters)

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3103. Neglect—Essential Factual Elements (Welf. & Inst. Code, § 15610.57)

[*Name of plaintiff***] claims that [he/she/[***name of decedent***]] was neglected by [[***name of individual defendant***]/ [and] [***name of employer defendant***]] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] had a substantial caretaking or custodial relationship with ~~care or custody of~~ [***name of plaintiff/decedent***], involving ongoing responsibility for [his/her] basic needs;**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] while [he/she] was in [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's] care or custody;**

3. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] failed to use the degree of care that a reasonable person in the same situation would have used in [***insert one or more of the following:***]**

   [assisting in personal hygiene or in the provision of food, clothing, or shelter;]

   [providing medical care for physical and mental health needs;]

   [protecting [*name of plaintiff/decedent***] from health and safety hazards;]**

   [preventing malnutrition or dehydration;]

   [*insert other grounds for neglect;***]**

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

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

New September 2003; Revised December 2005, June 2006, October 2008, December 2016

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act (the Act) by the victim of elder neglect, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage),* in the Damages series.

If the plaintiff seeks the enhanced remedies of attorney fees and costs, and in the case of a wrongful death, the decedent's pain and suffering, give CACI No. 3104, *Neglect—Enhanced Remedies Sought,* in

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addition to this instruction. (See Welf. & Inst. Code, § 15657.)

If the individual responsible for the neglect is a defendant in the case, use "[*name of individual defendant*]" throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

If the plaintiff is seeking enhanced remedies against the individual's employer, also give either CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants,* or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only.* To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

The Act does not extend to~~is instruction is not intended for~~ cases involving professional negligence against health-care providers as defined by the California Medical Injury Compensation Reform Act of 1975 (MICRA) unless the professional had a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient. (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, --.[-- Cal.Rptr.3d --, -- P.3d --]; see Welf. & Inst. Code, § 15657.2, Civ. Code, § 3333.2(c)(2).)~~.~~

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- "Elder Abuse" Defined. Welfare and Institutions Code section 15610.07.
- "Dependent Adult" Defined. Welfare and Institutions Code section 15610.23.
- "Elder" Defined. Welfare and Institutions Code section 15610.27.
- "Neglect" Defined. Welfare and Institutions Code section 15610.57.
- Claims for Professional Negligence Excluded. Welfare and Institutions Code section 15657.2.
- "It is true that statutory elder abuse includes 'neglect as defined in Section 15610.57,' which in turn includes negligent failure of an elder custodian 'to provide medical care for [the elder's] physical and mental health needs.' … '[N]eglect' within the meaning of Welfare and Institutions Code section 15610.57 covers an area of misconduct distinct from 'professional negligence.' As used in the Act, neglect refers not to the substandard performance of medical services but, rather, to the 'failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' Thus, the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783 [11 Cal.Rptr.3d 222, 86 P.3d 290], original italics, internal citations omitted.)
- "[T]he Act does not apply unless the defendant health care provider had a substantial caretaking or

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custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient. It is the nature of the elder or dependent adult's relationship with the defendant—not the defendant's professional standing—that makes the defendant potentially liable for neglect." (*Winn, supra,*63 Cal.4th at p. --.)

- "The Act seems premised on the idea that certain situations place elders and dependent adults at heightened risk of harm, and heightened remedies relative to conventional tort remedies are appropriate as a consequence. Blurring the distinction between neglect under the Act and conduct actionable under ordinary tort remedies—even in the absence of a care or custody relationship—risks undermining the Act's central premise. Accordingly, plaintiffs alleging professional negligence may seek certain tort remedies, though not the heightened remedies available under the Elder Abuse Act." (*Winn, supra,* 63 Cal.4th at p. --, internal citation omitted.)

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "[T]he statutory definition of neglect set forth in the first sentence of Welfare and Institutions Code section 15610.57 is substantially the same as the ordinary definition of neglect." (*Conservatorship of Gregory v. Beverly Enterprises, Inc.* (2000) 80 Cal.App.4th 514, 521 [95 Cal.Rptr.2d 336].)

- ~~"The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment ... .' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a 'physician and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals—health practitioners as well as care custodians—should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974 [95 Cal.Rptr.2d 830], internal citations omitted.)~~

- "[N]eglect as a form of abuse under the Elder Abuse Act refers 'to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' " (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404 [129 Cal.Rptr.3d 895].)

- "[A] violation of staffing regulations here may provide a basis for finding neglect. Such a violation might constitute a negligent failure to exercise the care that a similarly situated reasonable person would exercise, or it might constitute a failure to protect from health and safety hazards … . The former is the definition of neglect under the Act, and the latter is just one nonexclusive example of neglect under the Act." (*Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339, 1348−1349 [200 Cal.Rptr.3d 245].)

Secondary Sources

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6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 2.70–2.71

3 Levy et al., California Torts, Ch. 31 *Liability of Physicians and Other Medical Practitioners,* § 31.50[4][d] (Matthew Bender)

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly,* § 5.33[3] (Matthew Bender)

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3511. Permanent Severance Damages

The [*name of condemnor*] has taken only a part of [*name of property owner*]'s property. [*Name of property owner*] claims that [his/her/its] remaining property has lost value as a result of the taking because [*specify reasons alleged for diminution of value of remaining property*]. This loss in value is called "severance damages." ~~**and must be included in determining just compensation.**~~

Severance damages are the damages to [*name of property owner*]'s remaining property caused by the taking~~**, or by the construction and use of the [*name of condemnor*]'s proposed project, or by both**~~**. If you determine that the remaining property has lost value because of the taking, severance damages must be included in determining just compensation.**

Severance damages are determined as follows:

1. **Determine the fair market value of the remaining property on [*date of valuation*] by subtracting the fair market value of the part taken from the fair market value of the entire property;**

2. **Determine the fair market value of the remaining property after the [*name of condemnor*]'s proposed project is completed; and**

3. **Subtract the fair market value of the remaining property after the [*name of condemnor*]'s proposed project is completed from the fair market value of the remaining property on [*date of valuation*].**

New September 2003; Revised December 2016

Directions for Use

Give this instruction if the owner claims that property not taken has permanently lost value because of the taking, for example because a view has been lost. 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.) Read CACI No. 3512, *Severance Damages—Offset for Benefits*, if benefits to the owner's remaining property are at issue.

A property owner may also be able to recover for economic loss to the remaining property incurred during the construction of the project. (*City of Fremont v. Fisher* (2008) 160 Cal.App.4th 666, 676 [73 Cal.Rptr.3d 54].). This recovery has been called "temporary severance damages." This instruction is not for use to compute loss during construction.

Sources and Authority

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- Right to Severance Damages. Code of Civil Procedure section 1263.410.

- Damages to Remainder After Severance. Code of Civil Procedure section 1263.420.

- 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.)

- "The claimed loss in market value must directly and proximately flow from the taking. Thus, recovery may not be based on ' " 'speculative, remote, imaginary, contingent, or merely possible' " ' events." (*City of Livermore v. Baca* (2012) 205 Cal.App.4th 1460, 1466 [141 Cal.Rptr.3d 271].)

- The court determines as a matter of law what constitutes the "larger parcel" for which severance damages may be obtained: "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'." (*City of San Diego, supra*, 6 Cal.4th at p. 745, internal citations omitted.)

- "As we said in *Pierpont Inn*, 'Where the property taken constitutes only a part of a larger parcel, the owner is entitled to recover, inter alia, the difference in the fair market value of his property in its "before" condition and the fair market value of the remaining portion thereof after the construction of the improvement on the portion taken. Items such as view, access to beach property, freedom from noise, etc. are unquestionably matters which a willing buyer in the open market would consider in determining the price he would pay for any given piece of real property.' Severance damages are not limited to special and direct damages, but can be based on any factor, resulting from the project, that causes a decline in the fair market value of the property." (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 712 [66 Cal.Rptr.2d 630, 941 P.2d 809], 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,* ~~*v. Campus Crusade for Christ, Inc.* (2007)~~ 41 Cal.4th at p. ~~954,~~ 972 ~~[62 Cal.Rptr.3d 623, 161 P.3d 1175~~, original italics, internal citations omitted.)

- "[W]here the property owner produces evidence tending to show that some other aspect of the taking … 'naturally tends to and actually does decrease the market value' of the remaining property, it is for

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the jury to weigh its effect on the value of the property, as long as the effect is not speculative, conjectural, or remote." (*Metropolitan Water Dist. of So. California, supra,* 41 Cal.4th at p. 973.)

- "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. The value of the remainder after the condemnation has occurred is referred to as the 'after' value of the property. The diminution in fair market value is determined by comparing the before and after values. This is the amount of the severance damage." (*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, supra,* 16 Cal.4th at p. 720.)

- "[S]everance damages are not limited to specific direct damages but can be based on any indirect factors that cause a decline in the market value of the property. California decisions have indicated the following are compensable as direct damages under section 1263.410: (1) impairment of view, (2) restriction of access, (3) increased noise, (4) invasion of privacy, (5) unsightliness of the project, (6) lack of maintenance of the easement and (7) nuisances in general such as trespassers and safety risks. Several courts have recognized that the condemnee should be compensated for any characteristic of the project which causes 'an adverse impact on the fair market value of the remainder.'" (*San Diego Gas & Electric Co., supra,* 205 Cal.App.3d at p. 1345.)

- "When 'the property acquired [by eminent domain] is part of a larger parcel,' in addition to compensation for the property actually taken, the property owner must be compensated for the injury, if any, to the land that he retains. Once it is determined that the owner is entitled to severance damages, they, too, normally are measured by comparing the fair market value of the remainder before and after the taking." (*City of San Diego, supra*, 6 Cal.4th at p. 745, internal citations and footnote 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 v. Fisher* (2008) 160 Cal.App.4th 666, 676 [73 Cal.Rptr.3d 54].)

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)

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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)

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3706. Special Employment—Lending~~General~~ Employer ~~and/or Special Employer~~ Denies Responsibility for Worker's Acts

When one employer sends or loans an employee to work for another employer, a special employment relationship is created that may affect the duties and responsibilities between the two employers and the employee. The arrangement may be temporary, with a determined ending date or event; or it may be open-ended. In this situation, the borrowing employer is known as a "special employer" and the employee is referred to as a "special employee."

[*Name of plaintiff***] claims that [***name of worker***] was the employee of [***name of defendant ~~first~~ lending employer***] when the incident occurred, and that [***name of defendant ~~first~~ lending employer***] is therefore responsible for [***name of worker***]'s conduct. [***Name of defendant ~~first~~ lending employer***] claims that [***name of worker***] was the ~~temporary~~ special employee of [***name of defendant ~~second~~ borrowing employer***] when the incident occurred, and therefore [***name of defendant ~~second~~ borrowing employer***] is solely responsible for [***name of worker***]'s conduct.**

In deciding whether [*name of worker***] was [***name of defendant ~~second~~ borrowing employer***]'s ~~temporary~~ special employee when the incident occurred, the most important factor is whether [***name of defendant borrowing employer***] had the right to fully control the details of the work activities of [***name of worker***], rather than just the right to specify the result. It does not matter whether [***name of defendant ~~second~~ borrowing employer***] actually exercised the right to control.**

In addition to the right of control, you must consider all the circumstances in deciding whether [*name of worker***] was [***name of defendant ~~second~~ borrowing employer***]'s ~~temporary~~ special employee when the incident occurred. The following factors, if true, may tend to show that [***name of worker***] was the ~~temporary~~ special employee of [***name of defendant ~~second~~ borrowing employer***]. 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 ~~second~~ borrowing employer***] supplied the equipment, tools, and place of work;**

(b) **[***Name of worker***] was paid by the hour rather than by the job;**

(c) **The work being done by [***name of worker***] was part of the regular business of [***name of defendant ~~second~~ borrowing employer***];**

(d) **[***Name of defendant ~~second~~ borrowing employer***] had the right to terminate [***name of worker***]'s employment, not just the right to have [him/her] removed from the job site;**

(e) **[***Name of worker***] was not engaged in a distinct occupation or business;**

(f) **The kind of work performed by [***name of worker***] is usually done under the direction of a supervisor rather than by a specialist working without supervision;**

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(g) The kind of work performed by [*name of worker*] does not require specialized or professional skill;

(h) The services performed by [*name of worker*] were to be performed over a long period of time;

(i) [*Name of defendant ~~first~~ lending employer*] and [*name of defendant ~~second~~ borrowing employer*] were not jointly engaged in a project of mutual interest;

(j) [*Name of worker*], expressly or by implication, consented to the temporary employment with [*name of defendant ~~second~~ borrowing employer*]; [and]

(k) [*Name of worker*] and [*name of defendant ~~second~~ borrowing employer*] believed that they had a temporary employment relationship[./;] [and]

(l) [*Specify any other relevant factors.*]

New September 2003; Revised June 2013, December 2015, December 2016

Directions for Use

This instruction is for use in "special employment" cases. Special employment arises when a worker has been loaned from one employer to another, and there is an issue as to which employer the worker should be attributed with regard to the claim in the case. The borrowing employer is called the "special" employer. The lending employer is sometimes called the "general" employer, though use of that term may be confusing to a jury.

The instruction as drafted is for use by the lending employer to claim that the worker should be considered as the special employee of the borrowing employer. This would be the case if the issue is which employer is responsible for the worker's tortious conduct under respondeat superior. It may be modified if the claim is for injury to the worker, and the borrowing employer wants to claim the worker as its own in order to take advantage of the exclusive remedy bar of workers compensation. This instruction is not for use by the worker to claim employment rights under the Labor Code, though many of its provisions will likely be applicable.
~~if the worker's regular (general) employer claims that at the time of injury, the worker was actually working for a different (special) employer. It may be adapted for use if the plaintiff's claim is against the special employer. The terms "first and second employer" have been substituted for "special and general employer" to make the concept more straightforward. Also, the term "temporary employee" has been substituted for the term "special employee" for the same reason.~~

In addition to the alleged special employer's control over the employee, there are a number of relevant secondary factors to use in deciding whether a special employment relationship existed. They are similar, but not identical, to the factors from the Restatement Second of Agency, section 220 to be used in an independent contractor analysis. (See *State ex rel. Dept. of California Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1013−1014 [184 Cal.Rptr.3d 354, 343 P.3d 415]; CACI No. 3704, *Existence of*

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"Employee" Status Disputed; see also *Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492 [162 Cal.Rptr. 320, 606 P.2d 355]; *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 176−177 [151 Cal.Rptr. 671, 588 P.2d 811].) In the employee-contractor context, it has been held to be error not to give the secondary factors. (See *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 303−304 [111 Cal.Rptr.3d 787].)

Sources and Authority

- "[W]here the servants of two employers are jointly engaged in a project of mutual interest, each employee ordinarily remains the servant of his own master and does not thereby become the special employee of the other." (*Marsh, supra,* 26 Cal.3d at p. 493.)

- "When an employer -- the 'general' employer -- lends an employee to another employer and relinquishes to a borrowing employer all right of control over the employee's activities, a 'special employment' relationship arises between the borrowing employer and the employee. During this period of transferred control, the special employer becomes solely liable under the doctrine of respondeat superior for the employee's job-related torts." (*Marsh, supra,* 26 Cal.3d at p. 492.)

- "The law of agency has long recognized that a person generally the servant of one master can become the borrowed servant of another. If the borrowed servant commits a tort while carrying out the bidding of the borrower, vicarious liability attaches to the borrower and not to the general master." (*Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 455-456 [183 Cal.Rptr. 51, 645 P.2d 102], internal citations omitted.)

- "Liability in borrowed servant cases involves the exact public policy considerations found in sole employer cases. Liability should be on the persons or firms which can best insure against the risk, which can best guard against the risk, which can most accurately predict the cost of the risk and allocate the cost directly to the consumers, thus reflecting in its prices the enterprise's true cost of doing business." (*Strait v. Hale Construction Co.* (1972) 26 Cal.App.3d 941, 949 [103 Cal.Rptr. 487].)

- "In determining whether a special employment relationship exists, the primary consideration is whether the special employer has " '[t]he right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not. ...' " However, '[whether] the right to control existed or was exercised is generally a question of fact to be resolved from the reasonable inferences to be drawn from the circumstances shown.' " (*Kowalski, supra,* 23 Cal.3d at p. 175, internal citations omitted.)

- "[S]pecial employment is most often resolved on the basis of 'reasonable *inferences* to be drawn from the circumstances shown.' Where the evidence, though not in conflict, permits conflicting inferences, ... ' "the existence or nonexistence of the special employment relationship barring the injured employee's action at law is generally a question reserved for the trier of fact." ' " (*Marsh, supra,* 26 Cal.3d at p. 493.)

- "[I]f neither the evidence nor inferences are in conflict, then the question of whether an employment relationship exists becomes a question of law which may be resolved by summary judgment." (*Riley v. Southwest Marine, Inc.* (1988) 203 Cal.App.3d 1242, 1248-1249 [250 Cal.Rptr. 718], internal

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citations omitted.)

- "The special employment relationship and its consequent imposition of liability upon the special employer flows from the borrower's power to supervise the details of the employee's work. Mere instruction by the borrower on the result to be achieved will not suffice." (*Marsh, supra,* 26 Cal.3d at p. 492.)

- ~~"The contract cannot affect the true relationship of the parties to it. Nor can it place an employee in a different position from that which he actually held." (*Kowalski, supra,* 23 Cal.3d at p. 176.)~~

- "California courts have held that evidence of the following circumstances tends to negate the existence of a special employment: The employee is (1) not paid by and cannot be discharged by the borrower, (2) a skilled worker with substantial control over operational details, (3) not engaged in the borrower's usual business, (4) employed for only a brief period of time, and (5) using tools and equipment furnished by the lending employer." (*Marsh, supra,* 26 Cal.3d at p. 492.)

- "The common law also recognizes factors secondary to the right of control. We have looked to other considerations discussed in the Restatement of Agency to assess whether an employer-employee relationship exists. The comments to section 227 of the Restatement Second of Agency, which covers servants lent by one master to another, note that '[m]any of the factors stated in Section 220 which determine that a person is a servant are also useful in determining whether the lent servant has become the servant of the borrowing employer.' The secondary Restatement factors that we have adopted are: ' "(a) [W]hether 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." [Citations.]' " (*State ex rel. Dept. of California Highway Patrol, supra,* 60 Cal.4th at pp. 1013−1014, internal citations omitted.)

- "Evidence that the alleged special employer has the power to discharge a worker 'is strong evidence of the existence of a special employment relationship. … The payment of wages is not, however, determinative.' Other factors to be taken into consideration are 'the nature of the services, whether skilled or unskilled, whether the work is part of the employer's regular business, the duration of the employment period, . . . and who supplies the work tools.' Evidence that (1) the employee provides unskilled labor, (2) the work he performs is part of the employer's regular business, (3) the employment period is lengthy, and (4) the employer provides the tools and equipment used, tends to indicate the existence of special employment. Conversely, evidence to the contrary negates existence of a special employment relationship. [¶¶] In addition, consideration must be given to whether the worker consented to the employment relationship, either expressly or impliedly, and to whether the parties believed they were creating the employer-employee relationship." (*Kowalski, supra,* 23 Cal.3d at pp. 176-178, footnotes and internal citations omitted.)

- "Moreover, that an alleged special employer can have an employee removed from the job site does

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not necessarily indicate the existence of a special employment relationship. Anyone who has the employees of an independent contractor working on his premises could, if dissatisfied with an employee, have the employee removed. Yet, the ability to do so would not make the employees of the independent contractor the special employees of the party receiving the services." (*Kowalski, supra,* 23 Cal.3d at p. 177 fn. 9.)

- [T]he jury need not find that [the worker] remained exclusively defendant's employee in order to impose liability on defendant. Facts demonstrating the existence of a special employment relationship do not necessarily preclude a finding that a particular employee also remained under the partial control of the original employer. Where general and special employers share control of an employee's work, a 'dual employment' arises, and the general employer remains concurrently and simultaneously, jointly and severally liable for the employee's torts." (*Marsh, supra,* 26 Cal.3d at pp. 494−495.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 169–172

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2][e] (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, § 577.22 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine*, § 239.28 (Matthew Bender)

1 California Civil Practice: Torts §§ 3:26–3:27 (Thomson Reuters)

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3707. Special Employment—Joint Responsibility

If you decide that [*name of worker***] was the ~~temporary~~ special employee of [***name of defendant ~~second~~ borrowing employer***], but that [***name of defendant ~~first~~ lending employer***] partially controlled [***name of worker***]'s activities along with [***name of defendant ~~second~~ borrowing employer***], then you must conclude that both [***name of defendant ~~first~~ lending employer***] and [***name of defendant ~~second~~ borrowing employer***] are responsible for the conduct of [***name of worker***].**

New September 2003; Revised December 2016

Directions for Use

Give this instruction with CACI No. 3706, *Special Employment—Lending Employer Denies Responsibility for Worker's Acts,* if the jury will be given the option of deciding that both the lending employer and the borrowing employer should be treated as the worker's employer with regard to the claim at issue.

Sources and Authority

- " ' "Where an employer sends an employee to do work for another person, and both have the right to exercise certain powers of control over the employee, that employee may be held to have two employers—his original or 'general' employer and a second, the 'special' employer." ' A general employer is absolved of respondeat superior liability when it has relinquished total control to the special employer. During this period of transferred control, the special employer becomes solely liable under the doctrine of respondeat superior for the employee's job-related torts." (*Montague v. AMN Healthcare, Inc.* (2014) 223 Cal.App.4th 1515, 1520 [168 Cal.Rptr.3d 123], internal citations omitted.)

- "Facts demonstrating the existence of a special employment relationship do not necessarily preclude a finding that a particular employee also remained under the partial control of the original employer. Where general and special employers share control of an employee's work, a 'dual employment' arises, and the general employer remains concurrently and simultaneously, jointly and severally liable for the employee's torts." (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 494-495 [162 Cal.Rptr. 320, 606 P.2d 355], internal citations omitted.)

- "This is especially true where the loaned employee performs work of interest to both the general and special employers." (*Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 460 [183 Cal.Rptr. 51, 645 P.2d 102], internal citation omitted.) If the loaned employee performs work of interest to both the general and special employers, "there is a presumption that the [employee] remained in his general employment. (*Ibid.*) The [general employer] can avoid liability only if it can [prove] that it gave up ... 'authoritative direction and control' [over the employee]." (*Ibid.*)

- " 'Authoritative direction and control' is more than the power to suggest details or the necessary

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cooperation." (*Societa per Azioni de Navigazione Italia, supra*, 31 Cal.3d at p. 460, internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 169–172

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2][e] (Matthew Bender)

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

1 California Civil Practice: Torts §§ 3:26–3:27 (Thomson Reuters)

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3935. Prejudgment Interest (Civ. Code, § 3288)

If you decide that [*name of plaintiff*] is entitled to recover damages for past economic loss in one or more of the categories of damages that [she/he/it] claims, then you must decide whether [he/she/it] should also receive prejudgment interest on each item of loss in those categories. Prejudgment interest is the amount of interest the law provides to a plaintiff to compensate for the loss of the ability to use the funds. If prejudgment interest is awarded, it is computed from the date on which each loss was incurred until the date of entry of your verdict.

Whether [*name of plaintiff*] should receive an award of prejudgment interest on all, some, or none of any past economic damages that you may award is within your discretion. If you award these damages to [*name of plaintiff*], you will be asked to address prejudgment interest in the special verdict form.

New December 2016

Directions for Use

Give this instruction if the court determines that the jury may award prejudgment interest. In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury. (Civ. Code, § 3288.) The statute allows the jury to award prejudgment interest on any claim within its scope. (*Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22; 582 P.2d 109].) The special verdict form may need to be augmented for the jury to make factual findings that need to be determined before an amount of prejudgment interest can be calculated.

The role of the jury in awarding prejudgment interest is not clear from Civil Code section 3288. This instruction assumes that the court exercises a gatekeeper function of deciding whether the case is one to which the statute applies. The jury does not select the interest rate, which is seven percent as a matter of law. (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1585 [36 Cal.Rptr.2d 343].)

It is also not completely clear what, if any, role the jury has in determining the number to be multiplied by the interest rate. It is settled that prejudgment interest cannot be awarded on damages for the intangible, noneconomic aspects of mental and emotional injury because they are inherently nonpecuniary, unliquidated, and not readily subject to precise calculation. (*Greater Westchester Homeowners Assn v. L.A*. (1979) 26 Cal.3d 86, 102−103 [160 Cal.Rptr.733, 603 P.2d 1329].) This instruction assumes that implicit in the reasoning for denying prejudgment interest for noneconomic damages is authorization to award it on all past economic damages, as these amounts are pecuniary and subject to more precise calculation.

Since the statute is permissive, the jury has the discretion to deny prejudgment interest, even if it might otherwise be authorized. (See *King v. Southern Pacific Co.* (1895) 109 Cal.96, 99 [41 P. 786] [error to instruct jury that it must add prejudgment interest to award of damages].)

Whether interest may be compounded is also not resolved. (Compare *Douglas v. Westfall* (1952) 113

Cal.App. 2d 107, 112 [248 P.2d 68] [trustee cannot be charged with compound interest unless s/he has been guilty of some positive misconduct or willful violation of duty; in cases of mere negligence, no more than simple interest can properly be added] and *State v. Day* (1946) 76 Cal.App.2d 536, 554 [173 P.2d 399] [general rule is that interest may not be computed on accrued interest unless by special statutory provision, or by stipulation of the parties] with *Michelson, supra,* 29 Cal.App.4th at p. 1588 [jury is vested with discretion to award prejudgment interest under section 3288, including compound interest] and *McNulty v. Copp* (1954) 125 Cal.App.2d 697, 712 [271 P.2d 90] [compound interest is properly allowed on a claim for wrongful and fraudulent detention of personalty].)

Sources and Authority

- Prejudgment interest on damages certain, or capable of being made certain. Civil Code section 3287(a).

- Interest on obligation not arising from contract. Civil Code section 3288.

- "Under Civil Code section 3288, the trier of fact may award prejudgment interest '[in] an action for the breach of an obligation not arising from contract, *and* in every case of oppression, fraud, or malice . . . .' " (*Bullis, supra,* 21 Cal.3d at p. 814, original italics.)

- "[U]nlike Civil Code section 3287, which relates to liquidated and contractual claims, section 3288 permits discretionary prejudgment interest for unliquidated tort claims." (*Greater Westchester Homeowners Assn, supra,* 26 Cal.3d at p. 102.)

- "In *Bullis,* we characterized prejudgment interest as 'awarded to compensate a party for the loss of his or her property.' The award of such interest represents the accretion of wealth which money or particular property could have produced during a period of loss. Using recognized and established techniques a fact finder can usually compute with fair accuracy the interest on a specific sum of money, or on property subject to specific valuation. Furthermore, the date of loss of the property is usually ascertainable, thus permitting an accurate interest computation." (*Greater Westchester Homeowners Assn, supra,* 26 Cal.3d at pp. 102−103, internal citations omitted.)

- "The award of [prejudgment] interest represents the accretion of wealth which money or particular property could have produced during a period of loss." (*Canavin v. Pac. Southwest Airlines* (1983)148 Cal.App.3d 512, 525 [196 Cal.Rptr. 82].)

- "However, damages for the intangible, noneconomic aspects of mental and emotional injury are of a different nature. They are inherently nonpecuniary, unliquidated and not readily subject to precise calculation. The amount of such damages is necessarily left to the subjective discretion of the trier of fact. Retroactive interest on such damages adds uncertain conjecture to speculation. Moreover where, as here, the injury was of a continuing nature, it is particularly difficult to determine when any particular increment of intangible loss arose. Acknowledging the problem, the trial court arbitrarily resorted to an "averaging" method applied to both the amount and duration of the loss. In our view this process was impermissibly speculative." (*Greater Westchester Homeowners Assn, supra,* 26 Cal.3d at p. 103.)

- "The amount of damages awarded in a wrongful death case designed to compensate these noneconomic losses are akin to those awarded for pain and suffering and emotional distress in *Greater Westchester* and do not support prejudgment interest. However, plaintiffs are entitled to prejudgment interest on those damages attributable to an ascertainable economic value, such as loss of household services or earning capacity, as well as funeral and related expenses. '[It] is important to underscore that [an] award is invalid only to the extent it represents interest on 'the intangible noneconomic aspects of mental and emotional injury' claimed by plaintiffs. [Citation.] If plaintiffs allege specific damage that is supported by tangible evidence, prejudgment interest may properly be awarded under Civil Code section 3288.' " (*Canavin, supra,* 148 Cal.App.3d at p. 527, internal citations omitted.)

- "Whether the proper interest rate was applied is a question of law. There is no legislative act specifying the rate of prejudgment interest for a fraud claim, and therefore the constitutional rate of 7 percent applies … . (*Michelson, supra,* 29 Cal.App.4th at p. 1585.)

- "Section 3288 … allows interest from date of monetary loss at the discretion of the trier of fact even if the damages are unliquidated." (*Stein v. Southern Cal. Edison Co.* (1992) 7 Cal.App.4th 565, 572 [8 Cal. Rptr. 2d 907].)

- "[T]his action lies in tort and it is the generally accepted view that [prejudgment] interest cannot be awarded on damages for personal injury." (*Curtis v. State of California ex rel. Dept. of Transportation* (1982) 128 Cal.App.3d 668, 686 [180 Cal.Rptr. 843].)

Secondary Sources

VF-400. Negligence—Single Defendant

The sentence at the end of the Directions for Use would be revised or added as shown for every verdict form for a claim on which prejudgment interest could be awarded.

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] negligent?**
____ 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***]'s negligence a substantial factor in causing harm to [***name of plaintiff***]?**
____ 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. 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

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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

Directions for Use

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 is based on CACI No. 400, *Negligence—Essential Factual Elements*.

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.

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*.

~~This form may be modified i~~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].) ~~on specific losses that occurred prior to judgment~~, give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make factual findings that need to be determined before an amount of prejudgment interest can be calculated.

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4100. "Fiduciary Duty" Explained

[A/An] [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[*insert other fiduciary relationship***]] owes what is known as a fiduciary duty to [his/her/its] [principal/client/corporation/partner/[***insert other fiduciary relationship***]]. A fiduciary duty imposes on [a/an] [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]] a duty to act with the utmost good faith in the best interests of [his/her/its] [principal/client/corporation/partner/[***insert other fiduciary relationship***]].**

New June 2006; Revised December 2010, December 2016

Directions for Use

This instruction explains the nature of a fiduciary relationship. It may be modified if other concepts involving fiduciary duty are relevant to the jury's understanding of the case. For instructions on damages resulting from misrepresentation by a fiduciary, see CACI No. 1923, *Damages—"Out of Pocket" Rule*, and CACI No. 1924, *Damages—"Benefit of the Bargain" Rule*.

"The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432-433 [140 Cal.Rptr.3d 569].) No fraudulent intent is required. (See Civ. Code, § 1573 (defining "constructive fraud".)

~~This instruction may be modified if other concepts involving fiduciary duty are relevant to the jury's understanding of the case. For instructions on damages resulting from misrepresentation by a fiduciary, see CACI No. 1923, *Damages—"Out of Pocket" Rule*, and CACI No. 1924, *Damages—"Benefit of the Bargain" Rule*.~~

Sources and Authority

- "A fiduciary relationship is ' " ' any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. …' " ' " (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29 [130 Cal.Rptr.2d 860], internal citations omitted.)

~~- "The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432-433 [140 Cal.Rptr.3d 569].)~~

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- "Whether a fiduciary duty exists is generally a question of law. Whether the defendant breached that duty towards the plaintiff is a question of fact." (*Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889, 915 [187 Cal.Rptr.3d 452], internal citation omitted.)

- " ' "[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." [Citation.]' " (*Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315, 1338 [147 Cal.Rptr.3d 772].)

- "[E]xamples of relationships that impose a fiduciary obligation to act on behalf of and for the benefit of another are 'a joint venture, a partnership, or an agency.' But, '[t]hose categories are merely illustrative of fiduciary relationships in which fiduciary duties are imposed by law.' " (*Cleveland, supra,* 209 Cal.App.4th at p. 1339, internal citation omitted.)

- "The investment adviser/client relationship is one such relationship, giving rise to a fiduciary duty as a matter of law." (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 140 [173 Cal.Rptr.3d 356].)

- "There is a 'strong public interest in assuring that corporate officers, directors, majority shareholders and others are faithful to their fiduciary obligations to minority shareholders.' " (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 395 [178 Cal.Rptr.3d 604].)

- "Any persons who subscribe for stock have a right to do so upon the assumption that the promoters are using their knowledge, skill, and ability for the benefit of the company. It is, therefore, clear on principle that promoters, under the circumstances just stated, do occupy a position of trust and confidence, and it devolves upon them to make full disclosure." (*Cleveland, supra,* 209 Cal.App.4th at p. 1339.)

- "[I]t is unclear whether a fiduciary relationship exists between an insurance broker and an insured." (*Mark Tanner Constr. v. Hub Internat. Ins. Servs.* (2014) 224 Cal.App.4th 574, 585 [169 Cal.Rptr.3d 39].)

- "It is a question of fact whether one is either an investment adviser or a party to a confidential relationship that gives rise to a fiduciary duty under common law." (*Hasso, supra,* 227 Cal.App.4th at p. 140, internal citations omitted.)

- "[A] third party who knowingly assists a trustee in breaching his or her fiduciary duty may, dependent upon the circumstances, be held liable along with that trustee for participating in the breach of trust." (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 325 [166 Cal.Rptr.3d 116].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 58

Greenwald et al., California Practice Guide: Real Property Transactions, Ch. 2-C, *Broker's Relationship And Obligations To Principal And Third Parties*, ¶ 2:158 et seq. (The Rutter Group)

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Vapnek et al., California Practice Guide: Professional Responsibility, Ch. 6-D, *Professional Liability*, ¶ 6:425 et seq. (The Rutter Group)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31[1] (Matthew Bender)

14 California Forms of Pleading and Practice, Ch. 167, *Corporations*: *Directors and Management*, § 167.53 et seq. (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, §§ 427.12, 427.23 (Matthew Bender)

5 California Points and Authorities, Ch. 52, *Corporations*, § 52.112 et seq. (Matthew Bender)

6 California Legal Forms, Ch. 12C, *Limited Liability Companies*, § 12C.24[6] (Matthew Bender)

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VF-4400. Misappropriation of Trade Secrets

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [the owner/a licensee] of** [*insert general description of alleged trade secret[s] subject to the misappropriation claim*]**?**
   ____ 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 this/Were these] [***select short term to describe, e.g., information***] secret at the time of the alleged misappropriation?**
   ____ 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 [this/these] [***e.g., information***] have actual or potential independent economic value because [it was/they were] secret?**
   ____ 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***] make reasonable efforts under the circumstances to keep the [***e.g., information***] secret?**
   ____ 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***] [acquire/use [or] disclose] the trade secret[s] by improper means?**
   ____ 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 improper [acquisition/use/ [or] disclosure] of the [***e.g., information***] a substantial factor in causing [[***name of plaintiff***] harm/ [or] [***name of*

defendant] to be unjustly enriched]?
____ 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 $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[other future economic loss $ _____]
Total Future Economic 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 December 2015; Revised December 2016

Directions for Use

This verdict form is based on CACI No. 4401, *Misappropriation of Trade Secrets—Essential Factual Elements,* CACI No. 4402, *"Trade Secret" Defined,* CACI No. 4403, *Secrecy Requirement,* CACI No. 4404, *Reasonable Efforts to Protect Secrecy,* and CACI No. 4412, *"Independent Economic Value" Explained*.

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

In question 1, briefly describe the material alleged to be a trade secret that is set forth in detail in element1 of CACI No. 4401. Then in question 2, select a short term to describe the material.

Additional questions may be added depending on whether misappropriation is claimed in question 5 by acquisition, disclosure, or use. See CACI No. 4405, *Misappropriation by Acquisition,* CACI No. 4406, *Misappropriation by Disclosure,* and CACI No. 4407, *Misappropriation by Use,* for additional elements that the jury should find in each kind of case.

Modify the claimed damages in question 7 as appropriate depending on the circumstances. (See CACI No. 4409, *Remedies for Misappropriation of Trade Secret*.) If unjust enrichment is alleged, additional questions on the value of the benefit to the defendant and the defendant's reasonable expenses should be included. (See CACI No. 4410, *Unjust Enrichment*.)

In cases involving more than one trade secret, the jury must answer all of the questions in the verdict form separately for each trade secret identified by the plaintiff on which findings must be made.

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*.

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 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 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 ~~deliberately testified untruthfully~~lied about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness ~~testified untruthfully~~lied 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 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

Directions for Use

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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, Cal. 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)

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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.

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