JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on May 17, 2019

Title
Jury Instructions: Civil Jury Instructions (Release 34)

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

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

Agenda Item Type
Action Required

Effective Date
May 17, 2019

Date of Report
April 11, 2019

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Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approving for publication the new, revised, and revoked civil jury instructions prepared by the committee. These revisions bring the instructions up to date with developments in the law over the previous six months. On Judicial Council approval, the instructions will be published in the official midyear supplement to the 2019 edition of the *Judicial Council of California Civil Jury Instructions* (*CACI*).

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective May 17, 2019, approve for publication the following civil jury instructions prepared by the committee:

1. Revisions to 21 instructions: CACI Nos. 101, 105, 472, 1204, 2020, 2021, 2506, 2508, 2510, 2540, 2541, 2544, 2704, 3725, 4002, 4106, 5001, 5009, 5012, 5017, and 5022;
2. The addition of 6 new instructions: CACI Nos. 3903Q, 4570, 4571, 4572, 4573, and 4574;
3. Revocation of CACI No. 4003;

4. The addition of a note to 7 instructions—CACI Nos. 2521A, 2521B, 2521C, 2522A, 2522B, 2522C, and 2524—indicating that proposed revisions are currently under consideration; and
5. One addition to the User Guide.

A table of contents and the proposed new, revised, and revoked civil jury instructions are attached at pages 8–138.

Relevant Previous Council Action

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

This is release 34 of *CACI*. The council approved release 33 at its November 2018 meeting.[2]

Analysis/Rationale

A total of 35 instructions and one addition to the User Guide are presented in this release. The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 25 additional instructions under a delegation of authority from the council to RUPRO.[3]

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

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

[2] The committee now also issues two releases annually in January and July for online only delivery. These online-only releases—Numbers 33A and 34A for 2019—are limited to nonsubstantive technical changes and the like (as described in note 3 below).

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

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

New instructions

CACI No. 3903Q, *Survival Damages (Economic Damage).* There is currently no CACI instruction on survival damages (the damages that a decedent incurs before death as a result of a fatal event).[4] A recent case[5] called the committee's attention to this omission. A trial judge member noted that survival damages are always at issue in asbestos cases, and that a new instruction would be of value to bench and bar. The committee therefore proposes this new instruction to address this subject.

CACI Nos. 4570–4574, *Right to Repair Act.* The Right to Repair Act (the Act)[6] supplants the common law with regard to construction defect claims based on negligence and strict liability.[7] It allows for a statutory cause of action for construction defects causing property damage or purely economic loss (but not personal injury).[8] There are limitations on damages[9] and eight affirmative defenses.[10] The Act seemed to be a good candidate for expansion of *CACI*'s Construction Law series into a new subject area. The committee now proposes the following new instructions based on the Act:

4570. *Right to Repair Act—Construction Defects—Essential Factual Elements*

4571. *Right to Repair Act—Damages*

4572. *Right to Repair Act—Affirmative Defense—Act of Nature*

4573. *Right to Repair Act—Affirmative Defense—Unreasonable Failure to Minimize or Prevent Damage*

4574. *Right to Repair Act—Affirmative Defense—Plaintiff's Subsequent Acts or Omissions*

CACI No. 4570 is the basic claim for specific construction defects as enumerated in Civil Code section 896. But the problem for jury instructions drafting is that the statute contains approximately 50 different possible construction standards the violation of which may give rise to a claim under the Act. It is not possible for a jury instruction to present all of the possible claims that might form the basis for the action.

The committee has addressed this problem by leaving the actual elements of the claim unspecified. Instead, the user is told to "[*Specify all defects from Civil Code section 896,*

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[4] See Code Civ. Proc., § 377.34.

[5] *Williams v. The Pep Boys Manny Moe & Jack of California* (2018) 26 Cal.App.5th 672, 682–687.

[6] Civ. Code, § 895 et seq.

[7] *McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241.

[8] Civ. Code, § 896.

[9] Civ. Code, § 944.

[10] Civ. Code, § 945.5.

e.g., that a defectively constructed door allowed unintended water to pass beyond, around, or through it.]"

Revised instructions

CACI No. 472, *Primary Assumption of Risk—Exception to Nonliability—Facilities Owners and Operators and Event Sponsors*. In a recent case,[11] the court addressed the duty of event sponsors and operators with regard to a risk that was not an inherent risk in the sport of long-distance running. The court held that event operators and organizers have two distinct duties: (1) the limited duty not to increase the inherent risks of an activity under the primary assumption of the risk doctrine and (2) the duty of due care with respect to the extrinsic risks of the activity, which should reasonably be minimized to the extent possible without altering the nature of the activity.[12] The committee proposes adding a second option to element 2 to address the duty with regard to extrinsic risks.

CACI No. 1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof*. Evidence of industry custom and practice is a controversial issue in product liability design defect cases under the risk-benefit test. In a recent case, the California Supreme Court held that if evidence of industry custom and practice has been admitted for a limited purpose, on the request of a party the jury must be given a limiting instruction on how this evidence may and may not be considered under the risk-benefit test.[13] The court offered no specifics as to what the limiting instruction should say. The committee proposes adding a brief mention of the court's holding to the Directions for Use to alert the bench and bar of a possible need for a limiting instruction. The committee has rejected comments calling for a more comprehensive treatment of the admissibility of custom and practice evidence as that is not the purpose of this instruction, nor an appropriate subject for any jury instruction. Juries do not decide the admissibility of evidence.

CACI No. 2020, *Public Nuisance—Essential Factual Elements*; CACI No. 2021, *Private Nuisance—Essential Factual Elements*. A committee member questioned whether these two nuisance instructions were correct in making lack of consent an element of the plaintiff's claim. There are cases that clearly list lack of consent with the elements.[14] However, other cases have referred to consent as a defense, albeit in the context of a nuisance action involving parties with interests in the same property.[15] The committee proposes bracketing the lack-of-consent elements and then explaining the apparent conflict in the Directions for Use.

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[11] *Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 38.

[12] *Hass, supra*, 26 Cal.App.5th at p. 38.

[13] See *Kim v. Toyota Motor Corp.* (2018) 6 Cal.5th 21, 30, 38.

[14] *See Department of Fish & Game v. Superior Court* (2011) 197 Cal.App.4th 1323, 1352; *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1548.

[15] See *Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 341–345; *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1138–1140.

CACI Nos. 2506, 2508, 2540, 2541, 2544 (Fair Employment and Housing Act series). An attorney from a law firm labor and employment group presented a number of proposals for revisions to instructions in the Fair Employment and Housing Act series. His proposals addressed things like improved language with no substantive difference, additional explanation, and inconsistencies in the series. The committee proposes that many of his proposals be adopted.

CACI No. 2506, *Limitation on Remedies—After-Acquired Evidence.* The attorney proposed adding an optional paragraph to the instruction to advise the jury that if it finds discrimination, it may only award damages up to the date of discovery of the after-acquired evidence. The committee agreed with the suggestion and now proposes adding a paragraph similar to the one proposed by the attorney.

CACI No. 2508, *Failure to File Timely Administrative Complaint—Plaintiff Alleges Continuing Violation*. The attorney found this instruction difficult to understand and proposed a number of revisions to improve clarity. One proposal was to shift the language of the instruction to focus on acts that occurred before the one-year limitation period, which would be barred unless saved by the continuing-violation rule of the instruction. Currently, the instruction refers to "triggering the filing requirement," which the attorney found potentially confusing to a jury. The committee agreed that much of the attorney's approach was better and proposes revising the instruction along the lines suggested.

CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements*; CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements.* The attorney noted that the elements of these two instructions that address the ability to perform essential job duties were incomplete in several regards. The element in both instructions is limited to employees, while the instructions also apply to disability discrimination against job applicants. Also, CACI No. 2541 does not address an employee's possible reassignment to a vacant position, which is one possible accommodation. The committee proposes revising element 4 of CACI No. 2540 and element 5 of CACI No. 2541 to address these concerns.

CACI No. 2544, *Disability Discrimination—Affirmative Defense—Health or Safety Risk*. The attorney noted that the last part of this instruction, defining essential job duties, duplicates CACI No. 2543, *Disability Discrimination—"Essential Job Duties" Explained.* The committee proposes removing this part of the instruction and cross referring to CACI No. 2543.[16]

Revoked instruction

CACI No. 4003, *"Gravely Disabled" Minor Explained.* CACI No. 4003 is for use in Lanterman-Petris-Short (LPS) Act conservatorship proceedings. It is based on the definition of

[16] The California Employment Lawyers Association submitted a comment noting that the regulation on which CACI No. 2544 is based has been revised and that the instruction no longer accurately replicates the regulation. Revisions to conform the instruction to the regulation will be considered in the next release cycle.

"gravely disabled minor" in Welfare and Institutions Code section 5585.25, which is part of the Children's Civil Commitment and Mental Health Treatment Act of 1988. In a recent case,[17] the court held that the definition in section 5585.25 does not apply under LPS, and instead, the general definition of "gravely disabled" in the LPS[18] applies to minors as well as to adults. The committee therefore proposes revoking CACI No. 4003 and noting in the Directions for Use to CACI No. 4002, *"Gravely Disabled" Explained,* that this instruction applies to both adults and minors.

Note: Revisions under consideration

CACI Nos. 2521A, 2521B, 2521C, 2522A, 2522B, 2522C, 2524, *Hostile Work Environment Harassment.* A new statute, Government Code section 12923,[19] declares legislative intent with regard to the laws about harassment.[20] The statute raises some challenges for drafters of jury instructions. The committee continues to address these challenges and expects to have proposed revisions to the affected instructions ready for posting for public comments on or before May 1, 2019.

User Guide

An attorney reported that in response to his request for non-*CACI* instructions, the judge stated "if CACI hasn't provided it, my assumption is CACI rejected it." An addition has been made to the User Guide to clarify that this is not the case.

Policy implications

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

Comments

The proposed additions and revisions to *CACI* circulated for comment from January 21 through March 1, 2019. Comments were received from 13 different commenters. Some submitted comments on multiple instructions, and some commented on only a single instruction. No single instruction generated a particularly large number of comments.

The committee evaluated all comments and revised some of the instructions in light of the comments received. A chart summarizing the comments received on all instructions and the committee's responses is attached at pages 8–138.

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[17] *Conservatorship of M.B.* (2018) 27 Cal.App.5th 98, 106–107.

[18] Welf. & Inst. Code, § 5008(h)(1)(A).

[19] See Stats. 2018, ch. 955 (Sen. Bill 1300).

[20] Gov. Code, § 12923 (introductory language preceding subdivisions).

Alternatives considered

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

Fiscal and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish the midyear supplement to the 2019 edition of *CACI* and pay royalties to the Judicial Council. Other licensing agreements with other publishers provide additional royalties.

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

Attachments

1. *CACI* instructions, at pages 8–138
2. Chart of comments and the committee's responses, at pages 139–177

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Release 34: May 2019

101. Overview of Trial

To assist you in your tasks as jurors, I will now explain how the trial will proceed. I will begin by identifying the parties to the case. [*Name of plaintiff***] filed this lawsuit. [He/She/It] is called a [plaintiff/petitioner]. [He/She/It] seeks [damages/***specify ~~for~~ other relief***] from [***name of defendant***], who is called a [defendant/respondent].**

[[*Name of plaintiff***] claims [***insert description of the plaintiff's claim(s)***]. [***Name of defendant***] denies those claims. [[***Name of defendant***] also contends that [***insert description of the defendant's affirmative defense(s)***].]]**

[[*Name of cross-complainant***] has also filed what is called a cross complaint against [***name of cross-defendant***]. [***Name of cross-complainant***] is the [defendant/respondent], but also is called the cross-complainant. [***Name of cross-defendant***] is called a cross-defendant.]**

[In [his/her/its] cross-complaint, [*name of cross-complainant***] claims [***insert description of the cross-complainant's claim(s)***]. [***Name of cross-defendant***] denies those claims. [[***Name of cross-defendant***] also contends that [***insert description of the cross-defendant's affirmative defense(s) to the cross-complaint***].]]**

First, each side may make an opening statement, but neither side is required to do so. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. Also, because it is often difficult to give you the evidence in the order we would prefer, the opening statement allows you to keep an overview of the case in mind during the presentation of the evidence.

Next, the jury will hear the evidence. [*Name of plaintiff***] will present evidence first. When [***name of plaintiff***] is finished, [***name of defendant***] will have an opportunity to present evidence. [Then [***name of cross-complainant***] will present evidence. Finally, [***name of cross-defendant***] will present evidence.]**

Each witness will first be questioned by the side that asked the witness to testify. This is called direct examination. Then the other side is permitted to question the witness. This is called cross-examination.

Documents or objects referred to during the trial are called exhibits. Exhibits are given a [number/letter] so that they may be clearly identified. Exhibits are not evidence until I admit them into evidence. During your deliberations, you will be able to look at all exhibits admitted into evidence.

There are many rules that govern whether something will be admitted into evidence. As one side presents evidence, the other side has the right to object and to ask me to decide if the evidence is permitted by the rules. Usually, I will decide immediately, but sometimes I may have to hear arguments outside of your presence.

After the evidence has been presented, I will instruct you on the law that applies to the case

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and the attorneys will make closing arguments. What the parties say in closing argument is not evidence. The arguments are offered to help you understand the evidence and how the law applies to it.

New September 2003; Revised February 2007, June 2010, May 2019

Directions for Use

This instruction is intended to provide a "road map" for the jurors. This instruction should be read in conjunction with CACI No. 100, *Preliminary Admonitions*.

The bracketed second, third, and fourth paragraphs are optional. The court may wish to use these paragraphs to provide the jurors with an explanation of the claims and defenses that are at issue in the case. Include the third and fourth paragraphs if a cross-complaint is also being tried. Include the last sentence in the second and fourth paragraphs if affirmative defenses are asserted on the complaint or cross-complaint.

The sixth paragraph presents the order of proof. If there is a cross-complaint, include the last two sentences. Alternatively, the parties may stipulate to a different order of proof—for example, by agreeing that some evidence will apply to both the complaint and the cross-complaint. In this case, customize this paragraph to correspond to the stipulation.

Sources and Authority

- Pretrial Instructions on Trial Issues and Procedure. Rule 2.1035 of the California Rules of Court.
- Order of Trial Proceedings. Code of Civil Procedure section 607.
- "[W]e can understand that it might not have *seemed* like [cross-complainants] were producing much evidence on their cross-complaint at trial. Most of the relevant (and undisputed) facts bearing on the legal question of whether [cross-defendants] had a fiduciary duty and, if so, violated it, had been brought out in plaintiffs' case-in-chief. But just because the undisputed evidence favoring the cross-complaint also happened to come out on *plaintiffs'* case-in-chief does not mean it was not available to support the cross-complaint." (*Le v. Pham* (2010) 180 Cal.App.4th 1201, 1207 [103 Cal.Rptr.3d 606], original italics.)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 147

Wagner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group) ¶¶ 1:427–1:432; 4:460–4:463

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.50 (Matthew Bender)

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California Judges Benchbook: Civil Proceedings—Trial (2d ed.) § 4.100 (Cal CJER 2010)

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105. Insurance

You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and the evidence.

New September 2003; Revised May 2019

Directions for Use

If this instruction is given, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

By statute, evidence of a defendant's insurance coverage is inadmissible to prove liability. (Evid. Code, § 1155.) If evidence of insurance has been admitted for some other reason, a limiting instruction should be given advising the jury to consider the evidence only for the purpose for which it was admitted.

Sources and Authority

- Evidence of Insurance Inadmissible to Prove Liability. Evidence Code section 1155.

- " 'The evidence [of liability insurance] is regarded as both irrelevant and prejudicial to the defendant. Hence, not only is it subject to objection and exclusion, but any attempt to inject it by question, suggestion or argument is considered misconduct of counsel, and is often held reversible error. [Citations.]' " ~~As a rule, evidence that the defendant has insurance is both irrelevant and prejudicial to the defendant.~~ (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469 [130 Cal.Rptr. 786].)

- "Evidence of a *defendant's* insurance coverage ordinarily is not admissible to prove the defendant's negligence or other wrongdoing." (*Blake v. E. Thompson Petroleum Repair Co.* (1985) 170 Cal.App.3d 823, 830 [216 Cal.Rptr. 568], original italics.)

- "[E]vidence of a *plaintiff's* insurance coverage is not admissible for the purpose of mitigating the damages the plaintiff would otherwise recover from the tortfeasor. This is the ~~Generally, evidence that the plaintiff was insured is not admissible under the "~~ 'collateral source rule~~."~~.' (*Blake, supra,* 170 Cal.App.3d at p. 830, original italics; see *Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1, 16-18 [84 Cal.Rptr. 173, 465 P.2d 61]~~; *Acosta v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 19, 25-26 [84 Cal.Rptr. 184, 465 P.2d 72]~~.)

- "Both of the foregoing principles are subject to the qualification that where the topic of insurance coverage is coupled with other relevant evidence, that topic may be admitted along with such other evidence. '[para.] It has always been the rule that the existence of insurance may properly be referred to in a case if the evidence is otherwise admissible.' The trial court must then determine, pursuant to Evidence Code section 352, whether the probative value of the other evidence outweighs the prejudicial effect of the mention of insurance."~~Evidence of insurance coverage may be admissible~~

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~~where it is coupled with other relevant evidence, provided that the probative value of the other evidence outweighs the prejudicial effect of the mention of insurance.~~ (*Blake*, *supra*, ~~*v. E. Thompson Petroleum Repair Co., Inc.* (1985)~~ 170 Cal.App.3d at p. ~~823,~~ 831, internal citation omitted ~~[216 Cal.Rptr. 568]~~.)

- "[T]he trial court did not abuse its discretion by excluding evidence of [plaintiff]'s insured [health care coverage] under Evidence Code section 352. [Plaintiff] had the right to treat outside his plan. Evidence of his insurance would have confused the issues or misled and prejudiced the jury." (*Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, 1278 [232 Cal.Rptr.3d 404].)

- ~~An instruction to disregard whether a party has insurance may, in some cases, cure the effect of counsel's improper reference to insurance. (*Scally v. Pacific Gas & Electric Co.* (1972) 23 Cal.App.3d 806, 814 [100 Cal.Rptr. 501].)~~

Secondary Sources

8 Witkin, California Procedure (5th ed. 2018) Trial, § 217 et seq.
~~7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 230-233~~

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 34.32-34.36

California Practice Guide: Civil Trials and Evidence, § 5:371

3 California Trial Guide, Unit 50, *Extrinsic Policies Affecting or Excluding Evidence*, §§ 50.20, 50.32 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.68 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 16, *Jury Instructions*, 16.06

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.26

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472. Primary Assumption of Risk—Exception to Nonliability— Facilities Owners and Operators and Event Sponsors

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[*Name of plaintiff***] claims [he/she] was harmed while [participating in/watching] [***sport or other recreational activity e.g., snowboarding***] at [***name of defendant***]'s [***specify facility or event where plaintiff was injured, e.g., ski resort***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [owner/operator/sponsor/***other***] of [***e.g., a ski resort***];**

2. [**That [***name of defendant***] unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., snowboarding***];**]

   [or]

   [That [*name of defendant***] unreasonably failed to minimize a risk that is not inherent in [***e.g., snowboarding***] and unreasonably exposed [***name of plaintiff***] to an increased risk of harm;]**

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

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

New December 2013; Revised and Renumbered From CACI No. 410 May 2017; Revised May 2019

Directions for Use

This instruction sets forth a plaintiff's response to a defendant's assertion of the affirmative defense of primary assumption of risk. Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].) There is, however, a duty applicable to facilities owners and operators and to event sponsors not to unreasonably increase the risks of injury to participants and spectators beyond those inherent in the activity. (See *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1162 [150 Cal.Rptr.3d 551, 290 P.3d 1158] [participants]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [spectators].)

There is also a duty to minimize risks that are extrinsic to the nature of the sport; that is, those that can be addressed without altering the essential nature of the activity. (*Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 38 [236 Cal.Rptr.3d 682].) Choose either or both options for element 2 depending on which duty is alleged to have been breached.

While duty is a question of law, courts have held that whether the defendant has increased the risk is a

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question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] [and cases cited therein]; cf. *Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC* (2018) 25 Cal.App.5th 344, 354 [235 Cal.Rptr.3d 716] [court to decide whether an activity is an active sport, the inherent risks of that sport, and whether the defendant has increased the risks of the activity beyond the risks inherent in the sport].) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. 470, *Primary Assumption of Risk—Exception to Nonliability—Coparticipant in Sport or Other Recreational Activity.* For an instruction on primary assumption of risk applicable to instructors, trainers, and coaches, see CACI No. 471, *Primary Assumption of Risk—Exception to Nonliability—Instructors, Trainers, or Coaches*. For an instruction applicable to occupations with inherent risk, see CACI No. 473, *Primary Assumption of Risk—Exception to Nonliability—Occupation With Inherent Risk.*

Sources and Authority

- "[U]nder the primary assumption of risk doctrine, operators, sponsors and instructors in recreational activities posing inherent risks of injury have no duty to eliminate those risks, but do owe participants the duty not to unreasonably increase the risks of injury beyond those inherent in the activity." (*Nalwa, supra,* 55 Cal.4th at p. 1162.)

- "The doctrine applies to recreational activities ' "involving an inherent risk of injury to voluntary participants … where the risk cannot be eliminated without altering the fundamental nature of the activity." ' " (*Griffin v. The Haunted Hotel, Inc.* (2015) 242 Cal.App.4th 490, 500 [194 Cal.Rptr.3d 830].)

- "Although the doctrine is often applied as between sports coparticipants, it defines the duty owed as between persons engaged in any activity involving inherent risks. The doctrine applies to activity 'done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury' … ." (*Jimenez v. Roseville City School Dist.* (2016) 247 Cal.App.4th 594, 601 [202 Cal.Rptr.3d 536], internal citations omitted; see also *Bertsch v. Mammoth Community Water Dist.* (2016) 247 Cal.App.4th 1201, 1208 [202 Cal.Rptr.3d 757] ["These factors certainly apply to skateboarding"], internal citations omitted.)

- "What the primary assumption of risk doctrine does not do, however, is absolve operators of *any obligation* to protect the safety of their customers. As a general rule, where an operator can take a measure that would increase safety and minimize the risks of the activity *without also altering the nature of the activity,* the operator is required to do so. As the court explained in *Knight,* 'in the sports setting, as elsewhere, the nature of the applicable duty or standard of care frequently varies with the role of the defendant whose conduct is at issue in a given case.' When the defendant is the operator of an inherently risky sport or activity (as opposed to a coparticipant), there are 'steps the sponsoring business entity reasonably should be obligated to take in order to minimize the risks without altering the nature of the sport [or activity].' " (*Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283, 1300 [222 Cal.Rptr.3d 633], original italics, internal citations omitted.)

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- "Thus, *Nalwa* actually reaffirms *Knight's* conclusions regarding the duties owed to participants by operators/organizers of recreational activities. In short, such operators and organizers have two distinct duties: the limited duty not to increase the *inherent* risks of an activity under the primary assumption of the risk doctrine and the ordinary duty of due care with respect to the *extrinsic* risks of the activity, which should reasonably be minimized to the extent possible without altering the nature of the activity." (*Hass, supra,* 26 Cal.App.5th at p. 38.)

- "The determinant of duty, 'inherent risk,' is to be decided solely as a question of law and based on the general characteristics of the sport activity and the parties' relationship to it." (*Griffin, supra,* 242 Cal.App.4th at p. 501.)

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

- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra,* 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra,* 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball 'is issue of fact to be resolved at trial']; but see *Huff v. Wilkins, supra,* 138 Cal.App.4th at p. 745 ['it is the trial court's province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury']; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t is for the court to decide … whether the defendant has increased the risks of the activity beyond the risks inherent in the sport']; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d 325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary

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assumption of the risk decision, *Shin v. Ahn, supra,* 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna, supra,* 169 Cal.App.4th at pp. 112–113.)

- "Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant." (*Knight, supra,* 3 Cal.4th at pp. 315−316.)

- "Under *Knight,* defendants had a duty *not to increase* the inherent risks to which spectators at professional baseball games are regularly exposed and which they assume. As a result, a triable issue of fact remained, namely whether the [defendants]' mascot cavorting in the stands and distracting plaintiff's attention, *while the game was in progress,* constituted a breach of that duty, i.e., constituted negligence in the form of increasing the inherent risk to plaintiff of being struck by a foul ball." (*Lowe, supra,* 56 Cal.App.4th at p. 114, original italics.)

- "[T]hose responsible for maintaining athletic facilities have a … duty not to increase the inherent risks, albeit in the context of businesses selling recreational opportunities." (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 162 [41 Cal.Rptr.3d 299, 131 P.3d 383], internal citation omitted.)

- "*Knight,* consistently with established case law, simply requires courts in each instance to examine the question of duty in light of the nature of the defendant's activities and the relationship of the parties to that activity." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 482 [63 Cal.Rptr.2d 291, 936 P.2d 70].)

- "Because primary assumption of risk focuses on the question of duty, it is *not* dependent on either the plaintiff's implied consent to, or subjective appreciation of, the potential risk." (*Griffin, supra,* 242 Cal.App.4th at p. 502, original italics.)

- "Defendants' obligation not to increase the risks inherent in the activity included a duty to provide safe equipment for the trip, such as a safe and sound craft." (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 255 [38 Cal.Rptr.2d 65].)

- "[A duty not to increase the risk] arises only if there is an ' "organized relationship" ' between the defendants and the participant in relation to the sporting activity, such as exists between a recreational business operator and its patrons … . [I]mposing such a duty in the context of these types of relationships is justified because the defendants are 'responsible for, or in control of, the conditions under which the [participant] engaged in the sport.' " However, '[t]his policy justification does not extend to a defendant wholly uninvolved with and unconnected to the sport,' … who neither 'held out their driveway as an appropriate place to skateboard or in any other way represented that the driveway was a safe place for skateboarding.' " (*Bertsch, supra,* 247 Cal.App.4th at pp. 1208−1209,

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internal citations omitted.)

Secondary Sources

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

Haning et al., California Practice Guide: Personal Injury, Ch. 3-D, *Mitigating Factors In Reduction Of Damages*, ¶¶ 3:234–3:254.30 (The Rutter Group)

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

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics,* § 273.31 (Matthew Bender)

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

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

[*Name of plaintiff***] claims that the [***product***]'s design caused harm to [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [manufactured/distributed/sold] the [***product***];**

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

3. **That the [***product***]'s design was a substantial factor in causing harm to [***name of plaintiff***].**

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

(a) The gravity of the potential harm resulting from the use of the [*product***];**

(b) The likelihood that this harm would occur;

(c) The feasibility of an alternative safer design at the time of manufacture;

(d) The cost of an alternative design; [and]

(e) The disadvantages of an alternative design; [and]

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

New September 2003; Revised February 2007, April 2009, December 2009, December 2010, June 2011, January 2018, May 2019

Directions for Use

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

To make a prima facie case, the plaintiff has the initial burden of producing evidence that he or

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she was injured while the product was being used in an intended or reasonably foreseeable manner. If this prima facie burden is met, the burden of proof shifts to the defendant to prove that the plaintiff's injury resulted from a misuse of the product. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678 [115 Cal.Rptr.3d 590]; see also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*.) Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole cause of the plaintiff's injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121]; see CACI No. 1245.) Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

If evidence of industry custom and practice has been admitted for a limited purpose, at the timely request of a party opposing this evidence, the jury must be given a limiting instruction on how this evidence may and may not be considered under the risk-benefit test. (See *Kim v. Toyota Motor Corp.* (2018) 6 Cal.5th 21, 30, 38 [237 Cal.Rptr.3d 205, 424 P.3d 290].)

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

Sources and Authority

"A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- "[T]he term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts." (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 31 [192 Cal.Rptr.2d 158].)

  "The risk-benefit test requires the plaintiff to first 'demonstrate[] that the product's design proximately caused his injury.' If the plaintiff makes this initial showing, the defendant must then 'establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.' " (*Kim, supra, ~~v. Toyota Motor Corp.~~* 6 Cal.5th at p.~~21,~~ 30 ~~[237 Cal.Rptr.3d 205, 424 P.3d]~~, internal citation omitted.)

- "Appellants are therefore correct in asserting that it was not their burden to show that the risks involved in the loader's design—the lack of mechanical safety devices, or of a warning—outweighed the benefits of these aspects of its designs. The trial court's instruction to the jury, which quite likely would have been understood to place this burden on appellants, was therefore an error." (*Lunghi v. Clark Equipment Co., Inc.* (1984) 153 Cal.App.3d 485, 497–498 [200 Cal.Rptr. 387], internal citations omitted.)

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- "[U]nder the risk/benefit test, the plaintiff may establish the product is defective by showing that its design proximately caused his injury and the defendant then fails to establish that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design. In such case, the jury must evaluate the product's design by considering the gravity of the danger posed by the design, the likelihood such danger would occur, the feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the consumer resulting from an alternative design. 'In such cases, the jury must consider the manufacturer's evidence of competing design considerations … , and the issue of design defect cannot fairly be resolved by standardless reference to the "expectations" of an "ordinary consumer." '" (*Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1233 [115 Cal.Rptr.3d 151], internal citations omitted.)

- "[T]he defendant's burden is one 'affecting the burden of proof, rather than simply the burden of producing evidence.' " (*Moreno v. Fey Manufacturing Corp.* (1983) 149 Cal.App.3d 23, 27 [196 Cal.Rptr. 487].)

- "The [consumer-expectation and risk-benefit] tests provide alternative means for a plaintiff to prove design defect and do not serve as defenses to one another. A product may be defective under the consumer expectation test even if the benefits of the design outweigh the risks. [Citation.] On the other hand, a product may be defective if it satisfies consumer expectations but contains an excessively preventable danger in that the risks of the design outweigh its benefits." (*Chavez, supra,* 207 Cal.App.4th at p. 1303.)

- "Under *Barker,* in short, the plaintiff bears an initial burden of making 'a prima facie showing that the injury was proximately caused by the product's design.' This showing requires evidence that the plaintiff was injured *while using the product in an intended or reasonably foreseeable manner* and that the plaintiff's ability to avoid injury was frustrated by the absence of a safety device, or by the nature of the product's design. If this prima facie burden is met, the burden of proof shifts to the defendant to prove, in light of the relevant factors, that the product is not defective. Importantly, the plaintiff's prima facie burden of producing evidence that injury occurred while the product was being used in an intended or reasonably foreseeable manner must be distinguished from the ultimate burden of proof that rests with the defendant to establish that its product was not defective because the plaintiff's injury resulted from a misuse of the product." (*Perez, supra,* 188 Cal.App.4th at p. 678, original italics, internal citations omitted.)

- " '[I]n evaluating the adequacy of a product's design pursuant to [the risk-benefit] standard, a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.'" (*Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 786–787 [64 Cal.Rptr.3d 908], internal citations omitted.)

- "[E]xpert evidence about compliance with industry standards can be considered on the issue of defective design, in light of all other relevant circumstances, even if such compliance is

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not a complete defense. An action on a design defect theory can be prosecuted and defended through expert testimony that is addressed to the elements of such a claim, including risk-benefit considerations." (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 426 [136 Cal.Rptr.3d 739].)

- "We stress that while industry custom and practice evidence is not categorically inadmissible, neither is it categorically admissible; its admissibility will depend on application of the ordinary rules of evidence in the circumstances of the case. … First, the party seeking admission of such evidence must establish its relevance to at least one of the elements of the risk-benefit test, either causation or the *Barker* factors. The evidence is relevant to the *Barker* inquiry if it sheds light on whether, objectively speaking, the product was designed as safely as it should have been, given 'the complexity of, and trade-offs implicit in, the design process.' Whether the evidence serves this purpose depends on whether, under the circumstances of the case, it is reasonable to conclude that other manufacturers' choices do, as the Court of Appeal put it, 'reflect legitimate, independent research and practical experience regarding the appropriate balance of product safety, cost, and functionality.' If the proponent of the evidence establishes a sufficient basis for drawing such a conclusion, the evidence is admissible, even though one side or the other may argue it is entitled to little weight because industry participants have weighed the relevant considerations incorrectly. The evidence may not, however, be introduced simply for the purpose of showing the manufacturer was acting no worse than its competitors." (*Kim, supra,* 6 Cal.5th at p. 37, internal citations omitted.)

- "[I]f the party opposing admission of this evidence makes a timely request, the trial court must issue a jury instruction that explains how this evidence may and may not be considered under the risk-benefit test." (*Kim, supra,* 6 Cal.5th at p. 38.)

- "Plaintiffs contend aesthetics is not a proper consideration in the risk-benefit analysis, and the trial court's ruling to the contrary was an '[e]rror in law.' We disagree. In our view, much of the perceived benefit of a car lies in its appearance. A car is not a strictly utilitarian product. We believe that a jury properly may consider aesthetics in balancing the benefits of a challenged design against the risk of danger inherent in the design. Although consideration of the disadvantages of an alternative design (CACI No. 1204, factor (e)) would encompass any impact on aesthetics, we conclude that there was no error in the trial court's approval of the modification listing aesthetics as a relevant factor." (*Bell, supra,* 181 Cal.App.4th at p. 1131, internal citations omitted.)

- "Taken together, section 2, subdivision (b), and section 5 of the Restatement indicate that a component part manufacturer may be held liable for a defect in the component. When viewed in its entirety, the Restatement does not support [defendant]'s argument that '[o]nly if the component part analysis establishes sufficient control over the design of the alleged defect should the component manufacturer be held to the standard of the risk-benefit test.' Instead, the test considering foreseeable risks of harm and alternative designs is applied to the component part manufacturer when the alleged defect is in the component." (*Gonzalez, supra,* 154 Cal.App.4th at pp. 789–790.)

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- "Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge." (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1185 [76 Cal.Rptr.2d 657].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1615–1631

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

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

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

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

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2020. Public Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] suffered harm because [***name of defendant***] created a nuisance. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

   [was harmful to health;] [or]

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

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

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

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

2. **That the condition affected a substantial number of people at the same time;**

3. **That an ordinary person would be reasonably annoyed or disturbed by the condition;**

4. **That the seriousness of the harm outweighs the social utility of [***name of defendant***]'s conduct;**

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

6. **That [***name of plaintiff***] suffered harm that was different from the type of harm suffered by the general public; and**

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

New September 2003; Revised December 2007, June 2016, November 2017, May 2019

Directions for Use

Give this instruction for a claim for public nuisance. For an instruction on private nuisance, give CACI No. 2021, *Private Nuisance—Essential Factual Elements.* While a private nuisance is designed to vindicate individual land ownership interests, a public nuisance is not dependent on an interference with

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any particular rights of land: The public nuisance doctrine aims at the protection and redress of community interests. (*Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 358 [213 Cal.Rptr.3d 538].)

There is some uncertainty as to whether lack of consent is an element (element 5) or consent is a defense. Cases clearly list lack of consent with the elements. (See *Department of Fish & Game v. Superior Court* (2011) 197 Cal.App.4th 1323, 1352 [129 Cal.Rptr.3d 719]; *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1548 [87 Cal.Rptr.3d 602].) However, other cases have referred to consent as a defense, albeit in the context of a nuisance action involving parties with interests in the same property. (See *Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 341–345, 23 Cal.Rptr. 2d 377; *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1138–1140 [281 Cal.Rptr. 827].)

Sources and Authority

- "Nuisance" Defined. Civil Code section 3479.
- Public Nuisance. Civil Code section 3480.
- Action by Private Person for Public Nuisance. Civil Code section 3493.
- Act Done Under Express Authority of Statute. Civil Code section 3482.
- Property Used for Dogfighting and Cockfighting. Civil Code section 3482.8.
- "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. ...' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury." ' " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.)
- "Public nuisance and private nuisance 'have almost nothing in common except the word "nuisance" itself.' Whereas private nuisance is designed to vindicate individual land ownership interests, the public nuisance doctrine has historically distinct origins and aims at 'the protection and redress of *community interests*.' With its roots tracing to the beginning of the 16th century as a criminal offense against the crown, public nuisances at common law are 'offenses against, or interferences with, the exercise of *rights common to the public,*' such as public health, safety, peace, comfort, or convenience." (*Citizens for Odor Nuisance Abatement, supra,* 8 Cal.App.5th at p. 358, original italics, internal citation omitted.)
- "The elements of a public nuisance, under the circumstances of this case, are as follows: (1) the 2007 poisoning obstructed the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) the 2007 poisoning affected a substantial number of people; (3) an ordinary person would be unreasonably annoyed or disturbed by the 2007 poisoning; (4) the seriousness of the harm occasioned by the 2007 poisoning outweighed its social utility; (5) plaintiffs did not consent to the

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2007 poisoning; (6) plaintiffs suffered harm as a result of the 2007 poisoning that was different from the type of harm suffered by the general public; and (7) the 2007 poisoning was a substantial factor in causing plaintiffs' harm." (*Department of Fish & Game, supra,* 197 Cal.App.4th at p. 1352 [citing this instruction].)

- "Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different in kind from that suffered by the general public." (*Venuto, supra,* 22 Cal.App.3d at p. 124, internal citations omitted; but see *Birke, supra, ~~v. Oakwood Worldwide (2009)~~* 169 Cal.App.4th at p.~~1540,~~ 1550 ~~[87 Cal.Rptr.3d 602]~~ ["to the extent *Venuto* … can be read as precluding an action to abate a public nuisance by a private individual who has suffered personal injuries as a result of the challenged condition, we believe it is an incorrect statement of the law"].)

- "Unlike the private nuisance-tied to and designed to vindicate individual ownership interests in land-the 'common' or public nuisance emerged from distinctly different historical origins. The public nuisance doctrine is aimed at the protection and redress of community interests and, at least in theory, embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the 16th century." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103 [60 Cal.Rptr.2d 277, 929 P.2d 596].)

- "[W]hen the nuisance is a private as well as a public one, there is no requirement the plaintiff suffer damage different in kind from that suffered by the general public. That is, the plaintiff ' "does not lose his rights as a landowner merely because others suffer damage of the same kind, or even of the same degree … ." ' " (*Birke, supra,* 169 Cal.App.4th at p. 1551, internal citations omitted.)

- "A public nuisance cause of action is established by proof that a defendant knowingly created or assisted in the creation of a substantial and unreasonable interference with a public right." (*People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 79~~112~~ [227 Cal.Rptr.3d 499].)

- "Of course, not every interference with collective social interests constitutes a public nuisance. To qualify ... the interference must be both substantial and unreasonable." (*People ex rel. Gallo, supra*, 14 Cal.4th at p. 1105.)

- "It is substantial if it causes significant harm and unreasonable if its social utility is outweighed by the gravity of the harm inflicted." *People v. ConAgra Grocery Products Co., supra,* ~~(2017)~~ 17 Cal.App.5th at p.~~51,~~ 112 ~~[227 Cal.Rptr.3d 499]~~.)

- "The fact that the defendants' alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability." (*Birke, supra,* 169 Cal.App.4th at p. 1552 [citing this instruction], internal citation omitted.)

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

- "Nuisance liability is not necessarily based on negligence, thus, 'one may be liable for a nuisance

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even in the absence of negligence. [Citations.]' However, ' "where liability for the nuisance is predicated on the omission of the owner of the premises to abate it, rather than on his having created it, then negligence is said to be involved. …" [Citations.]' " (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236 [176 Cal.Rptr.3d 422], internal citations omitted.)

- "An essential element of a cause of action for nuisance is damage or injury." (*Helix Land Co., Inc. v. City of San Diego* (1978) 82 Cal.App.3d 932, 950 [147 Cal.Rptr. 683].)

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

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

- "By analogy to the rules governing tort liability, courts apply the same elements to determine liability for a public nuisance." (*People ex rel. Gallo, supra,* 14 Cal.4th at p. 1105, fn. 3, internal citation omitted.)

- "The elements 'of a cause of action for public nuisance include the existence of a duty and causation.'' " (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542 [107 Cal.Rptr.3d 481], internal citations omitted.)

- "[L]iability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant *created or assisted in the creation of the nuisance*." (*People v. ConAgra Grocery Products Co., supra,* 17 Cal.App.5th at p. 109, original italics.)

- "Causation is an essential element of a public nuisance claim. A plaintiff must establish a 'connecting element' or a 'causative link' between the defendant's conduct and the threatened harm." (*Citizens for Odor Nuisance Abatement, supra,* 8 Cal.App.5th at p. 359 [citing this instruction], internal citation omitted.)

- "Causation may consist of either '(a) an act; or [¶] (b) a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the interference with the public interest or the invasion of the public interest.' A plaintiff must show the defendant's conduct was a 'substantial factor' in causing the alleged harm." (*Citizens for Odor Nuisance Abatement, supra,* 8 Cal.App.5th at p. 359 [citing this instruction], internal citation omitted.)

- " 'Where negligence and nuisance causes of action rely on the same facts about lack of due care, the nuisance claim is a negligence claim.' The nuisance claim 'stands or falls with the determination of the negligence cause of action' in such cases." (*Melton, supra,* 183 Cal.App.4th at p. 542, internal citations omitted.)

- "[W]here, as here, an owner of property seeks damages for creation of a nuisance by a prior lessee, the lessee has a defense that his use of the property was lawful and was authorized by the lease; i.e.,

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his use of the property was undertaken with the consent of the owner." (*Mangini, supra,* 230 Cal.App.3d at p. 1138, original italics.)

- "Nor is a defense of consent vitiated simply because plaintiffs seek damages based on special injury from public nuisance. 'Where special injury to a private person or persons entitles such person or persons to sue on account of a public nuisance, both a public and private nuisance, in a sense, are in existence.' " (*Mangini, supra. ~~v. Aerojet-General Corp.~~* ~~(1991)~~ 230 Cal.App.3d at p.~~1125,~~ 1139 ~~[281 Cal.Rptr. 827]~~.)

"[W]here the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made and in this sense its mere existence is said to be a nuisance per se. [Citation.] But, to rephrase the rule, to be considered a nuisance per se the object, substance, activity or circumstance at issue must be expressly declared to be a nuisance by its very existence by some applicable law." (*People v. ConAgra Grocery Products Co., supra,* 17 Cal.App.5th at p. 114.)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, § 152

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 5-D, *Common Law Environmental Hazards Liability*, ¶¶ 5:140-5:179 (The Rutter Group)

California Real Property Remedies and Damages (Cont.Ed.Bar 2d ed.) Ch. 11, Remedies for Nuisance and Trespass, § 11.7

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, §§ 17.01–17.04, 17.06 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.12 (Matthew Bender)

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

1 California Civil Practice: Torts §§ 17:1–17:3 (Thomson Reuters)

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2021. Private Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] suffered harm because [***name of defendant***] created a nuisance.~~interfered with [*name of plaintiff*]'s use and enjoyment of [his/her] land.~~ To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

   [was harmful to health;] [or]

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

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

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

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

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

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

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

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

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

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

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

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New September 2003; Revised February 2007, December 2011, December 2015, June 2016, May 2017, May 2018, May 2019

Directions for Use

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

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

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

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

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

There is some uncertainty as to whether lack of consent is an element (element 6) or consent is a defense. Cases clearly list lack of consent with the elements. (See *Department of Fish & Game v. Superior Court* (2011) 197 Cal.App.4th 1323, 1352 [129 Cal.Rptr.3d 719]; *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1548 [87 Cal.Rptr.3d 602].) However, other cases have referred to consent as a defense, albeit in the context of a nuisance action involving parties with interests in the same property. (See *Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 341–345, 23 Cal. Rptr. 2d 377; *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1138–1140 [281 Cal.Rptr. 827].)

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

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

Sources and Authority

- "Nuisance" Defined. Civil Code section 3479.
- Acts Done Under Express Authority of Statute. Civil Code section 3482.
- "A nuisance is considered a 'public nuisance' when it 'affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.' A 'private nuisance' is defined to include any nuisance not covered by the definition of a public nuisance, and also includes some public nuisances. 'In other words, it is possible for a nuisance to be public and, from the perspective of individuals who suffer an interference with their use and enjoyment of land, to be private as well.' " (*Mendez v. Rancho Valencia Resort Partners, LLC* (2016) 3 Cal.App.5th 248, 261-262 [207 Cal.Rptr.3d 532], internal citations omitted.)
- "The elements of a public nuisance, under the circumstances of this case, are as follows: (1) the 2007 poisoning obstructed the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) the 2007 poisoning affected a substantial number of people; (3) an ordinary person would be unreasonably annoyed or disturbed by the 2007 poisoning; (4) the seriousness of the harm occasioned by the 2007 poisoning outweighed its social utility; (5) plaintiffs did not consent to the 2007 poisoning; (6) plaintiffs suffered harm as a result of the 2007 poisoning that was different from the type of harm suffered by the general public; and (7) the 2007 poisoning was a substantial factor in causing plaintiffs' harm.[¶] The elements of a private nuisance are the same except there is no requirement that plaintiffs prove a substantial number of people were harmed and plaintiffs suffered harm that was different from that suffered by the general public, but there are additional elements that plaintiffs owned, leased, occupied or controlled real property, that the 2007 poisoning interfered with plaintiffs' use of their property, and that plaintiffs were harmed thereby" (*Department of Fish & Game, supra,* 197 Cal.App.4th at p. 1352 [citing this instruction].)
- "In their first cause of action, plaintiffs allege the 2007 poisoning adversely affected tourism for a substantial period of time, caused plaintiffs to suffer serious losses, obstructed the free use of plaintiffs' property, and interfered with plaintiffs' comfortable enjoyment of their property or their businesses. Strictly speaking, this does not state a claim for either public or private nuisance. There is no allegation that plaintiffs did not consent to the 2007 poisoning, that an ordinary person would have been annoyed or disturbed by the 2007 poisoning, or that

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the seriousness of the harm caused by the 2007 poisoning outweighed its public benefit." (*Department of Fish & Game, supra,* 197 Cal.App.4th at p. 1352.)

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

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

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

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

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

- "The requirements of *substantial damage* and *unreasonableness* are not inconsequential. These requirements stem from the law's recognition that: ' "Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of 'give and take, live and let live,' and *therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another*. Liability … is imposed in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation." ' " (*Mendez, supra,* 3 Cal.App.5th at p. 263, original italics.)

- "The first additional requirement for recovery of damages on a nuisance theory is proof that the invasion of the plaintiff's interest in the use and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer 'substantial actual damage.' The Restatement

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

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

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

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

- "A finding of an actionable nuisance does not require a showing that the defendant acted unreasonably. As one treatise noted, '[c]onfusion has resulted from the fact that the intentional interference with the plaintiff's use of his property can be unreasonable even when

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the defendant's conduct is reasonable. This is simply because a reasonable person could conclude that the plaintiff's loss resulting from the intentional interference ought to be allocated to the defendant.' " (*Wilson v. Southern California Edison Co.* (2018) 21 Cal.App.5th 786, 804 [230 Cal.Rptr.3d 595], quoting Prosser & Keeton (5th ed. 1984) Torts § 88.)

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

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

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

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

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

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

- "We acknowledge that to recover on a nuisance claim the harm the plaintiff suffers need not be a physical injury. Thus, the absence of evidence in this case to establish that [plaintiff] 's physical injuries were caused by the stray voltage would not preclude recovery on her nuisance claim." (*Wilson, supra,* 234 Cal.App.4th at p. 159, internal citations omitted.)

- "[M]ere apprehension of injury from a dangerous condition may constitute a nuisance where it interferes with the comfortable enjoyment of property… ." (*McIvor v. Mercer-Fraser Co.*

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(1946) 76 Cal.App.2d 247, 254 [172 P.2d 758].)

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

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

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

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

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

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

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

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- "[W]here, as here, an owner of property seeks damages for creation of a nuisance by a prior lessee, the lessee has a defense that his use of the property was lawful and was authorized by the lease; i.e., his use of the property was undertaken with the *consent* of the owner." (*Mangini, supra,* 230 Cal.App.3d at p. 1138, original italics.)

Secondary Sources

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

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

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

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

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

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2506. Limitation on Remedies—After-Acquired Evidence

[*Name of defendant***] claims that after [he/she/it] [discharged/refused to hire] [***name of plaintiff***], [he/she/it] discovered that [***name of plaintiff***] [***describe misconduct, e.g., had provided a false Social Security number***]. [***Name of defendant***] claims that [he/she/it] would have [discharged/refused to hire] [***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/refused to hire] [him/her] because of that misconduct alone had [***name of defendant***] known of it; and**

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

[If you find that [*name of defendant***] has proved that [***name of plaintiff***] [***describe misconduct***] and that had [***name of defendant***] known of the misconduct earlier, [he/she/it] would have [discharged/refused to hire] [***name of plaintiff***] as required by the elements above, then [***name of plaintiff***] may recover damages only for any time before the date on which [***name of defendant***] discovered the misconduct. [[***Name of defendant***] must prove the date of discovery if it is contested.]]**

New September 2003; Revised June 2016, December 2016, May 2019

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].)

There is some uncertainty as to whether or not it is an equitable doctrine. (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 doctrine, then the fact-finding in the elements of the instruction would be only advisory to the court, or the elements could be found by 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].)

After-acquired evidence is not a complete defense to liability, but may foreclose otherwise available remedies. (*Salas, supra,* 59 Cal.4th at pp. 430−431.) Give the optional last paragraph if the court decides to allow the jury to award damages or to make a finding on damages. Add the last sentence of the

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paragraph if the date on which the defendant discovered the after-acquired evidence is contested.

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*.)

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

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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 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.)

- "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.

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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 Ch. 7-A, *Employment Discrimination—Title VII and the California Fair Employment and Housing Act*, ¶¶ 7:930–7:932 (The Rutter Group)
Chin et al., Cal. Practice Guide: Employment Litigation Ch. 16-H, *Other Defenses--After-Acquired Evidence of Employee Misconduct*, ¶¶ 16:615–16:616, 16:625, 16:635–16:637, 16:647 (The Rutter Group)

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

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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2508. Failure to File Timely Administrative Complaint (Gov. Code, § 12960(d))—Plaintiff Alleges Continuing Violation

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[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit may not proceed because [***name of plaintiff***] did not timely file a complaint with the Department of Fair Employment and Housing (DFEH). A complaint is timely if it was filed within one year of the date on which [***name of defendant***]'s alleged unlawful practice occurred.**

[*Name of plaintiff***] filed a complaint with the DFEH on [***date***]. [***Name of plaintiff***] may recover for acts of alleged [***specify the unlawful practice, e.g., harassment***] that occurred before [***insert date one year before the DFEH complaint was filed***], only if [he/she] proves all of the following: ~~[***Name of defendant***] claims that its alleged unlawful practice that triggered the requirement to file a complaint occurred no later than [***date more than one year before DFEH complaint was filed***]. [***Name of plaintiff***] claims that [***name of defendant***]'s unlawful practice was a continuing violation so that the requirement to file a complaint was triggered no earlier than [***date less than one year before DFEH complaint was filed***].~~**

~~**[***Name of defendant***]'s alleged unlawful practice is considered as continuing to occur as long as [***name of plaintiff***] proves that all of the following three conditions continue to exist:**~~

1. **That [***name of defendant***]'s [***e.g., harassment***] that occurred before [***insert date one year before the DFEH complaint was filed***]~~Conduct occurring within a year of the date on which [***name of plaintiff***] filed [his/her] complaint with the DFEH~~ was similar or related to the conduct that occurred on or after that date~~earlier~~;**

2. **That the conduct was reasonably frequent; and**

3. **That the conduct had not yet become permanent before that date.**

"Permanent" in this context means that the conduct has stopped, [*name of plaintiff***] has resigned, or [***name of defendant***]'s statements and actions would make it clear to a reasonable employee that any further efforts to resolve the issue internally would be futile.**

New June 2010; Revised December 2011, June 2015, May 2019

Directions for Use

Give this instruction if the plaintiff relies on the continuing-violation doctrine in order to avoid the bar of the limitation period of one year within which to file an administrative complaint. (See Gov. Code, § 12960(d).) Although the continuing-violation doctrine is labeled an equitable exception to the one-year deadline, it may involve triable issues of fact. (See *Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 723-724 [85 Cal.Rptr.3d 705].)

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If the case involves multiple claims of FEHA violations, replace "lawsuit" in the opening sentence with reference to the particular claim or claims to which the continuing-violation rule may apply.

In the second paragraph, insert the date on which the administrative complaint was filed and the dates on which both sides allege that the complaint requirement was triggered. The verdict form should ask the jury to specify the date that it finds that the requirement accrued. If there are multiple claims with different continuing-violation dates, repeat this paragraph for each claim.

The plaintiff has the burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with the DFEH. (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1345 [172 Cal.Rptr.3d 686].) This burden of proof extends to any excuse or justification for the failure to timely file, such as the continuing violation exception. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1402 [194 Cal.Rptr.3d 689].)

Sources and Authority

- Administrative Complaint for FEHA Violation. Government Code section 12960.

- "At a jury trial, the facts are presented and the jury must decide whether there was a continuing course of unlawful conduct based on the law as stated in CACI No. 2508." (*Jumaane, supra,* 241 Cal.App.4th at p. 1401.)

- "Under the FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a complaint with the Department of Fair Employment and Housing (Department) and must obtain from the Department a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA. The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA. As for the applicable limitation period, the FEHA provides that no complaint for any violation of its provisions may be filed with the Department 'after the expiration of one year from the date upon which the alleged *unlawful practice* or refusal to cooperate *occurred*,' with an exception for delayed discovery not relevant here." (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 63 [105 Cal.Rptr.2d 652], original italics, internal citations omitted.)

- "[I]t is 'plaintiff's burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with [DFEH] and obtaining a right-to-sue letter.' " (*Kim, supra,* 226 Cal.App.4th at p. 1345.)

- "[W]hen defendant has asserted the statute of limitation defense, plaintiff has the burden of proof to show his or her claims are timely under the continuing violation doctrine." (*Jumaane, supra,* 241 Cal.App.4th at p. 1402.)

- "Under the continuing violation doctrine, a plaintiff may recover for unlawful acts occurring outside the limitations period if they continued into that period. The continuing violation doctrine requires proof that (1) the defendant's actions inside and outside the limitations period are sufficiently similar in kind; (2) those actions occurred with sufficient frequency; and (3) those actions have not acquired a

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degree of permanence." (*Wassmann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, 850-851 [234 Cal.Rptr.3d 712] , internal citations omitted.)

- " '[P]ermanence' in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile. [¶] Thus, when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run, not necessarily when the employee first believes that his or her rights may have been violated, but rather, either when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, or when the employee is on notice that further efforts to end the unlawful conduct will be in vain. Accordingly, an employer who is confronted with an employee seeking accommodation of disability or relief from disability harassment may assert control over its legal relationship with the employee either by accommodating the employee's requests, or by making clear to the employee in a definitive manner that it will not be granting any such requests, thereby commencing the running of the statute of limitations." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823–824 [111 Cal.Rptr.2d 87, 29 P.3d 175], internal citations omitted.)

- "[T]he *Richards* court interpreted section 12960 to mean that when a continuing pattern of wrongful conduct occurs partly in the statutory period and partly outside the statutory period, the limitations period begins to accrue once an employee is on notice of the violation of his or her rights and on notice that 'litigation, not informal conciliation, is the only alternative for the vindication of his or her rights.' " (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1412 [159 Cal.Rptr.3d 749].)

- "A continuing violation may be established by demonstrating 'a company wide policy or practice' or 'a series of related acts against a single individual.' 'The continuing violation theory generally has been applied in the context of a continuing policy and practice of discrimination on a company-wide basis; a plaintiff who shows that a policy and practice operated at least in part within the limitation period satisfies the filing requirements. "[A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions." ' The plaintiff must demonstrate that at least one act occurred within the filing period and that 'the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." … The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern.' " (*Morgan, supra,* 88 Cal.App.4th at p. 64, internal citations omitted.)

- "[A] continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence would have known, [he] was being discriminated against at the time the earlier events occurred." (*Morgan, supra,* 88 Cal.App.4th at p. 65.)

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- "The Supreme Court has extended the continuing violation doctrine to retaliation claims. And the doctrine also applies to racial harassment claims. Indeed, as we observed in *Morgan v. Regents of University of California, supra,* 88 Cal.App.4th 52, 65: 'Cases alleging a hostile work environment due to racial or sexual harassment are often found to come within the continuing violations framework.' " (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 270 [100 Cal.Rptr.3d 296], internal citations omitted.)

Secondary Sources

7 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1065

3 Witkin, California Procedure (5th ed. 2008) Actions, § 564

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:561.1, 7:975 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 16-A, *Failure To Exhaust Administrative Remedies,* ¶ 16:85 (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.51[1] (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.59 (Matthew Bender)

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2510. "Constructive Discharge" Explained

[*Name of plaintiff*] must prove that [he/she] was constructively discharged. To establish constructive discharge, [*name of plaintiff*] must prove the following:

1. **That [*name of defendant*] [through [*name of defendant*]'s officers, directors, managing agents, or supervisory employees] intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in [*name of plaintiff*]'s position would have had no reasonable alternative except to resign; and**

2. **That [*name of plaintiff*] resigned because of these working conditions.**

In order to be sufficiently intolerable, adverse working conditions must be unusually aggravated or amount to a continuous pattern. In general, single, trivial, or isolated acts of misconduct are insufficient to support a constructive discharge claim. But in some circumstances, a single intolerable incident may constitute a constructive discharge.

New June 2012; Revised May 2019

Directions for Use

Give this instruction with CACI No. 2401, *Breach of Employment Contract—Unspecified Term—Actual or Constructive Discharge—Essential Factual Elements,* CACI No. 2500, *Disparate Treatment—Essential Factual Elements,* CACI No. 2505, *Retaliation,* CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements,* CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements,* or CACI No. 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements,* if the employee alleges that because of the employer's actions, he or she had no reasonable alternative other than to leave the employment. Constructive discharge can constitute the adverse employment action required to establish a FEHA violation for discrimination or retaliation. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 [76 Cal.Rptr.3d 632].)

Sources and Authority

- "[C]onstructive discharge occurs only when an employer terminates employment by forcing the employee to resign. A constructive discharge is equivalent to a dismissal, although it is accomplished indirectly. Constructive discharge occurs only when the employer coerces the employee's resignation, either by creating working conditions that are intolerable under an objective standard, or by failing to remedy objectively intolerable working conditions that actually are known to the employer. We have said 'a constructive discharge is legally regarded as a firing rather than a resignation.' " (*Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal.4th 731, 737 [63 Cal.Rptr.2d 636, 936 P.2d 1246], internal citations omitted.)

- "Actual discharge carries significant legal consequences for employers, including possible liability for wrongful discharge. In an attempt to avoid liability, an employer may refrain from actually firing

an employee, preferring instead to engage in conduct causing him or her to quit. The doctrine of constructive discharge addresses such employer-attempted 'end runs' around wrongful discharge and other claims requiring employer-initiated terminations of employment." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244 [32 Cal.Rptr.2d 223, 876 P.2d 1022].)

- "Standing alone, constructive discharge is neither a tort nor a breach of contract, but a doctrine that transforms what is ostensibly a resignation into a firing." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "In order to amount to constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner, supra,* 7 Cal.4th at p. 1247, internal citation and footnotes omitted.)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)

- "Although situations may exist where the employee's decision to resign is unreasonable as a matter of law, '[w]hether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact. [Citation.]' " (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827 [166 Cal.Rptr.3d 242].)

- "[T]he standard by which a constructive discharge is determined is an objective one—the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "[U]nder *Turner,* the proper focus is on the working conditions themselves, not on the plaintiff's subjective reaction to those conditions." (*Simers v. Los Angeles Times Communications, LLC* (2018) 18 Cal.App.5th 1248, 1272 [227 Cal.Rptr.3d 695].)

- "The length of time the plaintiff remained on the job may be *one* relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner, supra,* 7 Cal.4th at p. 1254, original italics.)

- "[T]here was, as the trial court found, substantial evidence that plaintiff's age and disability were 'substantial motivating reason[s]' for the adverse employment action or actions to which plaintiff was subjected. But the discriminatory motive for plaintiff's working conditions has no bearing on whether the evidence was sufficient to establish constructive discharge." (*Simers, supra,* 18 Cal.App.5th at p. 1271.)

- "In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly

permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. [¶] For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees." (*Turner, supra,* 7 Cal.4th at p. 1251.)

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, § ~~225~~238

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-G, *Constructive Discharge,* ¶ 4:405 et seq. (The Rutter Group)

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.34 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.31 et seq. (Matthew Bender)

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

The advisory committee is currently considering revisions to this instruction in light of newly enacted Government Code section 12923. (See SB 1300, Stats. 2018, ch. 955.)

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

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

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

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

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

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

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

   [That a supervisor engaged in the conduct;]

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

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

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

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

Directions for Use

This instruction is for use in a hostile work environment case when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is not the target of the harassment, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for

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use if the hostile environment is due to sexual favoritism, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

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

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

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

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- "[A]n employer is strictly liable for all acts of sexual harassment by a supervisor." (*State Dep't of Health Servs., supra,* 31 Cal.4th at p. 1042.)

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

- "When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action)." (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 952 [139 Cal.Rptr.3d 464].)

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

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

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

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

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

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

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

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

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

- "In contending that the 'subjectively offensive' element was not proven, a defendant 'will assert that a plaintiff consented to the conduct through active participation in it, or was not injured because the plaintiff did not subjectively find it abusive.' [¶] [Evidence Code] Section 1106 limits the evidence the defendant may use to support this assertion. It provides that '[i]n any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff … .' This general rule is, however, subject to the exception that it 'does not apply to evidence of the plaintiff's sexual conduct with the alleged perpetrator.' The term 'sexual conduct' within the meaning of section 1106 has been broadly construed to include 'all active or passive behavior (whether statements or actions), that either directly or through reasonable inference establishes a plaintiff's willingness to engage in sexual activity,' including 'racy banter, sexual

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horseplay, and statements concerning prior, proposed, or planned sexual exploits.' " (*Meeks v. AutoZone, Inc.* (2018) 24 Cal.App.5th 855, 874 [235 Cal.Rptr.3d 161], internal citations omitted.)

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

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

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

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

- "[A] heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the attacks are motivated by sexual desire or interest." (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1239-1240 [166 Cal.Rptr.3d 676].)

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

- "California courts have held so-called 'me too' evidence, that is, evidence of gender bias against employees other than the plaintiff, may be admissible evidence in discrimination and harassment cases." (*Meeks, supra,* 24 Cal.App.5th at p. 871.)

Secondary Sources

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

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

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

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

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

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

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

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

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

The advisory committee is currently considering revisions to this instruction in light of newly enacted Government Code section 12923. (See SB 1300, Stats. 2018, ch. 955.)

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

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

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

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

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

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

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

   [That a supervisor engaged in the conduct;]

   [*or***]**

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

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

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

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

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an employer or other entity covered by the FEHA. For an

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individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is the target of the harassment, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the hostile environment is due to widespread sexual favoritism, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

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

See also the Sources and Authority to CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C),
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment;

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and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)

- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)

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

- "[U]nder the FEHA, an employer is strictly liable for *all* acts of sexual harassment by a supervisor. (*State Dep't of Health Servs., supra,* 31 Cal.4th at p. 1041, original italics.)

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

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment.

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Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

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

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

Secondary Sources

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

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

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

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

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

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

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

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

The advisory committee is currently considering revisions to this instruction in light of newly enacted Government Code section 12923. (See SB 1300, Stats. 2018, ch. 955.)

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

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

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

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

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

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

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

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

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

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

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

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

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an employer or other entity covered by the FEHA. For an individual defendant,

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such as the alleged harasser or plaintiff's coworker, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

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

See also the Sources and Authority to CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently

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pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)

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

- "The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. This is a negligence standard. Because the FEHA imposes this negligence standard only for harassment 'by an employee other than an agent or supervisor', by implication the FEHA makes the employer strictly liable for harassment by a supervisor." (*State Dep't of Health Servs., supra,* 31 Cal.4th at pp. 1040-1041, original italics.)

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

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

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

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

Secondary Sources

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

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

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

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

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

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

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

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

The advisory committee is currently considering revisions to this instruction in light of newly enacted Government Code section 12923. (See SB 1300, Stats. 2018, ch. 955.)

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

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

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

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

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

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

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

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

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

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

Directions for Use

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

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

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

See also the Sources and Authority to CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- "Under FEHA, an employee who harasses another employee may be held personally liable." (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1524 [169 Cal.Rptr.3d 794].)

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

Secondary Sources

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

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

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

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

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

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

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

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

The advisory committee is currently considering revisions to this instruction in light of newly enacted Government Code section 12923. (See SB 1300, Stats. 2018, ch. 955.)

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

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

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

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

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

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

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

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

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

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

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is the target of the harassment, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for

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use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

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

See also the Sources and Authority to CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will

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obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)

- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)

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

- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)

Secondary Sources

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

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

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

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

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2522C. Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j))

The advisory committee is currently considering revisions to this instruction in light of newly enacted Government Code section 12923. (See SB 1300, Stats. 2018, ch. 955.)

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

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

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

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

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

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

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

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

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

Derived from former CACI No. 2522 December 2007; Revised December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for use if the plaintiff is not the target of the

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harassment, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

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

See also the Sources and Authority to CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her

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working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)

- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)
- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)

Secondary Sources

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

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

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

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

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36[5] (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

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2524. "Severe or Pervasive" Explained

The advisory committee is currently considering revisions to this instruction in light of newly enacted Government Code section 12923. (See SB 1300, Stats. 2018, ch. 955.)

"Severe or pervasive" means conduct that alters the conditions of employment and creates a hostile or abusive work environment.

In determining whether the conduct was severe or pervasive, you should consider all the circumstances. You may consider any or all of the following:

(a) The nature of the conduct;

(b) How often, and over what period of time, the conduct occurred;

(c) The circumstances under which the conduct occurred;

(d) Whether the conduct was physically threatening or humiliating;

(e) The extent to which the conduct unreasonably interfered with an employee's work performance.

New September 2003; Revised December 2007

Directions for Use

Read this instruction with any of the Hostile Work Environment Harassment instructions (CACI Nos. 2521A, 2521B, 2521C, 2522A, 2522B, and 2522C). Read also CACI No. 2523, *"Harassing Conduct" Explained*.

Sources and Authority

- "We have agreed with the United States Supreme Court that, to prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex. The working environment must be evaluated in light of the totality of the circumstances: '[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 462 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the

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

- "Whether the sexual conduct complained of is sufficiently pervasive to create a hostile or offensive work environment must be determined from the totality of the circumstances. The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance … and that she was actually offended ... . The factors that can be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609–610 [262 Cal.Rptr. 842], internal citation omitted.)

- "In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (*Fisher*, *supra*, 214 Cal.App.3d at p. 610.)

- "The United States Supreme Court ... has clarified that conduct need not seriously affect an employee's psychological well-being to be actionable as abusive work environment harassment. So long as the environment reasonably would be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 412 [27 Cal.Rptr.2d 457], internal citations omitted.)

- "As the Supreme Court recently reiterated, in order to be actionable, '... a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' The work environment must be viewed from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' This determination requires judges and juries to exercise '[c]ommon sense, and an appropriate sensitivity to social context' in order to evaluate whether a reasonable person in the plaintiff's position would find the conduct severely hostile or abusive." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 518–519 [76 Cal.Rptr.2d 547], internal citations omitted.)

- "The requirement that the conduct be sufficiently severe or pervasive to create a working environment a reasonable person would find hostile or abusive is a crucial limitation that prevents sexual harassment law from being expanded into a 'general civility code.' The conduct must be extreme: ' "simple teasing," … offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment." ' " (*Jones v. Department of Corrections* (2007) 152 Cal. App. 4th 1367, 1377 [62 Cal.Rptr. 3d 200], internal

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citations omitted.)

- "[E]mployment law acknowledges that an isolated incident of harassing conduct may qualify as 'severe' when it consists of 'a *physical* assault or the threat thereof.' " (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1049 [95 Cal.Rptr.3d 636, 209 P.3d 963], original italics.)

- "In the present case, the jury was instructed as follows: 'In order to find in favor of Plaintiff on his claim of race harassment, you must find that Plaintiff has proved by a preponderance of the evidence that the racial conduct complained of was sufficiently severe or pervasive to alter the conditions of employment. In order to find that racial harassment is "sufficiently severe or pervasive," the acts of racial harassment cannot be occasional, isolated, sporadic, or trivial.' ... [W]e find no error in the jury instruction given here ... . [T]he law requires the plaintiff to meet a threshold standard of severity or pervasiveness. We hold that the statement within the instruction that severe or pervasive conduct requires more than 'occasional, isolated, sporadic, or trivial' acts was an accurate statement of that threshold standard." (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 465–467 [79 Cal.Rptr.2d 33].)

Secondary Sources

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

Chin, et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 10:160–10:249

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.17, 3.36–3.41

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

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

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

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

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2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

[*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 of [his/her current position/the position for which [he/she] applied] [with reasonable accommodation for [his/her] [***e.g., physical condition***]];**

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

   [or]

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

   [or]

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

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

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

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

[*Name of plaintiff***] does not need to prove that [***name of defendant***] held any ill will or animosity toward [him/her] 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, May 2019

Directions for Use

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

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

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

This instruction is for use by both an employee and a job applicant. Select the appropriate options in elements 2, 4, 5, and 6 depending on the plaintiff's status.

Modify elements 3 and 6 if 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

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for the jury. If constructive discharge is alleged, give the third option for element 5 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 6 if either the second or third option is included for element 5.

Element 6 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

Give the optional sentence in the last paragraph if there is evidence that the defendant harbored personal animus against the plaintiff because of 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.)

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- "The distinction between cases involving *direct evidence* of the employer's motive for the adverse employment action and cases where there is only *circumstantial evidence* of the employer's discriminatory motive is critical to the outcome of this appeal. There is a vast body of case law that addresses proving discriminatory intent in cases where there was no direct evidence that the adverse employment action taken by the employer was motivated by race, religion, national origin, age or sex. In such cases, proof of discriminatory motive is governed by the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* [(1973) 411 U.S. 792 [93 S. Ct. 1817, 36 L. Ed. 2d 668]. (*Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 123 [199 Cal.Rptr.3d 462], original italics, footnote and internal citations omitted.)

- "The three-stage framework and the many principles adopted to guide its application do not apply in discrimination cases where, like here, the plaintiff presents direct evidence of the employer's motivation for the adverse employment action. In many types of discrimination cases, courts state that direct evidence of intentional discrimination is rare, but disability discrimination cases often involve direct evidence of the role of the employee's actual or perceived *disability* in the employer's decision to implement an adverse employment action. Instead of litigating the employer's reasons for the action, the parties' disputes in disability cases focus on whether the employee was able to perform essential job functions, whether there were reasonable accommodations that would have allowed the employee to perform those functions, and whether a reasonable accommodation would have imposed an undue hardship on the employer. To summarize, courts and practitioners should not automatically apply principles related to the *McDonnell Douglas* test to disability discrimination cases. Rather, they should examine the critical threshold issue and determine whether there is direct evidence that the motive for the employer's conduct was related to the employee's physical or mental condition." (*Wallace, supra,* 245 Cal.App.4th at p. 123, original italics, footnote and internal citations omitted; cf. *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 234 fn. 3 [206 Cal.Rptr.3d 841] [case did not present so-called "typical" disability discrimination case, as described in *Wallace,* in that the parties disputed the employer's reasons for terminating plaintiff's employment].)

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

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

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- "[Defendant] argues that, because [it] hired plaintiffs as recruit officers, they must show they were able to perform the essential functions of a police recruit in order to be qualified individuals entitled to protection under FEHA. [Defendant] argues that plaintiffs cannot satisfy their burden of proof under FEHA because they failed to show that they could perform those essential functions. [¶] Plaintiffs do not directly respond to [defendant]'s argument. Instead, they contend that the relevant question is whether they could perform the essential functions of the positions to which they sought reassignment. Plaintiffs' argument improperly conflates the legal standards for their claim under section 12940, subdivision (a), for discrimination, and their claim under section 12940, subdivision (m), for failure to make reasonable accommodation, including reassignment. In connection with a discrimination claim under section 12940, subdivision (a), the court considers whether a plaintiff could perform the essential functions of the job held—or for job applicants, the job desired—with or without reasonable accommodation." (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 716–717 [214 Cal.Rptr.3d 113].)

- "Summary adjudication of the section 12940(a) claim … turns on … whether [plaintiff] could perform the essential functions of the relevant job with or without accommodation. [Plaintiff] does not dispute that she was unable to perform the essential functions of her *former* position as a clothes fitter with or without accommodation. Under federal law, however, when an employee seeks accommodation by being reassigned to a vacant position in the company, the employee satisfies the 'qualified individual with a disability' requirement by showing he or she can perform the essential functions of the *vacant position* with or without accommodation. The position must exist and be vacant, and the employer need not promote the disabled employee. We apply the same rule here. To prevail on summary adjudication of the section 12940(a) claim, [defendant] must show there is no triable issue of fact about [plaintiff]'s ability, with or without accommodation, to perform the essential functions of an available vacant position that would not be a promotion." (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 965 [83 Cal.Rptr.3d 190], original italics, internal citations omitted.)

- "To establish a prima facie case of mental disability discrimination under FEHA, a plaintiff must show the following elements: (1) She suffers from a mental disability; (2) she is otherwise qualified to do the job with or without reasonable accommodation; and (3) she was subjected to an adverse employment action because of the disability." (*Higgins-Williams v. Sutter Medical Foundation* (2015) 237 Cal.App.4th 78, 84 [187 Cal.Rptr.3d 745].)

- "At most, [plaintiff] alleges only that he anticipated becoming disabled for some time after the organ donation. This is insufficient. [Plaintiff] cannot pursue a cause of action for discrimination under FEHA on the basis of his 'actual' physical disability in the absence of factual allegations that he was in fact, physically disabled." (*Rope, supra,* 220 Cal.App.4th at p. 659.)

- "[Defendant] asserts the statute's 'regarded as' protection is limited to persons who are denied or who lose jobs based on an employer's reliance on the 'myths, fears or stereotypes' frequently associated with disabilities. … However, the statutory language does not expressly restrict FEHA's protections to the narrow class to whom [defendant] would limit its coverage. To impose such a restriction would exclude from protection a large group of individuals, like [plaintiff], with more mundane long-term medical conditions, the significance of which is exacerbated by an employer's failure to reasonably accommodate. Both the policy and language of the statute offer protection to a person who is not

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actually disabled, but is wrongly perceived to be. The statute's plain language leads to the conclusion that the 'regarded as' definition casts a broader net and protects *any* individual 'regarded' or 'treated' by an employer 'as having, or having had, any physical condition that makes achievement of a major life activity difficult' or may do so in the future. We agree most individuals who sue exclusively under this definitional prong likely are and will continue to be victims of an employer's 'mistaken' perception, based on an unfounded fear or stereotypical assumption. Nevertheless, FEHA's protection is nowhere expressly premised on such a factual showing, and we decline the invitation to import such a requirement." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 [43 Cal.Rptr.3d 874], original italics, internal citations omitted.)

- "[T]he purpose of the 'regarded-as' prong is to protect individuals rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities. In other words, to find a perceived disability, the perception must stem from a false idea about the existence of or the limiting effect of a disability." (*Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031, 1037 [101 Cal.Rptr.2d 353], internal citation omitted.)

- "We say on this record that [defendant] took action against [plaintiff] based on concerns or fear about his possible future disability. The relevant FEHA definition of an individual regarded as disabled applies only to those who suffer certain specified physical disabilities or those who have a condition with 'no present disabling effect' but which 'may become a physical disability … .' According to the pleadings, [defendant] fired [plaintiff] to avoid accommodating him because of his association with his physically disabled sister. That is not a basis for liability under the 'regarded as' disabled standard." (*Rope, supra,* 220 Cal.App.4th at p. 659, internal citations omitted.)

- " '[A]n employer "knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation. The employer need only know the underlying facts, not the legal significance of those facts." ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 592 [210 Cal.Rptr.3d 59].)

- " 'An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer. Thus, in order to prove [a discrimination] claim, a plaintiff must prove the employer had knowledge of the employee's disability when the adverse employment decision was made. … While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations … ." … ' " (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008 [93 Cal.Rptr.3d 338].)

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

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

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

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

- Based on *Harris,* we conclude that an employer has treated an employee differently 'because of' a disability when the disability is a substantial motivating reason for the employer's decision to subject the [employee] to an adverse employment action. This conclusion resolves how the jury should have been instructed on [defendant]'s motivation or intent in connection with the disability discrimination claim." (*Wallace, supra,* 245 Cal.App.4th at p. 128.)

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

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

- " '[W]eight may qualify as a protected "handicap" or "disability" within the meaning of the FEHA if medical evidence demonstrates that it results from a physiological condition affecting one or more of

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the basic bodily systems and limits a major life activity.'… '[A]n individual who asserts a violation of the FEHA on the basis of his or her weight must adduce evidence of a physiological, systemic basis for the condition.' " (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 928 [227 Cal.Rptr.3d 286].)

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

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1045–1049

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA),* ¶¶ 9:2160–9:2241 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.78–2.80

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.32[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.14, 115.23, 115.34, 115.77[3][a] (Matthew Bender)

California Civil Practice: Employment Litigation § 2:46 (Thomson Reuters)

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2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements (Gov. Code, § 12940(m))

[*Name of plaintiff***] claims that [***name of defendant***] failed to reasonably accommodate [his/her] [***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 plaintiff***] had/[***name of defendant***] treated [***name of plaintiff***] as if [he/she] had] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];**

4. **[That [***name of defendant***] knew of [***name of plaintiff***]'s [***e.g., physical condition***] [that limited [***insert major life activity***]];]**

5. **That [***name of plaintiff***] was able to perform the essential ~~job~~ duties of [[his/her] current position or a vacant alternative position to which [he/she] could have been reassigned/the position for which [he/she] applied] with reasonable accommodation for [his/her] [***e.g., physical condition***];**

6. **That [***name of defendant***] failed to provide reasonable accommodation for [***name of plaintiff***]'s [***e.g., physical condition***];**

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

8. **That [***name of defendant***]'s failure to provide reasonable accommodation was a substantial factor in causing [***name of plaintiff***]'s harm.**

[In determining whether [*name of plaintiff***]'s [***e.g., physical condition***] limits [***insert major life activity***], you must consider the [***e.g., physical condition***] [in its unmedicated state/without assistive devices/[***describe mitigating measures***]].]**

New September 2003; Revised April 2007, December 2007, April 2009, December 2009, June 2010, December 2011, June 2012, June 2013, May 2019

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."

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

This instruction is for use by both an employee and a job applicant. Select the appropriate options in elements 2 and 5 depending on the plaintiff's status.

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit "that limited [*insert major life activity*]" in elements 3 and 4 and do not include the last paragraph. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

In a case of perceived disability, include "[*name of defendant*] treated [*name of plaintiff*] as if [he/she] had" in element 3, and delete optional element 4. (See Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) In a case of actual disability, include "**[***name of plaintiff*] had" in element 3, and give element 4.

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).)

The California Supreme Court has held that under Government Code section 12940(a), the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job with or without reasonable accommodation. (See *Green v. State of California* (2007) 42 Cal.4th 254, 260 [64 Cal.Rptr.3d 390, 165 P.3d 118].) While the court left open the question of whether the same rule should apply to cases under Government Code section 12940(m) (see *id.* at p. 265), appellate courts have subsequently placed the burden on the employee to prove that he or she would be able to perform the job duties with reasonable accommodation (see element 5). (See *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 766 [123 Cal.Rptr.3d 562]; *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 973–979 [83 Cal.Rptr.3d 190].)

There may still be an unresolved issue if the employee claims that the employer failed to provide him or her with other suitable job positions that he or she might be able to perform with reasonable accommodation. The rule has been that the employer has an affirmative duty to make known to the employee other suitable job opportunities and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951 [62 Cal.Rptr.2d 142]; see also *Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 745 [151 Cal.Rptr.3d 292]; *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837]; *Hanson v. Lucky Stores* (1999) 74 Cal.App.4th 215, 226 [87 Cal.Rptr.2d 487].) In contrast, other courts have said that it is the employee's burden to prove that a reasonable accommodation could have been made, i.e., that he or she was qualified for a position in light of the potential accommodation. (See *Nadaf-Rahrov, supra,* 166 Cal.App.4th at p. 978; see also *Cuiellette, supra,* 194 Cal.App.4th at p. 767 [plaintiff proves he or she is a qualified individual by establishing that

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he or she can perform the essential functions of the position to which reassignment is sought].) The question of whether the employee has to present evidence of other suitable job descriptions and prove that a vacancy existed for a position that the employee could do with reasonable accommodation may not be fully resolved.

No element has been included that requires the plaintiff to specifically request reasonable accommodation. Unlike Government Code section 12940(n) on the interactive process (see CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*), section 12940(m) does not specifically require that the employee request reasonable accommodation; it requires only that the employer know of the disability. (See *Prilliman, supra,* 53 Cal.App.4th at pp. 950–951.)

Sources and Authority

- Reasonable Accommodation Required. Government Code section 12940(m).
- "Reasonable Accommodation" Explained. Government Code section 12926(p).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "There are three elements to a failure to accommodate action: '(1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff's disability. [Citation.]' " (*Hernandez v. Rancho Santiago Cmty. College Dist.* (2018) 22 Cal.App.5th 1187, 1193-1194 [232 Cal.Rptr.3d 349].)
- "Under the FEHA, 'reasonable accommodation' means 'a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.' " (*Cuiellette, supra,* 194 Cal.App.4th at p. 766.)
- "Reasonable accommodations include '[j]ob restructuring, part-time or modified work schedules, *reassignment to a vacant position,* … and other similar accommodations for individuals with disabilities.' " (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 968 [181 Cal.Rptr.3d 553], original italics.)
- "The examples of reasonable accommodations in the relevant statutes and regulations include reallocating nonessential functions or modifying how or when an employee performs an essential function, but not eliminating essential functions altogether. FEHA does not obligate the employer to accommodate the employee by excusing him or her from the performance of essential functions." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 375 [184 Cal.Rptr.3d 9].)

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- "A term of leave from work can be a reasonable accommodation under FEHA, and, therefore, a request for leave can be considered to be a request for accommodation under FEHA." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 243 [206 Cal.Rptr.3d 841], internal citation omitted.)

- "Failure to accommodate claims are not subject to the *McDonnell Douglas* burden-shifting framework." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 926 [227 Cal.Rptr.3d 286].)

- "The question now arises whether it is the employees' burden to prove that a reasonable accommodation could have been made, i.e., that they were qualified for a position in light of the potential accommodation, or the employers' burden to prove that no reasonable accommodation was available, i.e., that the employees were not qualified for any position because no reasonable accommodation was available. [¶¶] Applying *Green's* burden of proof analysis to section 12940(m), we conclude that the burden of proving ability to perform the essential functions of a job with accommodation should be placed on the plaintiff under this statute as well. First, … an employee's ability to perform the essential functions of a job is a prerequisite to liability under section 12940(m). Second, the Legislature modeled section 12940(m) on the federal reasonable accommodation requirement (adopting almost verbatim the federal statutory definition of 'reasonable accommodation' by way of example). Had the Legislature intended the employer to bear the burden of proving ability to perform the essential functions of the job, contrary to the federal allocation of the burden of proof, … it could have expressly provided for that result, but it did not. Finally, general evidentiary principles support allocating the burden of proof on this issue to the plaintiff." (*Nadaf-Rahrov, supra,* 166 Cal.App.4th at pp. 977–978, internal citations omitted.)

- " 'If the employee cannot be accommodated in his or her existing position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available. [Citation.] A reassignment, however, is not required if "there is no vacant position for which the employee is qualified." [Citations.] "The responsibility to reassign a disabled employee who cannot otherwise be accommodated does 'not require creating a new job, moving another employee, promoting the disabled employee or violating another employee's rights … .' " [Citations.] "What is required is the 'duty to reassign a disabled employee if an already funded, vacant position at the same level exists.' [Citations.]" [Citations.]' " (*Furtado, supra,* 212 Cal.App.4th at p. 745.)

- "[A]n employee's probationary status does not, in and of itself, deprive an employee of the protections of FEHA, including a reasonable reassignment. The statute does not distinguish between the types of reasonable accommodations an employer may have to provide to employees on probation or in training and those an employer may have to provide to other employees. We decline to read into FEHA a limitation on an employee's eligibility for reassignment based on an employee's training or probationary status. Instead, the trier of fact should consider whether an employee is on probation or in training in determining whether a particular reassignment is comparable in pay and status to the employee's original position." (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 724 [214 Cal.Rptr.3d 113], internal citations omitted.)

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- "[A] disabled employee seeking reassignment to a vacant position 'is entitled to preferential consideration.' " (*Swanson, supra,* 232 Cal.App.4th at p. 970.)

- " 'Generally, " '[t]he employee bears the burden of giving the employer notice of the disability.' " ' An employer, in other words, has no affirmative duty to investigate whether an employee's illness might qualify as a disability. ' " '[T]he employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it. Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no knowledge.' " ' " (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1167 [217 Cal.Rptr.3d 258], internal citations omitted.)

- " '[A]n employer "knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation." ' … [¶] '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 under the [FEHA]." ' " (*Featherstone, supra,* 10 Cal.App.5th at p. 1167, internal citations omitted.)

- "In other words, so long as the employer is aware of the employee's condition, there is no requirement that the employer be aware that the condition is considered a disability under the FEHA. By the same token, it is insufficient to tell the employer merely that one is disabled or requires an accommodation." (*Cornell, supra,* 18 Cal.App.5th at p. 938, internal citation omitted.)

- " ' " 'This notice then triggers the employer's burden to take "positive steps" to accommodate the employee's limitations. … [¶] … The employee, of course, retains a duty to cooperate with the employer's efforts by explaining [his or her] disability and qualifications. [Citation.] Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the [employee's] capabilities and available positions.' " ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 598 [210 Cal.Rptr.3d 59].)

- "Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an 'undue hardship.' " (*Prilliman*, *supra,* 53 Cal.App.4th at p. 947.)

- " 'Ordinarily the reasonableness of an accommodation is an issue for the jury.' " (*Prilliman*, *supra*, 53 Cal.App.4th at p. 954, internal citation omitted.)

- "[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA." (*Bagatti, supra,* 97 Cal.App.4th at p. 362.)

- "[A]n employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an 'undue hardship' on its operations … ." (*Atkins, supra,* 8 Cal.App.5th at p. 721.)

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- "The question whether plaintiffs could perform the essential functions of a position to which they sought reassignment is relevant to a claim for failure to accommodate under section 12940, subdivision (m) … ." (*Atkins, supra,* 8 Cal.App.5th at p. 717.)

- "On these issues, which are novel to California and on which the federal courts are divided, we conclude that employers must reasonably accommodate individuals falling within any of FEHA's statutorily defined 'disabilities,' including those 'regarded as' disabled, and must engage in an informal, interactive process to determine any effective accommodations." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 55 [43 Cal.Rptr.3d 874].)

- "While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Moore, supra,* 248 Cal.App.4th at p. 242.)

- "[A] pretextual termination of a perceived-as-disabled employee's employment in lieu of providing reasonable accommodation or engaging in the interactive process does not provide an employer a reprieve from claims for failure to accommodate and failure to engage in the interactive process." (*Moore, supra,* 248 Cal.App.4th at p. 244.)

- "Appellant also stated a viable claim under section 12940, subdivision (m), which mandates that an employer provide reasonable accommodations for the known physical disability of an employee. She alleged that she was unable to work during her pregnancy, that she was denied reasonable accommodations for her pregnancy-related disability and terminated, and that the requested accommodations would not have imposed an undue hardship on [defendant]. A finite leave of greater than four months may be a reasonable accommodation for a known disability under the FEHA." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1341 [153 Cal.Rptr.3d 367].)

- "To the extent [plaintiff] claims the [defendant] had a duty to await a vacant position to arise, he is incorrect. A finite leave of absence may be a reasonable accommodation to allow an employee time to recover, but FEHA does not require the employer to provide an indefinite leave of absence to await possible future vacancies." (*Nealy, supra,* 234 Cal.App.4th at pp. 377−378.)

- "While 'a finite leave can be a reasonable accommodation under FEHA, provided it is likely that at the end of the leave, the employee would be able to perform … her duties', a finite leave is not a reasonable accommodation when the leave leads directly to termination of employment because the employee's performance could not be evaluated while she was on the leave." (*Hernandez, supra,* 22 Cal.App.5th at p. 1194.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 833

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2250–9:2285, 9:2345–9:2347 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

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2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.32[2][c], 41.51[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35, 115.92 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:50 (Thomson Reuters)

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2544. Disability Discrimination—Affirmative Defense—Health or Safety Risk

[*Name of defendant*] claims that [his/her/its] conduct was lawful because, even with reasonable accommodations, [*name of plaintiff*] was unable to perform an essential job duty without endangering [[his/her] health or safety] [or] [the health or safety of others]. To succeed, [*name of defendant*] must prove both of the following:

1. **That [*describe job duty*] was an essential job duty; and**

2. **That even with reasonable accommodations, [*name of plaintiff*] could not [*describe job duty*] without endangering [[his/her] health or safety] [or] [the health or safety of others] more than if an individual without a disability performed the job duty.**

[In determining whether [*name of plaintiff*]'s performance of the job duty would endanger [his/her] health or safety, you must decide whether the performance of the job duty presents an immediate and substantial degree of risk to [him/her].]

~~**In deciding whether a job duty is essential, you may consider, among other factors, the following:**~~

~~**a. Whether the reason the job exists is to perform that duty;**~~

~~**b. The number of employees available who can perform that duty; and**~~

~~**c. Whether the job duty is highly specialized.**~~

New September 2003; Revised May 2019

Directions for Use

Give CACI No. 2543, *Disability Discrimination—"Essential Job Duties" Explained*, to instruct on when a job duty is essential.

Sources and Authority

- Risk to Health or Safety. Government Code section 12940(a)(1).
- Risk to Health or Safety. Cal. Code Regs., tit. 2, § 11067(c)-(e).
- "FEHA's 'danger to self' defense has a narrow scope; an employer must offer more than mere conclusions or speculation in order to prevail on the defense ... . As one court said, '[t]he defense requires that the employee face an "imminent and substantial degree of risk" in performing the essential functions of the job.' An employer may not terminate an employee for harm that is merely potential ... . In addition, in cases in which the employer is able to establish the 'danger to self' defense, it must also show that there are 'no "available reasonable means of accommodation which

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could, without undue hardship to [the employer], have allowed [the plaintiff] to perform the essential job functions ... without danger to himself." ' " (*Wittkopf v. County of Los Angeles* (2001) 90 Cal.App.4th 1205, 1218-1219 [109 Cal.Rptr.2d 543], internal citations omitted.)

- "An employer may refuse to hire persons whose physical handicap prevents them from performing their duties in a manner which does not endanger their health. Unlike the BFOQ defense, this exception must be tailored to the individual characteristics of each applicant ... in relation to specific, legitimate job requirements ... . [Defendant's] evidence, at best, shows a possibility [plaintiff] might endanger his health sometime in the future. In the light of the strong policy for providing equal employment opportunity, such conjecture will not justify a refusal to employ a handicapped person." (*Sterling Transit Co. v. Fair Employment Practice Com.* (1981) 121 Cal.App.3d 791, 798, 799 [175 Cal.Rptr. 548], internal citations and footnote omitted.)

- "FEHA does not expressly address whether the act protects an employee whose disability causes him or her to make threats against coworkers. FEHA, however, does authorize an employer to terminate or refuse to hire an employee who poses an actual threat of harm to others due to a disability … ." (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 169 [125 Cal.Rptr.3d 1] [idle threats against coworkers do not disqualify employee from job, but rather may provide legitimate, nondiscriminatory reason for discharging employee].)

- "The employer has the burden of proving the defense of the threat to the health and safety of other workers by a preponderance of the evidence." (*Raytheon Co. v. Fair Employment & Housing Com.* (1989) 212 Cal.App.3d 1242, 1252 [261 Cal.Rptr. 197].)

Secondary Sources

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

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2298, 9:2402–9:2403, 9:2405, 9:2420 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.111

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.97[1] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.54, 115.104 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:86 (Thomson Reuters)

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

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

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

1. **That ~~The date on which~~ [***name of plaintiff***]'s employment with [***name of defendant***] ended;**

2. **~~[~~That [***name of defendant***] failed to pay [***name of plaintiff***] all wages when due ~~by [***insert date***]~~; and~~]~~**

3. **That [***name of defendant***] willfully failed to pay these wages.**

The term "willfully" means only that the employer intentionally failed or refused to pay the wages. It does not imply a need for any additional bad motive.

~~*[or]*~~

~~**[The date on which [***name of defendant***] paid [***name of plaintiff***] all wages due;]**~~

[*Name of plaintiff***] must also prove the following:**

1. **The date on which [***name of plaintiff***]'s wages were due;**

2. **[***Name of plaintiff***]'s daily wage rate at the time [his/her] employment with [***name of defendant***] ended[; and/.]**

[3. The date on which [*name of defendant***] finally paid [***name of plaintiff***] all wages due.]**

~~**4. That [***name of defendant***] willfully failed to pay these wages.**~~

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

~~**The term "willfully" means that the employer intentionally failed or refused to pay the wages.**~~

New September 2003; Revised June 2005, May 2019

Directions for Use

The first part of this instruction sets forth the elements required to obtain a waiting time penalty under Labor Code section 203. The second part ~~This instruction~~ is intended to instruct the jury on the factsual

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~~determinations~~ required to assist the court in calculating the amount of waiting time penalties ~~under Labor Code section 203~~. Some or all of these facts may be stipulated, in which case they may be omitted from the instruction. Give the third optional fact if the employer eventually paid all wages due, but after their due date.

The court must determine when final wages are due based on the circumstances of the case and applicable law. (See Lab. ~~or~~ Code, ~~§§ sections~~ 201, ~~and~~ 202.) Final wages are generally due on the day an employee is discharged by the employer (Lab. Code, § 201(a)), but are not due for 72 hours if an employee quits without notice. (Lab. Code, § 202(a).) ~~see Lab. Code, §§ 201, 201.5, 201.7, 202, 205.5).~~

If there is a factual dispute, for example, whether plaintiff gave advance notice of his or her intention to quit, or whether payment of final wages by mail was authorized by plaintiff, the court may be required to give further instruction to the jury. ~~Final wages generally are due on the day an employee is discharged by the employer, but are not due for 72 hours if an employee quits without notice (see Lab. Code, §§ 201, 201.5, 201.7, 202, 205.5).~~

The definition of "wages" may be deleted ~~as redundant if it is redundant with~~ if it is included in other instructions.

Sources and Authority

- Wages of Discharged Employee Due Immediately. Labor Code section 201.
- Wages of ~~Contract~~ Employee on Quitting. Labor Code section 202.
- Willful Failure to Pay Wages of Discharged Employee. Labor Code section 203.
- Right of Action for Unpaid Wages. Labor Code section 218.
- ~~Wages of Contract Employee on Quitting. Labor Code section 202.~~
- "Wages" Defined. Labor Code section 200.
- Payment for Accrued Vacation of Terminated Employee. Labor Code section 227.3.
- Wages Partially in Dispute. Labor Code section 206(a).
- Exemption for Certain Governmental Employers. Labor Code section 220(b).
- "Labor Code section 203 empowers a court to award 'an employee who is discharged or who quits' a penalty equal to up to 30 days' worth of the employee's wages '[i]f an employer *willfully* fails to pay' the employee his full wages immediately (if discharged) or within 72 hours (if he or she quits). It is called a waiting time penalty because it is awarded for effectively making the employee wait for his or her final paycheck. A waiting time penalty may be awarded when the final paycheck is for less than the applicable wage—whether it be the minimum wage, a prevailing wage, or a living wage." (*Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 867 [233 Cal.Rptr.3d 524], original

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italics, internal citations omitted.)

- " '[T]he public policy in favor of full and prompt payment of an employee's earned wages is fundamental and well established …' and the failure to timely pay wages injures not only the employee, but the public at large as well. We have also recognized that sections 201, 202, and 203 play an important role in vindicating this public policy. To that end, the Legislature adopted the penalty provision as a disincentive for employers to pay final wages late. It goes without saying that a longer statute of limitations for section 203 penalties provides additional incentive to encourage employers to pay final wages in a prompt manner, thus furthering the public policy." (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1400 [117 Cal.Rptr.3d 377, 241 P.3d 870], internal citations omitted.)

- " 'The plain purpose of [Labor Code] sections 201 and 203 is to compel the immediate payment of earned wages upon a discharge.' The prompt payment of an employee's earned wages is a fundamental public policy of this state." (*Kao v. Holiday* (2017) 12 Cal.App.5th 947, 962 [219 Cal.Rptr.3d 580], internal citation omitted.)

- "The statutory policy favoring prompt payment of wages applies to employees who retire, as well as those who quit for other reasons." (*McLean v. State* (2016) 1 Cal.5th 615, 626 [206 Cal.Rptr.3d 545, 377 P.3d 796].)

- "[A]n employer may not delay payment for several days until the next regular pay period. Unpaid wages are due *immediately* upon discharge. This requirement is strictly applied and may not be 'undercut' by company payroll practices or 'any industry habit or custom to the contrary.' " (*Kao, supra,* 12 Cal.App.5th at p. 962, original italics, internal citation omitted.)

- " ' "[T]o be at fault within the meaning of [section 203], the employer's refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due. As used in section 203, 'willful' merely means that the employer intentionally failed or refused to perform an act which was required to be done." …' " (*Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 54 [155 Cal.Rptr.3d 18].)

- "In civil cases the word 'willful' as ordinarily used in courts of law, does not necessarily imply anything blameable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done, was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent." (*Nishiki v. Danko Meredith, P.C.* (2018) 25 Cal.App.5th 883, 891 [236 Cal.Rptr.3d 626].)

- "[A]n employer's reasonable, good faith belief that wages are not owed may negate a finding of willfulness." (*Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1468 [155 Cal.Rptr.3d 915].)

- "A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recover[y] on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist." (*Kao, supra,* 12 Cal.App.5th at p. 963.)

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- "A 'good faith dispute' excludes defenses that 'are unsupported by any evidence, are unreasonable, *or* are presented in bad faith.' Any of the three precludes a defense from being a good faith dispute. Thus, [defendant]'s good faith does not cure the objective unreasonableness of its challenge or the lack of evidence to support it." (*Diaz, supra,* 23 Cal.App.5th at pp. 873–874, original italics, internal citations omitted.)

- "A proper reading of section 203 mandates a penalty equivalent to the employee's daily wages for each day he or she remained unpaid up to a total of 30 days. … [¶] [T]he critical computation required by section 203 is the calculation of a daily wage rate, which can then be multiplied by the number of days of nonpayment, up to 30 days." (*Mamika v. Barca* (1998) 68 Cal.App.4th 487, 493 [80 Cal.Rptr.2d 175].)

- " 'A tender of the wages due at the time of the discharge, if properly made and in the proper amount, terminates the further accumulation of penalty, but it does not preclude the employee from recovering the penalty already accrued.' " (*Oppenheimer v. Sunkist Growers, Inc.* (1957) 153 Cal.App.2d Supp. 897, 899 [315 P.2d 116], citation omitted.)

- "[Plaintiff] fails to distinguish between a request for statutory penalties provided by the Labor Code for employer wage-and-hour violations, which were recoverable directly by employees well before the Act became part of the Labor Code, and a demand for 'civil penalties,' previously enforceable only by the state's labor law enforcement agencies. An example of the former is section 203, which obligates an employer that willfully fails to pay wages due an employee who is discharged or quits to pay the employee, in addition to the unpaid wages, a penalty equal to the employee's daily wages for each day, not exceeding 30 days, that the wages are unpaid." (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 377-378 [36 Cal.Rptr.3d 31].)

- "In light of the unambiguous statutory language, as well as the practical difficulties that would arise under defendant's interpretation, we conclude there is but one reasonable construction: section 203(b) contains a single, three-year limitations period governing all actions for section 203 penalties irrespective of whether an employee's claim for penalties is accompanied by a claim for unpaid final wages." (*Pineda, supra,* 50 Cal.4th at p. 1398.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 437–439

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

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

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

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

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-B, *Remedies—Contract Damages*, ¶ 17:148 (The Rutter Group)

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

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

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

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3725. Going-and-Coming Rule—Vehicle-Use Exception

In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer's business, then the drive to and from work is within the scope of employment. The employer's requirement may be either express or implied.

The drive to and from work may also be within the scope of employment if the use of the employee's vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle's use and expects the employee to make it available regularly. The employee's agreement may be either express or implied.

New September 2003; Revised June 2014, May 2017

Directions for Use

This instruction sets forth the vehicle use exception to the going-and-coming rule, sometimes called the required-vehicle exception. (See (*Jorge v. Culinary Institute of America* (2016) 3 Cal.App.5th 382, 398, fn. 6 [207 Cal.Rptr.3d 586]; see also *Pierson v. Helmerich & Payne International Drilling Co.* (2016) 4 Cal.App.5th 608, 624–630 [209 Cal.Rptr.3d 222 [vehicle-use exception encompasses two categories; required-vehicle and incidental-use, both of which are expressed within CACI No. 3725].) It may be given with CACI No. 3720, *Scope of Employment*.

Under the going-and-coming rule, commute time is not within the scope of employment. However, commute time is within the scope of employment if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has reasonably come to rely on its use and to expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment. (See *Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301 [105 Cal.Rptr.3d 718].) Whether there is such a requirement or agreement can be a question of fact for the jury. (See *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 723 [159 Cal. Rptr. 835, 602 P.2d 755].)

Under this exception, the commute itself is considered the employer's business. However, scope of employment may end if the employee substantially deviates from the commute route for personal reasons. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 899, 907–908 [162 Cal.Rptr.3d 280].) If substantial deviation is alleged, give CACI No. 3723, *Substantial Deviation*.

One court has stated that the employee must have been using the vehicle to do the employer's business or provide a benefit for the employer *at the time of the accident*. (*Newland v. County of L.A.* (2018) 24 Cal.App.5th 676, 693 [234 Cal.App.3d 374], emphasis added.) However, many cases have applied the vehicle use exception without imposing this time -of-the-accident requirement. (See, e.g., *Moradi, supra,* 219 Cal.App.4th at p. 892 (employee was just going home at the time of the accident); *Lobo, supra,* 182

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Cal.App.4th at p. 302 (same); *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal.App.3d 803, 806-807 [99 Cal.Rptr. 666] (same); see also *Smith v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 814, 815 [73 Cal.Rptr. 253, 447 P.2d 365] (workers compensation case: accident happened on the way to work).) *Newland* could be read as requiring the employee to need the vehicle for the employer's business on the *day* of the accident, even if he or she was not engaged in the employer's business at the *time* of the accident. (See *Newland supra,* 24 Cal.App.5th at p. 696 ["no evidence that [employee] required a vehicle for work on the day of the accident, and no evidence that the [employer] received any direct or incidental benefit from [employee] driving to and from work that day"].)

Sources and Authority

- " 'An offshoot of the doctrine of respondeat superior is the so-called "going and coming rule." Under this rule, an employee is not regarded as acting within the scope of employment while going to or coming from the workplace. … This is based on the concept that the employment relationship is suspended from the time the employee leaves work until he or she returns, since the employee is not ordinarily rendering services to the employer while traveling. …' " (*Jeewarat v. Warner Brothers Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435 [98 Cal.Rptr.3d 837].)

- "The 'required-vehicle' exception to the going and coming rule and its variants have been given many labels. In *Halliburton, supra,* 220 Cal.App.4th 87, we used the phrase 'incidental benefit exception' as the equivalent of the required-vehicle exception. In *Felix v. Asai* (1987) 192 Cal.App.3d 926 [237 Cal. Rptr. 718] (*Felix*), we used the phrase 'vehicle-use exception.' The phrase 'required-use doctrine' also has been used. The 'vehicle-use' variant appears in the title to California Civil Jury Instruction (CACI) No. 3725, 'Going-and-Coming Rule—Vehicle-Use Exception.' The various labels and the wide range of circumstances they cover have the potential to create uncertainty about the factual elements of the exception—a topic of particular importance when reviewing a motion for summary judgment for triable issues of *material* fact. [¶] To structure our analysis of this exception, and assist the clear statement of the factual elements of its variants, we adopt the phrase 'vehicle-use exception' from *Felix* and CACI No. 3725 to describe the exception in its broadest form. Next, under the umbrella of the vehicle-use exception, we recognize two identifiable categories with different factual elements. We label those two categories as the 'required-vehicle exception' and 'incidental benefit exception' because those labels emphasize the factual difference between the two categories." (*Pierson, supra,* 4 Cal.App.5th at pp. 624–625, original italics, internal citations omitted.)

- "Our division of the vehicle-use exception for purposes of this summary judgment motion should not be read as implying that this division is required, or even helpful, when presenting the scope of employment issue to a jury. The broad formulation of the vehicle-use exception in CACI No. 3725 correctly informs the jury that the issue of ultimate fact—namely, the scope of employment—may be proven in different ways." (*Pierson, supra,* 4 Cal.App.5th at p. 625, fn. 4.)

- "The portion of CACI No. 3725 addressing an employer requirement states: '[I]f an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer's business, then the drive to and from work is within the scope of employment. The employer's requirement may be either express or implied.' " (*Pierson, supra,* 4 Cal.App.5th at p. 625.)

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"Our formulation of the incidental benefit exception is based on the part of CACI No. 3725 that states: 'The drive to and from work may … be within the scope of employment if the use of the employee's vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle's use and expects the employee to make it available regularly.' The 'agreement may be either express or implied.' The existence of an express or implied agreement can be a question of fact for the jury." (*Pierson, supra,* 4 Cal.App.5th at p. 629.)

- " '[W]hen a business enterprise requires an employee to drive to and from its office in order to have his vehicle available for company business during the day, accidents on the way to or from the office are statistically certain to occur eventually, and, the business enterprise having required the driving to and from work, the risk of such accidents are risks incident to the business enterprise.' [¶] These holdings are the bases for the CACI instruction, the first paragraph of which tells the jury that the drive to and from work is within the scope of employment if the "employer requires [the] employee to drive to and from the workplace so that the vehicle is available for the employer's business," and the second paragraph, that the drive may be if 'the use of the employee's vehicle provides some direct or incidental benefit to the employer' and 'there may be a benefit to the employer if, one, the employee has [agreed] to make the vehicle available as an accommodation to the employer, and two, the employer has reasonably come to rely on the vehicle's use and expect the employee to make it available regularly.' (CACI No. 3725.)" (*Jorge, supra,* 3 Cal.App.5th at pp. 401–402, internal citation omitted.)

- " 'A well-known exception to the going-and-coming rule arises *where the use of the car gives some incidental benefit to the employer*. Thus, the key inquiry is whether there is an incidental benefit derived by the employer. [Citation.]' … The exception can apply if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has 'reasonably come to rely upon its use and [to] expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment.' " (*Lobo, supra,* 182 Cal.App.4th at p. 297, original italics, internal citations omitted.)

- " 'To be sure, ordinary commuting is beyond the scope of employment … . Driving a required vehicle, however, is a horse of another color because it satisfies the control and benefit elements of respondeat superior. An employee who is required to use his or her own vehicle provides an "essential instrumentality" for the performance of the employer's work. … When a vehicle must be provided by an employee, the employer benefits by not having to have available an office car and yet possessing a means by which off-site visits can be performed by its employees.' " (*Moradi, supra,* 219 Cal.App.4th at p. 899.)

- "When an employer requires an employee to use a personal vehicle, it exercises meaningful control over the method of the commute by compelling the employee to foreswear the use of carpooling, walking, public transportation, or just being dropped off at work." (*Moradi, supra,* 219 Cal.App.4th at p. 899.)

- "The cases invoking the required-vehicle exception all involve employees whose jobs entail the

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regular use of a vehicle to accomplish the job in contrast to employees who use a vehicle to commute to a definite place of business." (*Tryer v. Ojai Valley School Dist.* (1992) 9 Cal.App.4th 1476, 1481 [12 Cal.Rptr.2d 114].)

- "[N]ot all benefits to the employer are of the type that satisfy the incidental benefits exception. The requisite benefit must be one that is 'not common to commute trips by ordinary members of the work force.' Thus, employers benefit when employees arrive at work on time, but this benefit is insufficient to satisfy the incidental benefits exception. An example of a sufficient benefit is where an employer enlarges the available labor market by providing travel expenses and paying for travel time." (*Pierson, supra,* 4 Cal.App.5th at p. 630.)

- "Where the incidental benefit exception applies, the employee's commute directly between work and home is considered to be within the scope of employment for respondeat superior purposes. Minor deviations from a direct commute are also included, but there is no respondeat superior liability if the employee substantially departs from the employer's business or is engaged in a purely personal activity at the time of the tortious injury." (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 97 [162 Cal.Rptr.3d 752].)

- "Here, the required vehicle exception to the going and coming rule, not the special errand exception, governs our analysis. Accordingly, we have not applied the six factors used in special errand cases to determine whether [employee] was acting within the scope of her employment at the time of the accident. [¶] Rather, we have applied the relevant principles under the required vehicle exception. Those principles differ from the six factors used to determine whether the special errand exception applies. In the present case, [employer] required [employee] to use her personal vehicle to travel to and from the office and other destinations. She also had to use her personal vehicle before, during, and after regular work hours to develop new business. We have properly examined whether [employee]'s use of her personal vehicle conferred an incidental benefit on [employer]—it did; whether her planned stops at the frozen yogurt shop and the yoga studio were an unforeseeable, substantial departure from her commute—they were not; whether they were a foreseeable, minor deviation from her regular commute—they were; whether they were not so unusual or startling that it would be unfair to include the resulting loss among the other costs of the employer's business—they were not; and whether they were necessary for [employee]'s comfort, convenience, health, and welfare—they were." (*Moradi, supra,* 219 Cal.App.4th at pp. 907−908.)

- "One exception to the going and coming rule has been recognized when the commute involves ' "an incidental benefit to the employer, not common to commute trips by ordinary members of the work force." [Citation.]' When the employer incidentally benefits from the employee's commute, that commute may become part of the employee's workday for the purposes of respondeat superior liability. [¶] The incidental benefit exception has been applied when the employer furnishes, or requires the employee to furnish, a vehicle for transportation on the job, and the negligence occurs while the employee is traveling to or from work in that vehicle." (*Halliburton Energy Services, Inc., supra,* 220 Cal.App.4th at p. 96, internal citation omitted.)

- "Public policy would be ill-served by a rule establishing 24-hour employer liability for on-call employees, regardless of the nature of the employee's activities at the time of an accident." (*Le Elder v. Rice* (1994) 21 Cal.App.4th 1604, 1610 [26 Cal.Rptr.2d 749].)

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- "[T]he trier of fact remains free to determine in a particular case that the employee's use of his or her vehicle was too infrequent to confer a sufficient benefit to the employer so as to make it reasonable to require the employer to bear the cost of the employee's negligence in operating the vehicle. This is particularly true in the absence of an express requirement that the employee make his or her vehicle available for the employer's benefit or evidence that the employer actually relied on the availability of the employee's car to further the employer's purposes." (*Lobo v. Tamco* (2014) 230 Cal.App.4th 438, 447 [178 Cal.Rptr.3d 515].)

- "Whether the transit is part of the employment relationship tends to be a more subtle issue than whether the transit was between home and work. … 'These are the extraordinary transits that vary from the norm because the employer requires a special, different transit, means of transit, or use of a car, for some particular reason of his own. When the employer gains that kind of a particular advantage, the job does more than call for routine transport to it; it plays a different role, bestowing a special benefit upon the employer by reason of the extraordinary circumstances. The employer's special request, his imposition of an unusual condition, removes the transit from the employee's choice or convenience and places it within the ambit of the employer's choice or convenience, restoring the employer-employee relationship.' " (*Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1038-1039 [219 Cal.Rptr.3d 630].)

- "Liability may be imposed on an employer for an employee's tortious conduct while driving to or from work, if at the time of the accident, the employee's use of a personal vehicle was required by the employer or otherwise provided a benefit to the employer." (*Newland, supra,* 24 Cal.App.5th at p. 679.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 195

Haning, et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, Part II *Theories Of Recovery—Vicarious Liability,* ¶ 2:803 (The Rutter Group)

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.42[3][d] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior,* § 100A.26 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 3:10 (Thomson Reuters)

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3903Q. Survival Damages (Economic Damage) (Code Civ. Proc, § 377.34)

If you decide that [*name of plaintiff***] has proved [his/her] claim against [***name of defendant***] for the death of [***name of decedent***], you must also decide the amount of damages that [***name of decedent***] sustained before death and that [he/she] would have been entitled to recover because of [***name of defendant***]'s conduct[, including any [penalties/ [or] punitive damages] as explained in the other instructions that I will give you].**

[*Name of plaintiff***] may recover the following damages:**

[1. The reasonable cost of reasonably necessary medical care that [*name of decedent***] received;]**

[2. The amount of [income/earnings/salary/wages] that [he/she] lost before death;]

[3. The reasonable cost of health care services that [*name of decedent***] would have provided to [***name of family member***] before [***name of decedent***]'s death;]**

[3. [*Specify other recoverable economic damage.***]]**

You may not award damages for any loss for [*name of decedent***]'s shortened life span attributable to [his/her] death.**

New May 2019

Directions for Use

Give this instruction if a deceased person's estate claims survival damages for harm that the decedent incurred in his or her lifetime. Survival damages can include punitive damages and penalties. (See Code Civ. Proc., § 377.34.) Include the bracketed language in the last sentence of the opening paragraph if either or both are sought. If punitive damages are claimed, give the appropriate instruction from CACI Nos. 3940–3949.

If items 1 and 2 are given, do not also give CACI No. 3903A, *Medical Expenses—Past and Future (Economic Damages)*, and CACI No. 3903C, *Past and Future Lost Earnings (Economic Damages),* as the future damages parts of those instructions are not applicable. Other 3903 group instructions may be omitted if their items of damages are included under item 3 and must not be given if they include future damages.

Damages for pain, suffering, or disfigurement are not recoverable in a survival action except at times in an elder abuse case. (Code Civ. Proc., § 377.34; see *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1265 [45 Cal.Rptr.3d 222]; see also instructions in the 3100 Series, Elder Abuse and Dependent Adult Civil Protection Act.)

Sources and Authority

- Survival Damages. Code of Civil Procedure section 377.34.

- "In California, 'a cause of action for or against a person is not lost by reason of the person's death' and no 'pending action . . . abate[s] by the death of a party . . .' In a survival action by the deceased plaintiff's estate, the damages recoverable expressly exclude 'damages for pain, suffering, or disfigurement.' They do, however, include all 'loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages.' Thus, under California's survival law, an estate can recover not only the deceased plaintiff's lost wages, medical expenses, and any other pecuniary losses incurred before death, but also punitive or exemplary damages." (*County of L.A. v. Superior Court* (1999) 21 Cal.4th 292, 303-304 [87 Cal.Rptr.2d 441, 981 P.2d 68], internal citations omitted.)

- "The first category consists of the reasonable value of nursing and other services that Decedent would have provided to his wife prior to his death, but was unable to provide due to his illness (replacement care). Again, [defendant] does not contest the recoverability of such damages here. Nor did it below. Such damages are recoverable. (See … CACI No. 3903E ["Loss of Ability to Provide Household Services (Economic Damage)"].)" (*Williams v. The Pep Boys Manny Moe & Jack of California* (2018) 27 Cal.App.5th 225, 238 [238 Cal.Rptr.3d 809], internal citations omitted.)

- "By expressly authorizing recovery of only penalties or punitive damages that the decedent would have been entitled to recover had the decedent lived, the Legislature necessarily implied that *other* categories of damages that the decedent would have been entitled to recover had the decedent lived would not be recoverable in a survival action." (*Williams, supra,* 27 Cal.App.5th at p. 239, original italics.)

- "In survival actions, … damages are narrowly limited to 'the loss or damage that the decedent sustained or incurred before death", which by definition excludes future damages. For a trial court to award ' "lost years" damages' in a survival action—that is, damages for 'loss of future economic benefits that [a decedent] would have earned during the period by which his life expectancy was shortened'—would collapse this fundamental distinction and render the plain language of 377.34 meaningless." (*Williams, supra,* 27 Cal.App.5th at p. 240, internal citations omitted.)

- "The same conclusion [that they are not recoverable in a survival action] would seem to follow as to the trial court's award of damages for the value of Decedent's lost pension benefits and Social Security benefits." (*Williams, supra,* 27 Cal.App.5th at p. 240, fn. 21.)

- "[T]here is at least one exception to the rule that damages for the decedent's predeath pain and suffering are not recoverable in a survivor action. Such damages are expressly recoverable in a survivor action under the Elder Abuse Act if certain conditions are met." (*Quiroz, supra,* 140 Cal.App.4th at p. 1265.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 27

4 Levy et al., California Torts, Ch. 55, *Death and Survival Actions*, § 55.21 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions*, § 181.45 (Matthew Bender)

6 California Points and Authorities, Ch. 66, *Death and Survival Actions*, § 66.63 et seq. (Matthew Bender)

4002. "Gravely Disabled" Explained

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

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

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

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

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

New June 2005; Revised January 2018, May 2019

Directions for Use

This instruction provides the definition of "gravely disabled" from Welfare and Institutions Code section 5008(h)(1)(A), which will be the applicable standard in most cases. The instruction applies to both adults and minors. (*Conservatorship of M.B.* (2018) 27 Cal.App.5th 98, 107 [237 Cal.Rptr.3d 775].)

Read the bracketed sentence at the end of the first paragraph if appropriate to the facts of the case. There is a second standard in Welfare and Institutions Code section 5008(h)(1)(B) involving a finding of mental incompetence under Penal Code section 1370. A different instruction will be required if this standard is alleged.

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

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

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Sources and Authority

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

- "The enactment of the LPS and with it the substitution of 'gravely disabled' for 'in need of treatment' as the basis for commitment of individuals not dangerous to themselves or others reflects a legislative determination to meet the constitutional requirements of precision. The term 'gravely disabled' is sufficiently precise to exclude unusual or nonconformist lifestyles. It connotes an inability or refusal on the part of the proposed conservatee to care for basic personal needs of food, clothing and shelter." (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 284 [139 Cal.Rptr. 357], footnotes omitted.)

- "[T]he public guardian must prove beyond a reasonable doubt that the proposed conservatee is gravely disabled." (*Conservatorship of Jesse G.* (2016) 248 Cal.App.4th 453, 461 [203 Cal.Rptr.3d 667].)

- "The stricter criminal standard is used because the threat to the conservatee's individual liberty and personal reputation is no different than the burdens associated with criminal prosecutions." (*Conservatorship of Smith* (1986) 187 Cal.App.3d 903, 909 [232 Cal.Rptr. 277] internal citations omitted.)

- "Bizarre or eccentric behavior, even if it interferes with a person's normal intercourse with society, does not rise to a level warranting conservatorship except where such behavior renders the individual helpless to fend for herself or destroys her ability to meet those basic needs for survival." (*Conservatorship of Smith, supra,* 187 Cal.App.3d at p. 909.)

- "Under [Welfare and Institutions Code] section 5350, subdivision (e)(1), 'a person is not "gravely disabled" if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter.' " (*Conservatorship of Jesse G., supra,* 248 Cal.App.4th at p. 460.)

- "While [third person] may not have shown that he could manage appellant's mental health symptoms as adeptly as would a person professionally trained to care for someone with a mental disorder, that is not the standard. As appellant states, '[t]he question in a LPS conservatorship case where the proposed conservatee asserts a third party assistance claim is not whether the third party will be able to manage the person's mental health symptoms completely. Rather, the dispositive question is whether the person is able to provide the proposed conservatee with food, clothing, and shelter on a regular basis." (*Conservatorship of Jesse G., supra,* 248 Cal.App.4th at p. 463 fn. 4.)

- "We ... hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369].)

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- "[A]n individual who will not voluntarily accept mental health treatment is not for that reason alone gravely disabled." (*Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1468 [257 Cal.Rptr. 860].)

- "[T]he pivotal issue is whether [respondent] was 'presently' gravely disabled and the evidence demonstrates that he was not. Accordingly, the order granting the petition must be overturned." (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d. 1030, 1034 [226 Cal.Rptr. 33], fn. omitted, citing to *Conservatorship of Murphy* (1982) 134 Cal.App.3d 15, 18 [184 Cal.Rptr. 363].)

- "[A] conservatorship cannot be established because of a perceived likelihood of future relapse. To do so could deprive the liberty of persons who will not suffer such a relapse solely because of the pessimistic statistical odds. Because of the promptness with which a conservatorship proceeding can be invoked the cost in economic and liberty terms is unwarranted." (*Conservatorship of Neal* (1987) 190 Cal.App.3d 685, 689 [235 Cal.Rptr. 577].)

- "A perceived likelihood of future relapse, without more, is not enough to justify establishing a conservatorship. Neither can such a likelihood justify keeping a conservatorship in place if its subject is not presently gravely disabled, in light of the statutory provisions allowing rehearings to evaluate a conservatee's current status." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 302 [256 Cal.Rptr. 415], internal citation omitted.)

- "[T]he definition of ' "[g]ravely disabled minor" ' from section 5585.25 is not part of the LPS Act, but is found in the Children's Civil Commitment and Mental Health Treatment Act of 1988. (§ 5585.) This definition applies 'only to the initial 72 hours of mental health evaluation and treatment provided to a minor. … Evaluation and treatment of a minor beyond the initial 72 hours shall be pursuant to the … [LPS Act].' (§ 5585.20.) Accordingly, we must apply the definition found in the LPS Act, and determine whether there was substantial evidence Minor suffered from a mental disorder as a result of which she 'would be unable to provide for [her] basic personal needs' if she had to so provide." (*Conservatorship of M.B., supra,* 27 Cal.App.5th at p. 107.)

Secondary Sources

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

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

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

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4003. "Gravely Disabled" Minor Explained

Revoked May 2019. See *Conservatorship of M.B.* (2018) 27 Cal.App.5th 98, 107 [237 Cal.Rptr.3d 775].)

~~**The term "gravely disabled" means that a minor is presently unable to use those things that are essential to health, safety, and development, including food, clothing, and shelter, even if they are provided to the minor by others, because of a mental disorder. [The term "gravely disabled" does not include mentally retarded persons by reason of being mentally retarded alone.]**~~

~~**[[***Insert one or more of the following:***] [physical or mental immaturity/developmental disabilities/epilepsy/alcoholism/drug abuse/repeated antisocial behavior/psychosis/bizarre or eccentric behavior/delusions/hallucinations/[***insert other***]] [is/are] not enough, by [itself/themselves], to find that [***name of respondent***] is gravely disabled. [He/She] must be unable to use those things that are essential to health, safety, or development because of a mental disorder.]**~~

~~**[If you find [***name of respondent***] will not take [his/her] medication without supervision and that a mental disorder makes [him/her] unable to use those things that are essential to health, safety, or development without such medication, then you may conclude [***name of respondent***] is presently gravely disabled.**~~

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

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

~~*New June 2005*~~

~~Directions for Use~~

~~Read the bracketed sentence at the end of the first paragraph if appropriate to the facts of the case.~~

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

~~If there is evidence concerning the availability of third parties that are willing to provide assistance to the proposed conservatee, see CACI No. 4008, *Third Party Assistance to Minor*.~~

~~Sources and Authority~~

- ~~"Gravely Disabled Minor" Defined. Welfare and Institutions Code section 5585.25.~~

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- "[T]he actual commitment of a mentally disordered minor who is also a ward of the juvenile court can be accomplished *only* in accordance with the LPS Act." (*In re Michael E.* (1975) 15 Cal.3d 183, 189 [123 Cal.Rptr. 103, 538 P.2d 231].)

- "The actual commitment of a minor ward of a juvenile court to a state hospital can be lawfully accomplished only through the appointment of a conservator who is vested with authority to place the minor in such a hospital. Such conservator may be appointed only for a 'gravely disabled' minor who is entitled to a jury trial on the issue whether he is in fact 'gravely disabled.' Conservatorship shall be recommended to the court only if, on investigation, no suitable alternatives are available. The conservator's proposed powers and duties are to be recommended to the court. A conservator may commit the minor to a medical facility, including a state hospital, only when specifically authorized by the court. Conservatorships automatically terminate at the end of one year, and every six months a conservatee may petition for a rehearing as to his status. Finally, the entertainment of a petition for conservatorship is a function of the superior and not the juvenile court." (*In re Michael E., supra,* 15 Cal.3d at pp. 192–193, internal citations and footnotes omitted.)

- "Although a minor may not be legally responsible to provide for his basic personal needs, or may suffer disabilities other than a mental disorder which preclude him from so providing, the [statutory] definition is nevertheless applicable. A minor is 'gravely disabled' within the meaning of section 5008, subdivision (h)(1), when the trier of fact, on expert and other testimony, finds that disregarding other disabilities, if any, the minor, because of the further disability of a mental disorder, would be unable to provide for his basic personal needs. Immaturity, either physical or mental when not brought about by a mental disorder, is not a disability which would render a minor 'gravely disabled' within the meaning of section 5008." (*In re Michael E., supra,* 15 Cal.3d at p. 192, fn. 12.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 90, 97

Ross, California Practice Guide: Probate, Ch. 1-B, *Premortem Planning*, ¶ 1:112 et seq. (The Rutter Group)

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.16

28 California Forms of Pleading and Practice, Ch. 329, *Juvenile Courts: Delinquency Proceedings*, § 329.73 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, §§ 361A.42, 361A.45 (Matthew Bender)

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4106. Breach of Fiduciary Duty by Attorney—Essential Factual Elements

[*Name of plaintiff*] claims that [he/she/it] was harmed because [*name of defendant*] breached an attorney's duty [*describe duty, e.g., "not to represent clients with conflicting interests"*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] breached the duty of an attorney [*describe duty*];**

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

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

New September 2003; Revised April 2004; Renumbered from CACI No. 605 December 2007; Revised May 2019

Directions for Use

The existence of a fiduciary relationship is a question of law. Whether an attorney has breached that fiduciary duty is a question of fact. (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890 [250 Cal.Rptr. 339], disapproved on other grounds in *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239 [191 Cal.Rptr.3d 536, 354 P.3d 334].)

If the attorney's breach of duty is negligent rather than intentional or fraudulent, the "but for" ("would have happened anyway") causation standard applicable to legal malpractice (see *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046]) applies. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1093–1094 [236 Cal.Rptr.3d 473].) If so, the optional last sentence of CACI No. 430, *Causation: Substantial Factor,* should be given: "Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct."

Sources and Authority

- ~~"To establish a cause of action for breach of fiduciary duty, a plaintiff must demonstrate the existence of a fiduciary relationship, breach of that duty and damages." (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1509 [85 Cal.Rptr.3d 268].)~~

- " 'The relation between attorney and client is a fiduciary relation of the very highest character.' " (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189 [98 Cal.Rptr. 837, 491 P.2d 421].)

- ~~"[A] breach of fiduciary duty is a species of tort distinct from a cause of action for professional negligence." (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086 [41 Cal.Rptr.2d 768].)~~

- " 'The breach of fiduciary duty can be based upon either negligence or fraud depending on the

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circumstances. It has been referred to as a species of tort distinct from causes of action for professional negligence [citation] and from fraud [citation].' 'The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages.' " (*Knutson, supra,* 25 Cal.App.5th at pp. 1093–1094, internal citation omitted.)

- "Substantial factor causation is the correct causation standard for an intentional breach of fiduciary duty." (*Knutson, supra,* 25 Cal.App.5th at p. 1094.)

- "The trial court applied the legal malpractice standard of causation to [plaintiff]'s intentional breach of fiduciary duty cause of action. The court cited The Rutter Group's treatise on professional responsibility to equate causation for legal malpractice with causation for all breaches of fiduciary duty: ' "The rules concerning causation, damages, and defenses that apply to lawyer negligence actions … also govern actions for breach of fiduciary duty." ' This statement of the law is correct, however, only as to claims of breach of fiduciary duty arising from negligent conduct." (*Knutson, supra,* 25 Cal.App.5th at p. 1094, internal citations omitted.)

- "Expert testimony is not required, but is admissible to establish the duty and breach elements of a cause of action for breach of fiduciary duty where the attorney conduct is a matter beyond common knowledge." (*Stanley, supra,* 35 Cal.App.4th at p. 1087, internal citations omitted.)

- "The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, 'together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client.' " (*Stanley, supra,* 35 Cal.App.4th at p. 1087.)

Secondary Sources

1 Witkin, California Procedure (4th ed. 1996) Attorneys, § 118

Vapnek et al., California Practice Guide: Professional Responsibility (The Rutter Group) ¶ 6:425

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.02 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, § 76.150 (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, §§ 24A.27[3][d], 24A.29[3][j] (Matthew Bender)

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4570. Right to Repair Act—Construction Defects—Essential Factual Elements (Civ. Code, § 896)

[*Name of plaintiff***] claims that [he/she] has been harmed because of defects in [***name of defendant***]'s original construction of [***name of plaintiff***]'s home. To establish this claim, [***name of plaintiff***] must prove [one or more of the following:]**

> **[***Specify all defects from Civil Code section 896, e.g., that a defectively constructed door allowed unintended water to pass beyond, around, or through it.***]**

New May 2019

Directions for Use

Give this instruction for a claim under the Right to Repair Act (the Act). (Civ. Code, § 895 et seq.) The Act applies to original construction intended to be sold as an individual dwelling unit. (Civ. Code, § 896.) Section 896 lists all of the construction standards covered by the Act. List all defects within the coverage of section 896.

In order to make a claim for violation of the Act, a homeowner need only show that the home's original construction does not meet the applicable standard. No further showing of causation or damages is required to meet the burden of proof regarding a violation of the Act. (Civ. Code, § 942; see also Civ. Code, § 936 [negligence or breach of contract required in claim against general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals].)

For an instruction on the limited damages recoverable under Civil Code, section 944, see CACI No. 4571, *Right to Repair Act—Damages*. For instructions on various affirmative defenses available to the contractor under Civil Code section 945.5, see CACI Nos. 4572–4574

Sources and Authority

- Definitions. Civil Code section 895.
- Construction Standards Under the Right to Repair Act. Civil Code section 896.
- Intent of Standards. Civil Code section 897.
- Applicability of Act to Other Entities Involved in Construction. Civil Code section 936.
- Damages and Causation Not Required. Civil Code section 942.
- Exclusive Remedy for Certain Damages. Civil Code section 943.
- Damages Recoverable. Civil Code section 944.
- Affirmative Defenses. Civil Code section 945.5.

- "[T]he Right to Repair Act (the Act) was enacted in 2002. As recently explained by the Supreme Court, '[t]he Act sets forth detailed statewide standards that the components of a dwelling must satisfy. It also establishes a prelitigation dispute resolution process that affords builders notice of alleged construction defects and the opportunity to cure such defects, while granting homeowners the right to sue for deficiencies even in the absence of property damage or personal injury.' " (*Kohler Co. v. Superior Court* (2018) 29 Cal.App.5th 55, 59 [240 Cal.Rptr.3d 426], internal citation omitted.)

- "To sum up this portion of the statutory scheme: For economic losses, the Legislature intended to supersede *Aas* [*Aas v. Superior Court* (2000) 24 Cal.4th 627, 632] and provide a statutory basis for recovery. For personal injuries, the Legislature preserved the status quo, retaining the common law as an avenue for recovery. And for property damage, the Legislature replaced the common law methods of recovery with the new statutory scheme. The Act, in effect, provides that construction defect claims not involving personal injury will be treated the same procedurally going forward whether or not the underlying defects gave rise to any property damage." (*McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 253 [227 Cal.Rptr.3d 191, 408 P.3d 797].)

- "[A] homeowner alleging that a manufactured product—such as a plumbing fixture—installed in her home is defective may bring a claim under the Act only if the allegedly defective product caused a violation of one of the standards set forth in section 896; otherwise she must bring a common law claim outside of the Act against the manufacturer, and would be limited to the damages allowed under the common law." (*Kohler Co., supra,* 29 Cal.App.5th at p. 63.)

- "Insofar as section 944 allows recovery only for damages resulting from failure 'of the home,' it is clear that 'home' is not limited to the structure where people reside, because section 942 states that, '[i]n order to make a claim for violation of the standards set forth in Chapter 2 (commencing with Section 896), a homeowner need only demonstrate … that *the home* does not meet the applicable standard … .' As we have seen section 896 covers a multitude of defects not only in the residence but also in improvements such as driveways, landscaping, and damage to the lot, etc." (*Gillotti v. Stewart* (2017) 11 Cal.App.5th 875, 897 [217 Cal.Rptr.3d 860], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1307

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.43 (Matthew Bender)

19 California Points and Authorities, Ch. 66, *Products Liability*, § 190.224 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.60 et seq. (Matthew Bender)

4571. Right to Repair Act—Damages (Civ. Code, § 944)

If [*name of plaintiff*] proves any construction defects, [he/she] is entitled to recover only for the following:

a. The reasonable value of repairing the defect(s);

b. The reasonable cost of repairing any damage caused by the repair efforts;

c. The reasonable cost of repairing and correcting any damage resulting from the failure of the home to meet the standards;

d. The reasonable cost of removing and replacing any improper repair made by [*name of defendant*];

e. Reasonable relocation and storage expenses;

f. Lost business income if the home was used as a principal place of a business licensed to be operated from the home;

g. Reasonable investigative costs for each defect proved;

h. (*Specify any other costs or fees recoverable by contract or statute.*)

[[*Name of plaintiff*]'s right to the reasonable value of repairing any defect is limited to the lesser of the cost of repair or the diminution in current value of the home caused by the defect.]

New May 2019

Directions for Use

This instruction sets forth the damages recoverable in an action for construction defects under the Right to Repair Act. (Civ. Code, § 944.) Delete those that the plaintiff is not claiming.

Give the optional last paragraph for any claims involving a detached single-family home. The common-law personal use exception is preserved. (Civ. Code, § 943(b).)

Sources and Authority

- Damages Recoverable Under the Right to Repair Act. Civil Code section 944.
- "The provisions of chapter 5 make explicit the intended avenues for recouping economic losses, property damages, and personal injury damages. Section 944 defines the universe of damages that are recoverable in an action under the Act. (§ 944 ['If a claim for damages is made under this title, the homeowner is only entitled to damages for' a series of specified types of losses].) In turn,

section 943 makes an action under the Act the exclusive means of recovery for damages identified in section 944 absent an express exception: 'Except as provided in this title, no other cause of action for a claim covered by this title or for damages recoverable under Section 944 is allowed.' (§ 943, subd. (a).) In other words, section 944 identifies what damages may be recovered in an action under the Act, and section 943 establishes that such damages may only be recovered in an action under the Act, absent an express exception." (*McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 251 [227 Cal.Rptr.3d 191, 408 P.3d 797].)

- "Insofar as section 944 allows recovery only for damages resulting from failure 'of the home,' it is clear that 'home' is not limited to the structure where people reside, because section 942 states that, '[i]n order to make a claim for violation of the standards set forth in Chapter 2 (commencing with Section 896), a homeowner need only demonstrate … that *the home* does not meet the applicable standard … .' As we have seen section 896 covers a multitude of defects not only in the residence but also in improvements such as driveways, landscaping, and damage to the lot, etc." (*Gillotti v. Stewart* (2017) 11 Cal.App.5th 875, 897 [217 Cal.Rptr.3d 860], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1312

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.43 (Matthew Bender)

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

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.69 (Matthew Bender)

4572. Right to Repair Act—Affirmative Defense—Act of Nature (Civ. Code, § 945.5(a))

[*Name of defendant*] claims that [he/she/it] is not responsible for [*name of plaintiff*]'s harm because it was caused by an unforeseen event. To establish this defense, [*name of defendant*] must prove that the [*specify defect, e.g., door that allowed unintended water to pass through it*] was caused by [*specify, e.g., a landslide*], which was an unforeseen [act of nature/manmade event] that caused the home not to meet the otherwise required standard.

New May 2019

Directions for Use

This instruction sets forth a builder's affirmative defense to a homeowner's construction defect claim under the Right to Repair Act, asserting the construction defect was caused by an unforeseen act of nature. An "unforeseen act of nature" includes unforeseen manmade events such as war, terrorism, or vandalism, in addition to weather conditions and earthquakes. (See Civ. Code, § 945.5(a).)

The unforeseen event must be "in excess of the design criteria expressed by the applicable building codes, regulations, and ordinances in effect at the time of original construction." (Civ. Code, § 945.5(a).) If there is a question of fact with regard to such a situation, modify the instruction accordingly.

Sources and Authority

- Right to Repair Act Affirmative Defense of Unforeseen Act of Nature. Civil Code section 945.5(a).

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1312

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.43 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.70 (Matthew Bender)

4573. Right to Repair Act—Affirmative Defense—Unreasonable Failure to Minimize or Prevent Damage (Civ. Code, § 945.5(b))

[*Name of defendant***] claims that [he/she/it] is not responsible for [***name of plaintiff***]'s harm because [***name of plaintiff***] unreasonably failed to minimize or prevent [his/her] damages in a timely manner. To establish this defense, [***name of defendant***] must prove [***select one or more of the following***:]**

> **[a. [***Name of plaintiff***] failed to allow [***name of defendant***] reasonable and timely access to the home for inspections and repairs.]**
>
> **[b. [***Name of plaintiff***] failed to give [***name of defendant***] timely notice after discovery of a construction defect.]**
>
> **[c. [***Specify other act or omission of plaintiff that is alleged to constitute failure to minimize or prevent damage.***]**

[*Name of defendant***] cannot avoid responsibility for damages due to an untimely or inadequate response to [***name of plaintiff***]'s claim.**

New May 2019

Directions for Use

This instruction sets forth a builder's affirmative defense to a homeowner's construction defect claim under the Right to Repair Act, asserting the homeowner's failure to minimize or prevent damages. (See Civ. Code, § 945.5(b).) Select the particular failure to mitigate alleged from a or b, or specify a different failure in c. CACI No. 3931, *Mitigation of Damages (Property Damage)*, may also be given for the general principle of the plaintiff's duty to mitigate damages.

Sources and Authority

- Right to Repair Act Affirmative Defense of Homeowner's Failure to Mitigate. Civil Code section 945.5(b).

- "Although the Act establishes various maximum time periods in which the builder may respond, inspect, offer to repair, and commence repairs, the builder avails itself of the full time allowed by the Act at its peril. The builder is liable for the damages its construction defects cause, and even when a homeowner has acted unreasonably in failing to limit losses, the builder remains liable for 'damages due to the untimely or inadequate response of a builder to the homeowner's claim.' (§ 945.5, subd. (b).) What constitutes a timely response will vary according to the circumstances, and the maximum response periods set forth by the Act do not necessarily insulate a builder from damages when the builder has failed to take remedial action as promptly as is reasonable under the circumstances. The Act's liability provisions thus supply builders and homeowners clear incentives to move quickly to minimize damages when alerted to emergencies." (*McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 257-258 [227 Cal.Rptr.3d 191, 408 P.3d 797].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1312

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.43 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.70 (Matthew Bender)

4574. Right to Repair Act—Affirmative Defense—Plaintiff's Subsequent Acts or Omissions (Civ. Code, § 945.5(d))

[*Name of defendant*] claims that [he/she/it] is not responsible for [*name of plaintiff*]'s harm because it was caused by [*name of plaintiff*]'s later [acts/ [or] omissions]. To establish this defense [*name of defendant*] must prove that the harm was caused by [[*name of plaintiff*]'s later [alterations/ordinary wear and tear/misuse/abuse/[or] neglect]/ [or] the structure's use for something other than its intended purpose].

New May 2019

Directions for Use

This instruction sets forth a builder's affirmative defense to a homeowner's construction defect claim under the Right to Repair Act, asserting that the harm was caused by the homeowner's alterations, ordinary wear and tear, misuse, abuse, or neglect, or by the structure's use for something other than its intended purpose. (Civ.Code, § 945.5(d).)

The homeowner is responsible for any acts or omissions by any of his or her agents or independent third parties. (Civ.Code, § 945.5(d).) Modify the instruction as needed if the harm is alleged to have been caused by the subsequent acts of an agent or third party.

Sources and Authority

- Right to Repair Act Affirmative Defense of Alterations, Ordinary Wear and Tear, Misuse, Abuse, Neglect, or Use for Something Other Than Intended. Civil Code section 945.5(d).

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1312

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.43 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.70 (Matthew Bender)

5001. Insurance

You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and the evidence.

New September 2003; Revised April 2004, May 2019

Directions for Use

If this instruction is used, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

By statute, evidence of a defendant's insurance coverage is inadmissible to prove liability. (Evid. Code, § 1155.) If evidence of insurance has been admitted for some other reason, a limiting instruction should be given advising the jury to consider the evidence only for the purpose for which it was admitted.

Sources and Authority

- Evidence of Insurance Inadmissible to Prove Liability. Evidence Code section 1155.
- " 'The evidence [of liability insurance] is regarded as both irrelevant and prejudicial to the defendant. Hence, not only is it subject to objection and exclusion, but any attempt to inject it by question, suggestion or argument is considered misconduct of counsel, and is often held reversible error. [Citations.]' " (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469 [130 Cal.Rptr. 786].)
- "Evidence of a *defendant's* insurance coverage ordinarily is not admissible to prove the defendant's negligence or other wrongdoing." (*Blake v. E. Thompson Petroleum Repair Co.* (1985) 170 Cal.App.3d 823, 830 [216 Cal.Rptr. 568], original italics.)
- "[E]vidence of a plaintiff's insurance coverage is not admissible for the purpose of mitigating the damages the plaintiff would otherwise recover from the tortfeasor. This is the 'collateral source rule.' (*Blake, supra,* 170 Cal.App.3d at p. 830; see *Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1, 16-18 [84 Cal.Rptr. 173, 465 P.2d 61].)
- "Both of the foregoing principles are subject to the qualification that where the topic of insurance coverage is coupled with other relevant evidence, that topic may be admitted along with such other evidence. '[para.] It has always been the rule that the existence of insurance may properly be referred to in a case if the evidence is otherwise admissible.' The trial court must then determine, pursuant to Evidence Code section 352, whether the probative value of the other evidence outweighs the prejudicial effect of the mention of insurance." (*Blake, supra,* 170 Cal.App.3d at p. 831, internal citation omitted.)
- "[T]he trial court did not abuse its discretion by excluding evidence of [plaintiff]'s insured [health

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care coverage] under Evidence Code section 352. [Plaintiff] had the right to treat outside his plan. Evidence of his insurance would have confused the issues or misled and prejudiced the jury." (*Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, 1278 [232 Cal.Rptr.3d 404].)

- ~~As a rule, evidence that the defendant has insurance is both irrelevant and prejudicial to the defendant. (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469 [130 Cal.Rptr. 786].)~~

- ~~Generally, evidence that the plaintiff was insured is not admissible under the "collateral source rule." (*Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1, 16-18 [84 Cal.Rptr. 173, 465 P.2d 61]; *Acosta v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 19, 25–26 [84 Cal.Rptr. 184, 465 P.2d 72].)~~

- ~~Evidence of insurance coverage may be admissible where it is coupled with other relevant evidence, provided that the probative value of the other evidence outweighs the prejudicial effect of the mention of insurance. (*Blake v. E. Thompson Petroleum Repair Co., Inc.* (1985) 170 Cal.App.3d 823, 831 [216 Cal.Rptr. 568].)~~

- ~~An instruction to disregard whether a party has insurance may, in some cases, cure the effect of counsel's improper reference to insurance. (*Scally v. Pacific Gas & Electric Co.* (1972) 23 Cal.App.3d 806, 814 [100 Cal.Rptr. 501].)~~

Secondary Sources

8 Witkin, California Procedure (5th ed. 2018) Trial, § 217 et seq.
~~7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 230–233~~

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 34.32–34.36

California Practice Guide: Civil Trials and Evidence, § 5:371

3 California Trial Guide, Unit 50, *Extrinsic Policies Affecting or Excluding Evidence*, §§ 50.20, 50.32 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.68 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 16, *Jury Instructions*, 16.06

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.26

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5009. Predeliberation Instructions

When you go to the jury room, the first thing you should do is choose a presiding juror. The presiding juror should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently.

Please do not state your opinions too strongly at the beginning of your deliberations or immediately announce how you plan to vote as it may interfere with an open discussion. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

You should use your common sense and experience in deciding whether testimony is true and accurate. However, during your deliberations, do not make any statements or provide any information to other jurors based on any special training or unique personal experiences that you may have had related to matters involved in this case. What you may know or have learned through your training or experience is not a part of the evidence received in this case.

Sometimes jurors disagree or have questions about the evidence or about what the witnesses said in their testimony. If that happens, you may ask to have testimony read back to you [or ask to see any exhibits admitted into evidence that have not already been provided to you]. Also, jurors may need further explanation about the laws that apply to the case. If this happens during your discussions, write down your questions and give them to the [clerk/bailiff/court attendant]. I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will do my best to answer them. When you write me a note, do not tell me how you voted on an issue until I ask for this information in open court.

~~[At least nine jurors must agree on a verdict. When you have finished filling out the form, your presiding juror must write the date and sign it at the bottom and then notify the [bailiff/clerk/court attendant] that you are ready to present your verdict in the courtroom.]~~

Your decision must be based on your personal evaluation of the evidence presented in the case. Each of you may be asked in open court how you voted on each question.

While I know you would not do this, I am required to advise you that you must not base your decision on chance, such as a flip of a coin. If you decide to award damages, you may not agree in advance to simply add up the amounts each juror thinks is right and then, without further deliberations, make the average your verdict.

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You may take breaks, but do not discuss this case with anyone, including each other, until all of you are back in the jury room.

New September 2003; Revised April 2004, October 2004, February 2007, December 2009, June 2011, June 2013, May 2019

Directions for Use

The advisory committee recommends that this instruction be read to the jury after closing arguments and after reading instructions on the substantive law.

~~Read the sixth paragraph if a general verdict form is to be used.~~ If a special verdict will be used, give CACI No. 5012, *Introduction to Special Verdict Form*. If a general verdict is to be used, give CACI No. 5022, *Introduction to General Verdict Form*.

Judges may want to provide each juror with a copy of the verdict form so that the jurors can use it to keep track of how they vote. Jurors can be instructed that this copy is for their personal use only and that the presiding juror will be given the official verdict form to record the jury's decision. Judges may also want to advise jurors that they may be polled in open court regarding their individual verdicts.

Delete the reference to reading back testimony if the proceedings are not being recorded.

Sources and Authority

- Conduct of Jury Deliberations. Code of Civil Procedure section 613.
- Further Instructions After Deliberation Begins. Code of Civil Procedure section 614.
- Verdict Requires Three Fourths. Code of Civil Procedure section 618, article I, section 16, of the California Constitution.
- Juror Misconduct as Grounds for New Trial. Code of Civil Procedure section 657.
- "Chance is the 'hazard, risk, or the result or issue of uncertain and unknown conditions or forces.' Verdicts reached by tossing a coin, drawing lots, or any other form of gambling are examples of improper chance verdicts. 'The more sophisticated device of the *quotient verdict* is equally improper: The jurors agree to be bound by an *average* of their views; each writes the amount he favors on a slip of paper; the sums are added and divided by 12, and the resulting "quotient" pursuant to the prior agreement, is accepted as the verdict without further deliberation or consideration of its fairness.' " (*Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1064 [18 Cal.Rptr.2d 106], original italics.)
- " '[T]here is no impropriety in the jurors making an average of their individual estimates as to the amount of damages for the purpose of arriving at a basis for discussion and consideration, nor in adopting such average if it is subsequently agreed to by the jurors; but

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to agree beforehand to adopt such average and abide by the agreement, without further discussion or deliberation, is fatal to the verdict.' " (*Chronakis, supra,* 14 Cal.App.4th at p. 1066.)

- Jurors should be encouraged to deliberate on the case. (*Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 911 [64 Cal.Rptr.2d 492].)

- The jurors may properly be advised of the duty to hear and consider each other's arguments with open minds, rather than preventing agreement by stubbornly sticking to their first impressions. (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118].)

- "The trial court properly denied the motion for new trial on the ground that [the plaintiff] did not demonstrate the jury reached a chance or quotient verdict. The jury agreed on a high and a low figure and, before calculating an average, they further agreed to adjust downward the high figure and to adjust upward the low figure. There is no evidence that this average was adopted without further consideration or that the jury agreed at any time to adopt an average and abide by the agreement without further discussion or deliberation." (*Lara v. Nevitt* (2004) 123 Cal.App.4th 454, 462–463 [19 Cal.Rptr.3d 865].)

- "It is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct." (*In re Malone* (1996) 12 Cal.4th 935, 963 [50 Cal.Rptr.2d 281, 911 P.2d 468].)

- "[The juror]'s comments to the jury, in the nature of an expert opinion concerning the placement of crossing gate 'sensors,' their operation, and the consequent reason why gates had not been or could not be installed at the J-crossing, constituted misconduct … . Speaking with the authority of a professional transportation consultant, [the juror] interjected the subject of 'sensors,' on which there had been no evidence at trial." (*McDonald v. S. Pac. Transp. Co.* (1999) 71 Cal.App.4th 256, 263–264 [83 Cal.Rptr.2d 734].)

- "Jurors cannot, without violation of their oath, receive or communicate to fellow jurors information from sources outside the evidence in the case. '[It] is misconduct for a juror during the trial to discuss the matter under investigation outside the court or to receive any information on the subject of the litigation except in open court and in the manner provided by law. Such misconduct *unless shown by the prevailing party to have been harmless will invalidate the verdict*.' " (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 952–953 [161 Cal.Rptr. 377], original italics, internal citations omitted.)

- " 'All the jurors, including those with relevant personal backgrounds, were entitled to consider this evidence and express opinions regarding it. "[I]t is an impossible standard to require … [the jury] to be a laboratory, completely sterilized and freed from any external

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> factors." [Citation.] "It is 'virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' " [Citation.] A juror may not express opinions based on asserted personal expertise that is different from or contrary to the law as the trial court stated it or to the evidence, but if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in *evaluating and interpreting* that evidence. Moreover, during the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's *analysis* of the evidence. We cannot demand that jurors, especially lay jurors not versed in the subtle distinctions that attorneys draw, never refer to their background during deliberations. "Jurors are not automatons. They are imbued with human frailties as well as virtues." [Citation.]' " (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 77 [133 Cal.Rptr.3d 548, 264 P.3d 336], original italics.)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, §§ 318, 321, 380

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 15-A, *Jury Deliberations: General Considerations*, ¶ 15:15 et seq. (The Rutter Group)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.01 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.32[3] (Matthew Bender)
28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.14 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.33

California Judges Benchbook: Civil Proceedings—Trial (2d ed.) §§ 5.129, 14.8, 14.32, 14.50, 14.53, 14.59, 15.6, 15.21 (Cal CJER 2010)

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5012. Introduction to Special Verdict Form

I will give you [a] verdict form[s] with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form[s] carefully. You must consider each question separately. Although you may discuss the evidence and the issues to be decided in any order, you must answer the questions on the verdict form[s] in the order they appear. After you answer a question, the form tells you what to do next.

At least 9 of you must agree on an answer before you can move on to the next question. However, the same 9 or more people do not have to agree on each answer.

All 12 of you must deliberate on and answer each question regardless of how you voted on any earlier question. Unless the verdict form tells all 12 jurors to stop and answer no further questions, every juror must deliberate and vote on all of the remaining questions.

When you have finished filling out the form[s], your presiding juror must write the date and sign it at the bottom [of the last page] and then notify the [bailiff/clerk/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised April 2004, October 2008, December 2009, December 2014, May 2019

Directions for Use

This instruction should be given if a special verdict form is used. The second and third paragraphs will have to be modified in a case under the Lanterman-Petris-Short Act. (See CACI No. 4012, *Concluding Instruction* (for LPS Act).)

Sources and Authority

- General and Special Verdict Forms. Code of Civil Procedure section 624.
- Special Verdicts; Requirements for Award of Punitive Damages. Code of Civil Procedure section 625.
- " 'The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law.' (Code Civ. Proc., § 624.)" (*J.P. v. Carlsbad Unified School Dist.* (2014) 232 Cal.App.4th 323, 338 [181 Cal.Rptr.3d 286].)
- "A special verdict is 'fatally defective' if it does not allow the jury to resolve every controverted issue." (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 136 [220 Cal.Rptr.3d 127].)

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- "It is true that, in at least some respects, a special verdict—if carefully drawn and astutely employed—may improve the quality of the factfinding process. It can focus the jury's attention on the relevant questions, incorporating the pertinent legal principles, and guiding the jury away from irrelevant or improper considerations. It can also expose defects in the jury's deliberations when they occur, providing an opportunity for the court to seek correction through further deliberations." (*Ryan v. Crown Castle NG Networks, Inc.* (2016) 6 Cal.App.5th 775, 795 [211 Cal.Rptr.3d 743].)

- " 'This procedure presents certain problems: " 'The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. "[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings … ." [Citation.]' [Citation.]" ' 'A special verdict is "fatally defective" if it does not allow the jury to resolve every controverted issue.' "(*J.P., supra,* 232 Cal.App.4th at p. 338, internal citations omitted.)

- "All litigation is ultimately a matter of striking a reasonable compromise among competing interests, particularly the interest in resolving cases fairly and that of utilizing public and private resources economically. A special verdict is unlikely to serve either of these objectives unless it is drawn with considerable care." (*Ryan, supra,* 6 Cal.App.5th at p. 796.)

- "[T]hat the jury instruction … defined [the element] did not obviate the necessity of including that required element in the special verdict. 'A jury instruction alone does not constitute a finding. Nor does the fact that the evidence might support such a finding constitute a finding.' " (*Trejo, supra,* 13 Cal.App.5th at p. 138.)

- "When a jury is composed of 12 persons, it is sufficient if *any* nine jurors arrive at each special verdict, regardless of the jurors' votes on other special verdict questions." (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 255 [92 Cal.Rptr.3d 862, 206 P.3d 403], original italics.)

- "Appellate courts differ concerning the use of special verdicts. In one case the court said, 'we should utilize opportunities to force counsel into requesting special verdicts.' In contrast, a more recent decision included the negative view: 'Toward this end we advise that special findings be requested of juries only when there is a compelling need to do so. Absent strong reason to the contrary their use should be discouraged.' Obviously, it is easier to tell after the fact, rather than before, whether the special verdict is helpful in disclosing the jury conclusions leading to the end result." (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1221 [228 Cal.Rptr. 736], internal citations omitted.)

- "[W]e begin with the requirement that at least nine of twelve jurors agree that each element of a cause of action has been proved by a preponderance of the evidence. The elements of a cause of action constitute the essential or ultimate facts in a civil case comparable to the elements of a single, discrete criminal offense in a criminal case. Analogizing a civil 'cause of action' to a single, discrete criminal offense, and applying the criminal law jury agreement principles to civil law, we conclude that jurors need not agree from among a number of alternative acts which act is proved, so long as the jurors agree that each element of the cause of action is proved." (*Stoner v. Williams* (1996) 46 Cal.App.4th 986, 1002 [54 Cal.Rptr.2d 243, footnote omitted.)

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- "In civil cases in which there exist multiple causes of action for which multiple or alternative acts could support elements of more than one cause of action, possible jury confusion could result as to whether a specific cause of action is proved. In those cases, … we presume that jury instructions may be appropriate to inform the jury that it must agree on specific elements of each specific cause of action. Yet, this still does not require that the jurors agree on exactly how each particular element of a particular cause of action is proved." (*Stoner, supra,* 46 Cal.App.4th at p. 1002.)

- "[A] juror who dissented from a special verdict finding negligence should not be disqualified from fully participating in the jury's further deliberations, including the determination of proximate cause. The jury is to determine all questions submitted to it, and when the jury is composed of twelve persons, each should participate as to each verdict submitted to it. To hold that a juror may be disqualified by a special verdict on negligence from participation in the next special verdict would deny the parties of 'the right to a jury of 12 persons deliberating on all issues.' Permitting any nine jurors to arrive at each special verdict best serves the purpose of less-than-unanimous verdicts, overcoming minor disagreements and avoiding costly mistrials. Once nine jurors have found a party negligent, dissenting jurors can accept the finding and participate in determining proximate cause just as they may participate in apportioning liability, and we may not assume that the dissenting jurors will violate their oaths to deliberate honestly and conscientiously on the proximate cause issue." (*Resch v. Volkswagen of America, Inc.* (1984) 36 Cal.3d 676, 682 [205 Cal.Rptr. 827, 685 P.2d 1178], internal citations omitted.)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, §§ 342–346

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict,* § 91.21 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 318, *Judgments*, § 318.49 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.11 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, *Jury Verdicts*, 18.11 et seq.

California Judges Benchbook: Civil Proceedings—Trial (2d ed.) § 15.14 (Cal CJER 2010)

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5017. Polling the Jury

After your verdict is read in open court, you may be asked individually to indicate whether the verdict expresses your personal vote. This is referred to as "polling" the jury and is done to ensure that at least nine jurors have agreed to each decision.

The verdict form[s] that you will receive ask[s] you to answer several questions. You must vote separately on each question. Although nine or more jurors must agree on each answer, it does not have to be the same nine for each answer. Therefore, it is important for each of you to remember how you have voted on each question so that if the jury is polled, each of you will be able to answer accurately about how you voted.

[Each of you will be provided a draft copy of the verdict form[s] for your use in keeping track of your votes.]

New October 2008; Revised May 2019

Directions for Use

Use this instruction to explain the process of polling the jury, particularly if a long special verdict form will be used to assess the liability of multiple parties and the damages awarded to each plaintiff from each defendant.

The third sentence in the second paragraph referring to the agreement of nine or more jurors must be revised in a case under the Lanterman-Petris-Short Act. (See CACI No. 4012, *Concluding Instruction* (for LPS Act).

Sources and Authority

- Verdict by Three Fourths in Civil Case. Article I, section 16 of the California Constitution.
- Polling the Jury. Code of Civil Procedure section 618.
- "The polling process is designed to reveal mistakes in the written verdict, or to show 'that one or more jurors acceded to a verdict in the jury room but was unwilling to stand by it in open court.' " (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 256 [92 Cal.Rptr.3d 862, 206 P.3d 403].)
- "[A] juror may change his or her vote at the time of polling." (*Keener, supra,* 46 Cal.4th at p. 256.)
- "[I]t is quite apparent that when a poll discloses that more than one-quarter of the members of the jury disagree with the verdict, the trial judge retains control of the proceedings, and may properly order the jury to retire and again consider the case." (*Van Cise v. Lencioni* (1951) 106 Cal.App.2d 341, 348 [235 P.2d 236].)

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- "[W]e begin with the requirement that at least nine of twelve jurors agree that each element of a cause of action has been proved by a preponderance of the evidence. The elements of a cause of action constitute the essential or ultimate facts in a civil case comparable to the elements of a single, discrete criminal offense in a criminal case. Analogizing a civil 'cause of action' to a single, discrete criminal offense, and applying the criminal law jury agreement principles to civil law, we conclude that jurors need not agree from among a number of alternative acts which act is proved, so long as the jurors agree that each element of the cause of action is proved." (*Stoner v. Williams* (1996) 46 Cal.App.4th 986, 1002 [54 Cal.Rptr.2d 243], footnote omitted.)

- "In civil cases in which there exist multiple causes of action for which multiple or alternative acts could support elements of more than one cause of action, possible jury confusion could result as to whether a specific cause of action is proved. In those cases, … we presume that jury instructions may be appropriate to inform the jury that it must agree on specific elements of each specific cause of action. Yet, this still does not require that the jurors agree on exactly how each particular element of a particular cause of action is proved." (*Stoner, supra,* 46 Cal.App.4th at p. 1002.)

- "[I]f nine identical jurors agree that a party is negligent and that such negligence is the proximate cause of the other party's injuries, special verdicts apportioning damages are valid so long as they command the votes of any nine jurors. To hold otherwise would be to prohibit jurors who dissent on the question of a party's liability from participation in the important remaining issue of allocating responsibility among the parties, a result that would deny all parties the right to a jury of 12 persons deliberating on all issues." (*Juarez v. Superior Court* (1982) 31 Cal.3d 759, 768 [183 Cal.Rptr. 852, 647 P.2d 128].)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, §§ 339, 350

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.30[3][b] (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.14 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, *Jury Verdicts*, 18.43

California Judges Benchbook: Civil Proceedings—Trial (2d ed.) § 15.28 (Cal CJER 2010)

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5022. Introduction to General Verdict Form

I will give you [a] general verdict form[s]. The form[s] ask[s] you to find either in favor of [*name of plaintiff*] or [*name of defendant*]. [It also asks you to answer [an] additional question[s] regarding [*specify, e.g., the right to punitive damages*].] I have already instructed you on the law that you are to refer to in making your determination[s].

At least nine of you must agree on your decision [and in answering the additional question[s]]. [If there is more than one question on the verdict form, as long as nine of you agree on your answers to each question, the same nine do not have to agree on each answer.]

In reaching your verdict [and answering the additional question[s]], you must decide whether the party with the burden of proof has proved all of the necessary facts in support of each required element of [his/her/its] claim or defense. You should review the elements addressed in the other instructions that I have given you and determine if at least nine of you agree that each element has been proven by the evidence received in the trial. The same nine do not have to agree on each element.

When you have finished filling out the form, your presiding juror must write the date and sign it at the bottom and then notify the [bailiff/clerk/court attendant] that you are ready to present your verdict in the courtroom.

New May 2018; Revised May 2019

Directions for Use

If a general verdict will be used, this instruction may be given to guide the jury on how to go about reaching a verdict. With a general verdict, there is a danger that the jury will shortcut the deliberative process of carefully looking at each element of each claim or defense and simply vote for the plaintiff or for the defendant. This instruction directs the jury to approach its task as if a special verdict were being used and questions on each element of each claim or defense had to be answered. This instruction assumes that the rule applicable to special verdicts, that the same nine jurors do not need to agree on every element of a claim as long as there are nine in favor of each (see *Juarez v. Superior Court* (1982) 31 Cal.3d 759, 768–769 [183 Cal.Rptr. 852, 647 P.2d 128]; CACI No. 5012, *Introduction to Special Verdict Form*), would apply to deliberations using a general verdict.

This purpose of this instruction is to lessen the possibility that the "paradox of shifting majorities" will happen. This paradox occurs when the same jury analyzing the same evidence would find liability with a special verdict, but not with a general verdict. The possibility arises because with a special verdict, a juror who votes no on one question but is in a minority of three or fewer must continue to deliberate and vote on all of the remaining questions.

If, for example, the vote on element 3 is 9-3 yes with jurors 10-12 voting no, and the vote on element 4 is 11-1 yes with juror 1 voting no, there will be liability with a special verdict because each element has received nine yes votes. But if a general verdict is used, there would be no liability because only eight

jurors have found true every element of the claim. The California Supreme Court has found this result to be proper with regard to special verdicts. (See *Juarez, supra,* 31 Cal.3d at p. 768.) With a general verdict, if the jury votes on each element of each claim or defense, it is more likely to find nine votes for each element, even though it may be a different nine each time.

The second and third paragraphs will have to be modified in a case under the Lanterman-Petris-Short Act. (See CACI No. 4012, *Concluding Instruction* (for LPS Act).)

Sources and Authority

- "[I]f nine identical jurors agree that a party is negligent and that such negligence is the proximate cause of the other party's injuries, special verdicts apportioning damages are valid so long as they command the votes of *any* nine jurors. To hold otherwise would be to prohibit jurors who dissent on the question of a party's liability from participation in the important remaining issue of allocating responsibility among the parties, a result that would deny all parties the right to a jury of 12 persons deliberating on all issues." (*Juarez, supra,* 31 Cal.3d at p. 768, original italics.)

- "To determine whether a general verdict is supported by the evidence it is necessary to ascertain the issues embraced within the verdict and measure the sufficiency of the evidence as related to those issues. For this purpose reference may be had to the pleadings, the pretrial order and the charge to the jury. A general verdict implies a finding of every fact essential to its validity which is supported by the evidence. Where several issues responsive to different theories of law are presented to the jury and the evidence is sufficient to support facts sustaining the verdict under one of those theories, it will be upheld even though the evidence is insufficient to support facts sustaining it under any other theory." (*Owens v. Pyeatt* (1967) 248 Cal.App.2d 840, 844 [57 Cal.Rptr. 100], internal citations omitted.)

- "Implicit in [general] verdicts is the presumption that 'all material facts in issue as to which substantial evidence was received were determined in a manner consistent and in conformance with the verdict.' " (*Coorough v. De Lay* (1959) 171 Cal.App.2d 41, 45 [339 P.2d 963].)

- "A general verdict imports a finding in favor of the winning party on all the averments of his pleading material to his recovery." (*Behr v. County of Santa Cruz* (1959) 172 Cal.App.2d 697, 712 [342 P.2d 987].)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 338

Wegner, et al., California Practice Guide: Civil Trials & Evidence, Ch. 17-A, *Verdicts,* ¶ 17:1 et seq. (The Rutter Group)

Haning, et al., California Practice Guide: Personal Injury Ch. 9-M, *Trial of a Personal Injury Case--Verdicts and Judgment* ¶ 9:645 et seq. (The Rutter Group)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict,* § 91.21 (Matthew

Bender)

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts,* § 326A.11 et seq. (Matthew Bender)

Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, *Jury Verdicts,* 18.03 et seq.

Guide for Using Judicial Council of California Civil Jury Instructions

USER GUIDE

USER GUIDE

Ease of understanding by jurors, without sacrificing accuracy, is the primary goal of these Judicial Council instructions. A secondary goal is ease of use by lawyers. This guide provides an introduction to the instructions, explaining conventions and features that will assist in the use of both the print and electronic editions.

Jury Instructions as a Statement of the Law: While jury instructions are not a primary source of the law, they are a statement or compendium of the law, a secondary source. That the instructions are in plain English does not change their status as an accurate statement of the law.

Instructions Approved by Rule of Court: Rule 2.1050 of the California Rules of Court provides: "The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California … The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law … Use of the Judicial Council instructions is strongly encouraged."

Absence of Instruction: The fact that there is no CACI instruction on a claim, defense, rule, or other situation does not indicate that no instruction would ever be appropriate.

Using the Instructions

Revision Dates: The original date of approval and all revision dates of each instruction are presented. An instruction is considered as having been revised if there is a nontechnical change to the title, instruction text, or Directions for Use. Additions or changes to the Sources and Authority and Secondary Sources do not generate a new revision date.

Directions for Use: The instructions contain Directions for Use. The directions alert the user to special circumstances involving the instruction and may include references to other instructions that should or should not be used. In some cases the directions include suggestions for modifications or for additional instructions that may be required. Before using any instruction, reference should be made to the Directions for Use.

Sources and Authority: Each instruction sets forth the primary sources that present the basic legal principles that support the instruction. Applicable statutes are listed along with quoted material from cases that pertain to the subject matter of the instruction. Authorities are included to support the text of the instruction, the burden of proof, and matters of law and of fact.

Cases included in the Sources and Authority should be treated as a digest of relevant citations. They are not meant to provide a complete analysis of the legal subject of the instruction. Nor does the inclusion of an excerpt necessarily mean that the committee views it as binding authority. Rather, they provide a starting point for further legal research on the subject. The standard is that the committee believes that the excerpt would be of interest and relevant to CACI users.

Secondary Sources are also provided for treatises and practice guides from a variety of legal publishers.

Instructions for the Common Case: These instructions were drafted for the common type of case and can be used as drafted in most cases. When unique or complex circumstances prevail, users will have to adapt the instructions to the particular case.

Multiple Parties: Because jurors more easily understand instructions that refer to parties by name rather than by legal terms such as "plaintiff" and "defendant," the instructions provide for insertion of names. For simplicity of presentation, the instructions use single party plaintiffs and defendants as examples. If a case involves multiple parties or cross-complaints, the user will usually need to modify the parties in the instructions. Rather than naming a number of parties in each place calling for names, the user may consider putting the names of all applicable parties in the beginning and thereafter identifying them as "plaintiffs," "defendants," "cross-complaints," etc. Different instructions often apply to different parties. The user should only include the parties to whom each instruction applies.

Reference to "Harm" in Place of "Damage" or "Injury": In many of the instructions, the word harm is used in place of damage, injury or other similar words. The drafters of the instructions felt that this word was clearer to jurors.

Substantial Factor: The instructions frequently use the term "substantial factor" to state the element of causation, rather than referring to "cause" and then defining that term in a separate instruction as a "substantial factor." An instruction that defines "substantial factor" is located in the Negligence series. The use of the instruction is not intended to be limited to cases involving negligence.

Listing of Elements and Factors: For ease of understanding, elements of causes of action or affirmative defenses are listed by numbers (*e.g.*, 1, 2, 3) and factors to be considered by jurors in their deliberations are listed by letters (*e.g.*, a, b, c).

Uncontested Elements: Although some elements may be the subject of a stipulation that the element has been proven, the instruction should set forth all of the elements and indicate those that are deemed to have been proven by stipulation of the parties. Omitting uncontested elements may leave the jury with an incomplete understanding of the cause of action and the plaintiff's full burden of proof. It is better to include all the elements and then indicate the parties have agreed that one or more of them has been established and need not be decided by the jury. One possible approach is as follows:

To establish this claim, [plaintiff] must prove all of the following:

1. That [plaintiff] and [defendant] entered into a contract (which is not disputed in this case);

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

3. That all conditions required for [defendant]'s performance had occurred (which is also not disputed in this case).

Irrelevant Factors: Factors are matters that the jury might consider in determining whether a party's burden of proof on the elements has been met. A list of possible factors may include some

that have no relevance to the case and on which no evidence was presented. These irrelevant factors may safely be omitted from the instruction.

Burdens of Proof: The applicable burden of proof is included within each instruction explaining a cause of action or affirmative defense. The drafters felt that placing the burden of proof in that position provided a clearer explanation for the jurors.

Affirmative Defenses: For ease of understanding by users, all instructions explaining affirmative defenses use the term "affirmative defense" in the title.

Titles and Definitions

Titles of Instructions: Titles to instructions are directed to lawyers and sometimes use words and phrases not used in the instructions themselves. Since the title is not a part of the instruction, the titles may be removed before presentation to the jury.

Definitions of Legal Terms: The instructions avoid separate definitions of legal terms whenever possible. Instead, definitions have been incorporated into the language of the instructions. In some instances (*e.g.*, specific statutory definitions) it was not possible to avoid providing a separate definition.

Evidence

Circumstantial Evidence: The words "indirect evidence" have been substituted for the expression "circumstantial evidence." In response to public comment on the subject, however, the drafters added a sentence indicating that indirect evidence is sometimes known as circumstantial evidence.

Preponderance of the Evidence: To simplify the instructions' language, the drafters avoided the phrase preponderance of the evidence and the verb preponderate. The instructions substitute in place of that phrase reference to evidence that is "more likely to be true than not true."

Using Verdict Forms

Verdict Forms are Models: A large selection of special verdict forms accompanies the instructions. Users of the forms must bear in mind that these are models only. Rarely can they be used without modifications to fit the circumstances of a particular case.

Purpose of Verdict Forms: The special verdict forms generally track the elements of the applicable cause of action. Their purpose is to obtain the jury's finding on the elements defined in the instructions. "The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law." (Code Civ. Proc., § 624; *see Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285 [73 Cal.Rptr.2d 596].) Modifications made to the instructions in particular cases ordinarily will require corresponding modifications to the special verdict form.

Multiple Parties: The verdict forms have been written to address one plaintiff against one defendant. In nearly all cases involving multiple parties, the issues and the evidence will be such that the jury could reach different results for different parties. The liability of each defendant should always be evaluated individually, and the damages to be awarded to each plaintiff must usually be determined separately. Therefore, separate special verdicts should usually be prepared for each plaintiff with regard to each defendant. In some cases, the facts may be sufficiently simple to include multiple parties in the same verdict form, but if this is done, the transitional language from one question to another must be modified to account for all the different possibilities of yes and no answers for the various parties.

Multiple Causes of Action: The verdict forms are self-contained for a particular cause of action. When multiple causes of action are being submitted to the jury, it may be better to combine the verdict forms and eliminate duplication.

Modifications as Required by Circumstances: The verdict forms must be modified as required by the circumstances. It is necessary to determine whether any lesser or greater specificity is appropriate. The question in special verdict forms for plaintiff's damages provides an illustration. Consistent with the jury instructions, the question asks the jury to determine separately the amounts of past and future economic loss, and of past and future noneconomic loss. These four choices are included in brackets. In some cases it may be unnecessary to distinguish between past and future losses. In others there may be no claim for either economic or noneconomic damages. In some cases the court may wish to eliminate the terms "economic loss" and "noneconomic loss" from both the instructions and the verdict form. Without defining those terms, the court may prefer simply to ask the jury to determine the appropriate amounts for the various components of the losses without categorizing them for the jury as economic or noneconomic. The court can fix liability as joint or several under Civil Code sections 1431 and 1431.2, based on the verdicts. A more itemized breakdown of damages may be appropriate if the court is concerned about the sufficiency of the evidence supporting a particular component of damages. Appropriate special verdicts are preferred when periodic payment schedules may be required by Code of Civil Procedure section 667.7. (*Gorman v. Leftwich* (1990) 218 Cal.App.3d 141, 148–150 [266 Cal. Rptr. 671].)

November 2017

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

Instruction	Commentator	Comment	Committee Response
101, *Overview of Trial*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We do not agree with the proposal. We see no need to use the terms "petitioner" and "respondent" when "plaintiff" and "defendant" would be more understandable to the jury and would be consistent with the use of the terms "plaintiff," "defendant" and "cross-defendant" later in the instruction.	All of those terms are options; the user picks the terms that apply to the case.
105, 5001, *Insurance*	Civil Justice Association of California, by Kim Stone, Interim President	We recommend removing the cite to *Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, 1278, from the Sources and Authority. (The comment included numerous arguments as to why *Pebley* is wrongly decided.)	The committee's general policy when there may be legitimate arguments that the case is wrongly decided is not to remove cases from the Sources and Authority. As stated in the User Guide, the fact that a case excerpt is included in the Sources and Authority does not mean that the committee necessarily is endorsing the language as binding precedent.
	Thomas Murray, Attorney at Law, San Francisco	The *Pebley* case holding will continue to drive up health care costs and encourage fraud in medical billing and claimed need for treatment. Terrible policy. If we can force people to buy health insurance, we can force them to use it or face a mitigation argument.	See response above.
472, *Primary Assumption of Risk—Exception to Nonliability—Facilities Owners and Operators and Event Sponsors*	Association of Southern California Defense Counsel, by Robert A. Olson, Greines, Martin, Stein & Richland, Los Angeles	The proposed jury instruction takes out of context the discussion in *Hass v.RhodyCo Productions* (2018) 26 Cal.App.5th 11, 38. The proposal suggests that it is up to a jury to determine what risks are "not inherent in" a particular activity. But *Hass* does not say that. To the contrary, the Court of Appeal in *Hass* determined on its own what risks are inherent in or extrinsic to the sport of competitive distance running, without reference to what is or is not a fact issue. *Hass* determined as a matter of law that cardiac arrest is an inherent risk associated with long-distance running and that providing grossly negligent emergency medical services to long distance runners is "a risk extrinsic to the sport of long distance running. . . ."	The issue for the jury is not to determine the nature of a risk, but to decide whether the defendant addressed the risk appropriately.

Instruction	Commentator	Comment	Committee Response
		(See *id.* at pp. 38-40.) *Hass* only found a triable issue as to whether the race organizer provided grossly negligent medical services, not as to what risks are inherent or extrinsic.	
		The proposed revisions to the Directions for Use add to the confusion by using a "but see" reference for *Willhide-Michiulis*, erroneously suggesting the case is an outlier and is inconsistent with the previously cited case, *Luna v. Vela* (2008) 169 Cal.App.4th 102. *Willhide-Michiulis* is entirely consistent with *Luna,* which holds that a jury can decide if a defendant has increased the activity's inherent risks. (See 169 Cal.App.4th at pp. 112-113.) A jury cannot make such a determination until after the court determines the inherent risks.	*Luna* (and cases cited therein) holds that whether the defendant increased the risk is for the jury. *Willhide-Michiulis* says it is for the court. The committee, however, has changed the citation signal from "but see" to "cf."
		The proposed revision also fails to mention *Martine v. Heavenly Valley Limited Partnership* (2018) 27 Cal.App.5th 715, 724, which holds that collisions with other skiers while being taken down the mountain by the ski patrol in a sled after an initial fall is, as a matter of law, part of the inherent risks of skiing. Again, it is the court, not a jury, that decides what risks are inherent in or extrinsic to an activity.	*Martine* does not add anything different that is particularly on point. The revisions do not suggest that the jury is to decide what risks are inherent and what are extrinsic. The jury has the task of deciding whether the defendant increased or failed to minimize a risk.
		The instruction nowhere defines for the jury what a risk inherent in the activity is, and likely could never do so adequately. Such risks must be decided by a court on a case-by-case basis, which the instruction does not say.	Since the instruction is not giving the jury the task of determining what risk are inherent or extrinsic, it doesn't need to say anything about what the court should do.
		The proposed revision is also entirely unnecessary and therefore confusing. *Hass* recognizes that failing to minimize risks that are not inherent in the activity means that the defendant has unreasonably increased inherent risks. Yet the proposed instruction poses its two options for element 2 as alternatives. As soon as a plaintiff makes a claim that a defendant both increased inherent risks and failed to minimize a risk that is not inherent, the plaintiff is going to request both redundant paragraphs. The jury	The current element 2 does not encompass the *Hass* facts. Current element 2 addresses inherent risks. The proposed new option for element 2 addresses the *Hass* situation involving extrinsic risks.

Instruction	Commentator	Comment	Committee Response
		will end up being be instructed twice on the same legal theory, improperly increasing that theory's impact on the jury. The fact of the matter is that the current "unreasonably increased the risks … over and above those inherent in …" formulation already encompasses the *Hass* circumstance (the defendant arguably increasing the inherent running risk by not having promised available medical care).	
	Civil Justice Association of California, by Kim Stone, Interim President	By effectively declaring or requiring a jury to find that a defendant "unreasonably exposed" the plaintiff to an increased risk of harm, the proposed addition also ignores that, in many circumstances involving recreational activities or sporting events, "the risk cannot be eliminated without altering the fundamental nature of the activity." (*Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650, 658; *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156.)	This comment does not address the actual reason for the proposed additional option for element 2 – that there is a different rule for extrinsic risks. The comment addresses only inherent risks. Extrinsic risks, by definition, *can* be eliminated without altering the fundamental nature of the activity.
		Although the appellate court in *Hass v. Rohody Co Prodution* (2018 26 Cal, App 5th 11, indicates that the *Nalwa* supports its version of this rule, no such language similar to the proposed revised instruction is referenced in *Nalwa*.	*Nalwa* was not an extrinsic risk case.
	James P. Lemieux, Attorney at Law, Demler, Armstrong & Rowland, Long Beach	CACI 472's proposed modification does not address the "without altering the nature of the activity" parameter which is the crux of the 'new rule' in *Hass v RhodyCo Productions* (2018) 26 Cal.App.5th 11, 38. To address that, it should read: 2. That defendant <u>could have reasonably minimized</u> a risk that is not inherent in [e.g., snowboarding], <u>without altering the nature of that activity,</u> but failed to <u>reasonably</u> minimize that risk and unreasonably exposed plaintiff to an increased risk of harm.	The committee sees no need to add "without altering the nature of the activity." As noted above, an extrinsic risk is by definition one that does not involve the nature of the activity. However, the committee agreed to revise the element to clarify that there are two reasonableness standards. The court in *Hass* says: "the operator or organizer of a recreational activity … does have a duty to *reasonably* minimize extrinsic risks so as not to *unreasonably* expose participants to an increased risk of harm." (italics added)

Instruction	Commentator	Comment	Committee Response
			The "reasonably" and the "unreasonably" apply to two different matters: "minimize risk" and "expose."
	Thomas Murray, Attorney at Law, San Francisco	The existing language is clear and concise in stating the law. The proposed change is gobblydegook providing less clarity for both businesses and jurors.	The committee is unable to respond as the comment provides no reasoning for its "gobblydegook" conclusion.
1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof*	Association of Southern California Defense Counsel, by David K. Schultz, Polsinelli LLP, Los Angeles	By limiting and directing the proposed addition to the risk-benefit test, there is a significant risk that the Use Note will be improperly cited as a basis to preclude the admission of industry custom and practice evidence or argue that a jury cannot consider such on other issues, including to evaluate claims for negligence and punitive damages. This would result in legal error and unfairly prejudice defendants. Notably, the plaintiff in *Kim* did not argue, and the California Supreme Court did not hold, that evidence of custom and practice was inadmissible or a limiting instruction must be provided when claims are asserted in the case that involve the reasonableness of a manufacturer's conduct-which is directly at issue in claims for negligence and punitive damages.	This is an instruction on the risk-benefit test. The added language specifically mentions the risk-benefit test. The comment's concern is speculation that somebody might misconstrue the language and apply it in other areas. It is not the role of a jury instruction to guard against possible collateral misuse.
		A trial court should have discretion to consider when and whether to provide a limiting instruction. (See e.g. *People v. Dennis* (1998) 17 Cal.4th 468, 533- 34; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1990) 216 Cal.App.3d 388, 412.) However, the proposed addition to the Directions for Use mandates and directs that a limiting instruction should be requested by the opposing party and given in every case. This ignores the discretion that trial courts must be afforded when considering limiting instruction requests.	The trial court has no discretion. Per the Supreme Court in *Kim:* "[I]f the party opposing admission of this evidence makes a timely request, the trial court *must* issue a jury instruction that explains how this evidence may and may not be considered *under the risk-benefit test*." (*Kim, supra,* 6 Cal.5th at p. 38, emphasis added.)
		Even when a case only involves a strict product liability design defect claim, as in *Kim*, "evidence of industry custom and practice" is relevant for many purposes. (*Kim*, 6 Cal.5th at 26, 34-38.)	The court in *Kim* makes clear that there may be situations in which custom and practice evidence is not relevant. Nothing in the added language suggests that custom and practice can never be relevant.

Instruction	Commentator	Comment	Committee Response
		The comment then goes on to list 10 ways in which custom and practice may be relevant.	
		ASCDC respectfully requests that the proposed addition to the Directions for Use should be revised as follows: "If evidence of industry custom and practice has been admitted, a limiting instruction may be provided to the jury to explain how it may be considered under the risk-benefit test for a strict product liability claim. (See *Kim v. Toyota Motor Corp.* 6 Cal.5th 21, 30, 38, 40.) Evidence of industry custom and practice is also relevant and admissible when claims such as negligence are asserted that involve the reasonableness of a defendant's conduct. See *Bouse v. Madonna Const. Co.* (1962) 201 Cal.App.2d 26, 29 ["Evidence of the custom in a business or industry is admissible in negligence cases on the issue of what constitutes due care or negligence under the circumstances. Thus, an instruction relative to the effect of such evidence was not only proper but necessary."]; *Morgan v. Stubble.field* (1972) 6 Cal.3d 606, 621 fn.9 ["It is settled that proof of practice or custom is admissible to assist the trier of fact in determining what constitutes due care."]; *Kim,* 6 Cal.5th at 34 [Evidence "of industry custom and practice sometimes does shed light not just on the reasonableness of the manufacturer's conduct in designing a product, but on the adequacy of the design itself."]"	The Directions for Use to an instruction on the risk-benefit test is not the place for a lengthy discussion on industry custom and practice evidence.
		Alternatively, the Judicial Council is requested to include specific examples concerning the proper purposes for which industry custom and practice evidence may be considered to defend against strict product liability claims, by quoting the excerpts from the California Supreme Court's opinion in *Kim* that endorse the admissibility of custom and practice evidence.	There are also examples in *Kim* that indicate that custom and practice evidence would not be admissible. This is a jury instruction on the risk-benefit test, not on industry custom and practice evidence.

Instruction	Commentator	Comment	Committee Response
	Civil Justice Association of California, by Kim Stone, Interim President	There is no need for such a directive, as the law governing limiting instructions and the *Kim* case can certainly be applied without the proposed addition.	Including the proposed additional language flags the issue for bench and bar.
		There will be circumstances for which industry custom and practice evidence will be admitted for purposes other than defending against a strict product liability design defect claim—such as to defend against negligence and punitive damage claims. Thus, a direction to provide a limiting instruction for the opposing party and only for the strict product limiting claim is unduly biased in favor of a plaintiff.	Addressed above in response to comments of ASCDC.
		A trial court does have the discretion to consider when and whether to even provide a limiting instruction. See e.g. *People v. Dennis* (1998) 17 Cal.4th 468, 533–34; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1990) 216 Cal.App.3d 388, 412.) When a proposed limiting instruction is too restrictive, argumentative, narrow and/or misstates the purposes for which the evidence can be used, a trial court always has discretion to deny such. By essentially directing that a limiting instruction should be requested by the opposing party and given in every case, this will invite litigation and appeals over the use of improper limiting instructions.	Addressed above in response to comments of ASCDC.
		Whenever evidence has limited use or application, either side can request a limiting instruction to explain to the jury the purpose for which the evidence may and may not be considered.	The proposed language says: "a party opposing this evidence" may request a limiting instruction.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by	In the Directions for Use, we would refer to a "timely request" for a limiting instruction, to be more consistent with *Kim v. Toyota Motor Corp.* (2018) 6 Cal5th 21, 38.	The committee has made this addition.

Instruction	Commentator	Comment	Committee Response
	Reuben A. Ginsberg, Chair		
	Thomas Murray, Attorney at Law, San Francisco	The requirement that a trial court must, in all circumstances, give a limiting instruction with respect to custom and practice vis a vis the risk-benefit test is extreme and reduces the ability of the trial judge to consider context. And the requirement of a limiting instruction was not the holding in *Kim*.	The committee believes that the court's "must" language in *Kim* a holding.
	Orange County Bar Association, by Deirdre Kelly, President	The change fails to properly cite this case with its year. It should be cited as *Kim v. Toyota Motor Corp.* (2018) 6 Cal. 5th 21	The error was caught and corrected.
		the proposed language is not directly on point with the Court's decision. The *Kim* Court adopted the appellate court's limited approach to the admissibility and inadmissibility of evidence of industry custom and practice relating to a product defect allegation. (*Id.* at 37.) The Court held if the trial court determines that evidence of industry custom and practice is relevant to an element of the Risk-Benefit test and it is not being used simply for the purpose of showing that a manufacturer was acting no worse than its competitors, such evidence can be admitted subject to Evidence Code section 352 and a limiting instruction based on Evidence Code section 355 must be given on how this evidence should be considered by the jury if the opposing party makes a timely request. (*Id* at 37-38.) We propose the following instead of the current proposed change: "If the trial court determines that evidence of industry custom and practice is relevant to an element of the Risk-Benefit test and it is not being used simply for the purpose of showing that a manufacturer was acting no worse than its competitors, such evidence can be admitted subject to	The committee believes that it is not necessary to get into the question of admissibility. The proposed language says: "If evidence of industry custom and practice has been admitted… ." The intent is to simply advise bench and bar that a limiting instruction will be required under some circumstances.

Instruction	Commentator	Comment	Committee Response
		Evidence Code section 352 and a limiting instruction based on Evidence Code section 355 must be given on how this evidence should be considered by the jury if the opposing party makes a timely request. (*Kim v. Toyota Motor Corp.* (2018) 6 Cal. 5th 21, 37-38.)"	
	Otis Elevator Company and PBF Holding Company, by Jayme C. Long, Dentons US LLP, Los Angeles (same letter submitted on behalf of both companies)	The proposed change essentially mischaracterizes *Kim,* suggesting that a limiting instruction is all that is required for evidence of industry custom and practice to be admissible in a strict liability design defect case. By failing to describe the additional requirements for admission of such evidence set forth in *Kim*, the Advisory Committee has defaulted in its responsibility to provide impartial guidance to the Judicial Council.	The committee does not believe that the language mischaracterizes *Kim* in any way. True, the proposed language does not address when custom and practice may be admitted. The language tells what to do *if* the evidence has been admitted.
		we object to the proposal because it mandates that a limiting instruction is required in all cases upon request.	Addressed in response to comment of ASCDC above
		we object to the proposal because it fails to explain what a party must show to establish, and what the court must consider, to determine that evidence of industry custom and practice is relevant to the risk-benefit test, as set forth in the factors enumerated in the instruction.	The Supreme Court in Kim does not address exactly what the limiting instruction should say. The court only imposes a requirement that a limiting instruction be given if evidence of custom and practice is admitted for a limited purpose. The committee can do no more than to let bench and bar know that under some circumstances, a limiting instruction will be required.
		we object to the proposal because it does not explain that the court retains discretion to exclude such evidence even if it is found to be relevant.	Addressed in response to comment of ASCDC above.
		Suggested Modifications in Directions for Use: A party seeking admission of evidence of industry custom and practice in a strict products liability cases involving an alleged design defect bears the initial burden to establish the relevance of the evidence to one of the elements of the risk-benefit test, either causation or factors outlined in CACI 1204. (See *Kim v. Toyota Motor Corp.* (2018) 6 Cal.5th 21, 37.) Relevance depends on whether the	The committee has added "for a limited purpose" even though it's not in the court's language. The evidence could have been admitted with no limitation. As seen from the comments, custom and practice is a very complex issue, which is beyond the scope of the modest addition proposed for the Directions for Use to this instruction.

Instruction	Commentator	Comment	Committee Response
		evidence "sheds light on whether, objectively speaking, the product was designed as safely as it should have been, given 'the complexity of, and trade-offs implicit in, the design process.'" (*Ibid*.) The court retains discretion under the Evidence Code to exclude the evidence even if it is found to be relevant. (*Id.* at p. 38.) But if evidence of industry custom and practice has been admitted for a limited purpose, at the request of a party opposing this evidence or seeking its admission for a limited purpose, the jury must be given a limiting instruction on how this evidence may and may not be considered under the risk-benefit test. (*Ibid.*)	
2020, *Public Nuisance—Essential Factual Elements*, 2021 *Private Nuisance—Essential Factual Elements*	Association of Southern California Defense Counsel, by David K. Schultz, Polsinelli LLP, Los Angeles	We believe that the proposed deletion of language in CACI 2021 to eliminate the requirement that an alleged nuisance "interfere with a plaintiff's use and enjoyment" of land, conflicts with cases that recognize this is the "very essence" of a claim for private nuisance. (See e.g *Oliver v. AT&T Wireless Services* (1990)76 Cal.App.4th 521 , 534 ["However, the essence of a private nuisance is its interference with the use and enjoyment of land. '1; *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 Cal.4th 893, 937 ["Plaintiffs attempt to state a cause of action for private nuisance, i.e., a nontrespassory interference with the private use and enjoyment of land."]; *Chee v. Amanda Goldt Property Mgmt.* (2006) 143 Cal.App.4th 1360, 1373 ["Nuisance liability arises from violation of a duty to another that interferes with the free use and enjoyment of his or her property."].)	Substantial interference is element 4. It does not need to be in the introductory paragraph. The change conforms 2021 to 2020.
		The same is true with respect to the proposed modifications to eliminate the element of lack of consent from CACI 2020 and 2021- which numerous courts recognize is a required element for nuisance claims. See e.g. *Dep't of Fish & Game v. Superior Court* (2011) 197 Cal.App.4th 1323, 1352 ["The elements of a public nuisance, under the circumstances of this case, are … (5)	The committee agreed and has restored the element for lack of consent but bracketed to make it optional. The committee has expanded the Directions for Use to note that there is authority both for an element and a defense. The cases cited in the comment do support lack of consent as an element. But *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d

Instruction	Commentator	Comment	Committee Response
		plaintiffs did not consent to the 2007 poisoning; *Birke v. Oakwood Worldwide* (2009) I69 Cal.App.4th 1540, 1548 ["Thus, to adequately plead a cause of action for public nuisance ... fplaintiffs) must allege .... (5) neither Melinda Birke nor her parents consented to the conduct ... "].)	1125, 1138 and *Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal. App. 4th 334, 341–345 refer to the defense of consent, albeit in the context of claims between prior and subsequent owners of the same property.
		Although The twenty-eight year old case of *Mangini v. Aerojet-General Corp*. (1991) 230 Cal.App.3d 1125 discusses a plaintiff's consent as a "defense" to a nuisance claim (230 Cal.App.3d at p. 1140), the issue was still evaluated in the context of considering whether the complaint properly and sufficiently alleged a nuisance claim. When considering whether the defendant's activities were "undertaken with the consent of the owner" (*Id.* at 1138), the appellate court initially reviewed the lease provisions that governed the premises and alleged hazardous activities that constituted the claimed nuisance. The lease provisions were "patently ambiguous" (*Id.* at 1 I 40) because they did "not identify either the nature of the contemplated hazardous activity nor the nature of the contemplated nuisance," and "other provisions" made it "unclear whether the lease contemplated the disposal of waste of the kind and in the amounts pleaded in the complaint." (Id.) As a result, *Mangini* held the plaintiff's nuisance claim should be allowed to "survive demurer" because it could not determine the elements of "consent and lawful use" against the plaintiff "as a matter of law." (*Id.* at 1131, 1140.)	The court in *Mangini* says: "where, as here, an owner of property seeks damages for creation of a nuisance by a prior lessee, the lessee has a *defense* that his use of the property was lawful and was authorized by the lease; i.e., his use of the property was undertaken with the consent of the owner." (italics added). *Newhall* two years later cites *Mangini* for its handling of the defense of consent but finds no consent on its facts (prior owner cannot consent to its own contamination of property in action by subsequent owner).
	Civil Justice Association of California, by Kim Stone, Interim President	While *Mangini* referred to consent as a defense, the court did not expressly analyze whether consent was more properly an element or a defense.	That is true, but the courts in the cases listing lack of consent as an element provided no analysis either. In the absence of a case that analyzes the burden of proof and holds one way or the other, the committee believes that the issue is unresolved.
		Cites *Fish & Game* and *Birke* for proposition that lack of consent is an element	Addressed in response to comment of ASCDC above.

Instruction	Commentator	Comment	Committee Response
		Makes point that interference with use and enjoyment is the very essence of a claim for private nuisance.	Addressed in response to comment of ASCDC above.
	Thomas Murray, Attorney at Law, San Francisco	The holding in *Mangini* was specifically limited to a statute of limitations question. That is not authority to eliminate an element of the cause of action.	*Mangini* is not authority for dropping the consent elements. But it does raise enough doubt to to bracket them.
	Orange County Bar Association, by Deirdre Kelly, President	The added prefatory language of "created a nuisance" should be modified to read: "created or assisted in the creation of the nuisance." Case law is clear that a defendant may be liable for a nuisance, not just where the defendant created the nuisance, but also where the defendant "assisted in the creation of the nuisance." (See *People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 109.)	*ConAgra* does include "assisted in creating a nuisance." But there is a question as to whether this rule is limited to public nuisance or whether one can also be liable for assisting in the creation of a private nuisance. The committee has elected to defer consideration of the comment to the next release cycle.
		The second proposed modification to these proposed instructions concerns the deletion of the lack-of- consent elements. These elements should not be deleted from the Instruction. It is unclear, therefore why the element of lack of consent is being proposed to be deleted from the Instruction. To the extent the deletion was made on the theory that the defense of consent is an affirmative defense and thus should be the subject of a separate instruction, then a separate instruction would need to be crafted in this regard and included to accompany this proposed deletion. Without such a separate proposed instruction, the deletion of the element of the lack of consent, would be inappropriate.	The comment is correct that if the issue were settled as a defense, a separate instruction would be appropriate. But in light of the committee's conclusion that the issue is unsettled, a separate instruction would be premature.
		The addition of the discussion of the case of *Mangini v. Aerojet-General Corp*. (1991) 230 Cal. App. 2d 1125 to the "Sources and Authority" is appropriate, because it provides support for the essential factual element of lack of consent.	No response is necessary.
		The additional quoted language from the *Mangini* case (proposed to be added to CACI 2021 Private Nuisance), should also be added to the *Mangini* quote for the Public	The committee agreed and has added the additional language.

Instruction	Commentator	Comment	Committee Response
		Nuisance Instruction; i.e., the following should be added to the beginning of the *Mangini* quote in the "Sources and Authority" section for this Public Nuisance Instruction: "[W]here, as here, an owner of property seeks damages for creation of a nuisance by a prior lessee, the lessee has a defense that his use of the property was lawful and was authorized by the lease, i.e, his use of the property was undertaken with the consent of the owner." (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal. App. 2d 1125, 1138.	
2506, *Limitation on Remedies—After-Acquired Evidence*	Association of Southern California Defense Counsel, by Eric C. Schwettmann, Co-chair, Employment Law Subcommittee, Ballard Rosenberg Golper & Savitt, Encino	The added full paragraph appears to suggest that damages must be awarded for any time before the date the defendant discovered the plaintiff's misconduct. However, this language appears inconsistent with the holding of *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 430-31 (after-acquired evidence is not a complete defense to liability but may foreclose other available remedies, i.e. the amount of damages). ASCDC suggests that the last paragraph be amended to read: "If you find that [*name of defendant*] has proved that [*name of plaintiff*] [*describe misconduct*] and that [*name of defendant*] would have validly discharged [*name of plaintiff*] if [he/she/it] had known of the misconduct, then [*name of plaintiff*] may recover damages, **if any,** from any time before the date on which [*name of defendant*] discovered the misconduct."	The proposed language says: "may recover damages;" the committee sees no need to also add "if any."
	California Employment Lawyers Association, by Craig T. Byrnes	We could not posit a situation in which the court would get to "decide[] to allow the jury to award damages or to make a finding on damages" as a consequence of this affirmative defense. Whether damages are to be awarded is not a decision left to the trial judge. That is a factual	The "decides to allow" refers to the previous discussion in the Directions for Use, that the court could take the fact-finding away from the jury because the judge deems the claim to be purely equitable.

Instruction	Commentator	Comment	Committee Response
	and Leonard H. Sansanowicz	question for the jury. Therefore, the comment should be deleted and the paragraph made mandatory.	
		We also propose deleting the last sentence from this paragraph and adding it as element 4 to the affirmative defense. That is, make "[[*Name of defendant*] must prove the date of discovery]]" as a fourth element. After-acquired evidence is an affirmative defense, and the burden is on defendant to prove every element of it. (See *Murillo v. Rite-Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 842, 845–846 (1998) (discussing after-acquired evidence as an affirmative defense).)	The burden of proof is made clear in the last paragraph.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We believe that whether particular conduct constitutes misconduct can depend on the facts, so an example such as the bracketed example in the second line of the instruction "e.g. had provided a false Social Security Number," may not be helpful. We would delete this language.	Whether particular conduct constitutes misconduct depends on the facts and therefore an example was provided. The committee finds the example to be helpful.
		The language "validly discharged" in the final paragraph of the instruction is not adequately defined. We would make a more specific reference to the language in element 3 stating the appropriate standard: ". . . would have ~~validly~~ discharged [*name of plaintiff*] as a matter of settled company policy if . . . ."	"Validly" does not just refer to element 3; it refers to all of the elements. While disagreeing with the comment's proposed revision, the committee did agree that "validly" without further explanation, would be confusing to the jury. The committee has revised this language to omit "validly."
	Orange County Bar Association, by Deirdre Kelly, President	The after-acquired evidence defense also applies to failure to hire. (See *Salas v. Sierra Chemical Co.* (2014) 59 Cal. 4th 407, 428 ("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.")	The committee agreed and has added "refused to hire" as an option to "terminated" throughout the instruction.
		Propose deleting the word "validly" as it could result in confusion and there is no authority using or defining the term.	Addressed above in response to the comment of the California Lawyers Association.

Instruction	Commentator	Comment	Committee Response
2508, *Failure to File Timely Administrative Complaint (Gov. Code, § 12960(d))—Plaintiff Alleges Continuing Violation*	Association of Southern California Defense Counsel, by Eric C. Schwettmann, Co-chair, Employment Law Subcommittee, Ballard Rosenberg Golper & Savitt, Encino	The revised paragraph 1 states "That [*name of defendant*]'s [*e.g. harassment*]" This appears confusing and given the reference to "conduct" in elements 2 and 3, the word "conduct" should be added between "[name of defendant]'s and "[*e.g. harassment*]."	The "*e.g., harassment*" refers back to the previous reference in the second paragraph: "[*specify the unlawful practice, e.g., harassment*]" That is the CACI format for providing examples after the first iteration. For elements 2 and 3, it is not necessary to use "*e.g., harassment*" again; it's fine to switch to just "conduct."
	California Employment Lawyers Association, by Craig T. Byrnes and Leonard H. Sansanowicz	The way the instruction currently reads, juries could be confused as to the scope of a DFEH administrative complaint, and what it reasonably should be read to include. Therefore, we propose the following optional language to be included in this instruction, and changing the title of the instruction to: "Failure to File Timely Administrative Complaint (Gov. Code, §12960(d)): [[*Name of defendant*] claims that [*name of plaintiff*] did not include in [his/her] DFEH complaint the [harassment/discrimination/retaliation] issue for which [he/she] is suing. If [*name of defendant*] proves that the [harassment/discrimination/retaliation] issue was not included in the DFEH complaint, [*name of plaintiff*] may still recover for those acts if you find them to be like or related to those issues that were included.]	The comment is really proposing a different instruction unrelated to the continuing violation rule. They would broaden this instruction to encompass a second issue that might come up with regard to a DFEH complaint; a deviation between the conduct alleged in the administrative complaint and the conduct sued on. The committee will consider drafting such an instruction in the next release cycle.
		The comment proposes adding three cases, *Baker v. Children's Hospital Medical Center* (1989) 209 Cal.App.3d 1057, 1064, 1065; *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655; and	The three excerpts proposed all present points related to deviation between the administrative complaint and the pleadings. None have anything to do with the continuing violation rule. They would be

Instruction	Commentator	Comment	Committee Response
		Nazir v. United Airlines, Inc. (2009) 178 Cal.App.4th 243, 267, 266 - 67 (2009) to Sources and Authority:	appropriate should the committee go forward with a new instruction.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We believe the proposed new language in the second paragraph of the instruction could be stated more clearly. We propose: "[*Name of plaintiff*] may recover ~~only~~ for acts of alleged [*specify the unlawful practice, e.g., harassment*] that occurred ~~after~~ before [*insert date one year before the DFEH complaint was filed*], ~~unless~~ only if [he/she] proves all of the following:" If the language is not changed as proposed, we would change "that occurred after" to "that occurred on or after" so as to capture the day exactly one year before the complaint was filed, which is within the limitations period.	The committee agreed with the comment and has made the proposed revisions.
		In element 1, we would change "that occurred after that date" to "that occurred on or after that date" so as to capture the day exactly one year before the complaint was filed, which is within the limitations period.	The committee agreed and has made the change.
2510, *"Constructive Discharge" Explained*	Association of Southern California Defense Counsel, by Eric C. Schwettmann, Co-chair, Employment Law Subcommittee, Ballard Rosenberg Golper & Savitt, Encino	The added paragraph, taken from *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, is misleading and does not include the full context of the quoted excerpts as demonstrated in the Sources and Authority. The last sentence ("But in some circumstances, a single intolerable incident may constitute a constructive discharge") in particular could badly mislead a jury because they are not going to have read the rest of the *Turner* decision, which makes it clear that last sentence almost never applies. ASCDC is generally not aware of any published decision finding a viable constructive discharge claim based on a single outrageous act. The first added sentence is consistent with *Turner* as is the second sentence. However, in the event the last sentence is deleted as it	What is not included is *Turner's* specific reference to criminal acts as an example of a single intolerable incident. The committee believes that the added language captures the language of *Turner* in a balanced way.

Instruction	Commentator	Comment	Committee Response
		should be to accurately reflect constructive discharge principles, then the second sentence should likewise be omitted.	
2521A, B, and C, 2522A, B, and C, *Hostile Work Environment Harassment* 2524, *"Severe or Pervasive" Explained*	Association of Southern California Defense Counsel, by Eric C. Schwettmann, Co-chair, Employment Law Subcommittee, Ballard Rosenberg Golper & Savitt, Encino	The Committee has indicated that it is considering possible revisions to this set of instructions relating to hostile work environment harassment in light of the passage of Government Code § 12923. ASCDC submits that the majority of § 12923 (particularly (b), (c), (d) and (e)) relate to the Court's analysis of prior case authority in relation to motions for summary judgment. Whether or not a single incident of harassment (sub. (b)) may create a triable issue of fact is irrelevant for the jury. The rejection of the "stray remarks" doctrine (affirming *Reid v. Google, Inc.* (2010) 50 Cal.4th 512) (sub. (c)) likewise is not a matter the jury would be considering in relation to the CACI instructions. Likewise, the determination that the standards for determining the existence of a hostile work environment should not vary from workplace to workplace (disapproving in whole or in part *Kelly v. Conco Companies* (2011) 196 Cal.App.4th 191) (sub. (d)) is not a matter which needs to be included or considered vis-à-vis the existing instruction language. ASCDC submits that this set of instructions still accurately reflect the standards for hostile work environment harassment. Further, ASCDC believes that any attempt to graft on the summary judgment-related, or non-jury question, standards of pars. (b)-(d) would be confusing, misleading, and improper as a matter of fact and law.	Consideration of possible revisions to the harassment instructions is currently underway. This comment has been provided to the committee. It will be substantively addressed in an upcoming release when the committee completes its work on these instructions.
	California Employment Lawyers Association, by Craig T. Byrnes and Leonard H. Sansanowicz	We support adding to the second element of each of these instructions to include harassment on the basis that the plaintiff was perceived to be a member of the protected class or associated with a member of the protected class. Each element would therefore read:	The Directions for Use say to "Modify element 2 if plaintiff was not actually a member of the protected class but alleges harassment because he or she was perceived to be a member or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).) The committee believes that this is sufficient.

Instruction	Commentator	Comment	Committee Response
		2. That [name of plaintiff] was subjected to unwanted harassing conduct because [he/she] was [*protected status, e.g., a woman; and/or perceived to be [a member of the protected class] and/or associated with [a member of the protected class*]	
		Add to "Sources and Authority:" Gov. Code § 12926(o) (" 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, or military and veteran status' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.")	GC 12926(o) is currently included under the label "Perception and Association. The committee no longer quotes statutory language in the Sources and Authority.
		In response to the advisory committee currently considering revisions to the harassment instructions in light of SB 1300 (Stats. 2018, ch. 955.), we have submitted a separate letter detailing how the committee should incorporate the new language into the harassment jury instructions.	This separate letter has also been provided to the committee for its consideration of possible changes to these instructions.
	Orange County Bar Association, by Deirdre Kelly, President	Government Code Section 12923 includes the legislature's intent regarding harassment claims but does not otherwise alter the elements of this claim. While Government Code section 12923(b) states that a single incident of harassing conduct may be sufficient to create a triable issue of fact, this deals with evaluating claims at the summary judgment stage. In addition, this provision within Government Code Section 12923 simply codified pre-existing law. Could consider referencing statute in source of authority section.	This comment has also been provided to the committee.
2540, 2541, 2544, Disability Discriminatio n	Association of Southern California Defense Counsel, by Eric C. Schwettmann,	ASCDC believes that the proposed revisions to these instructions to reflect the legal protections afforded job applicants as set forth in *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696 are consistent with that decision and existing standards.	No response is necessary.

Instruction	Commentator	Comment	Committee Response
	Co-chair, Employment Law Subcommittee, Ballard Rosenberg Golper & Savitt, Encino		
2540, 2541	California Employment Lawyers Association, by Craig T. Byrnes and Leonard H. Sansanowicz	We propose that the language of the "essential job duties" element be modified to reflect the language of the statute: Revise element 4 of 2540 as follows: "[with or without reasonable accommodation for [his/her] [*e.g., physical condition*]];"	By bracketing the language to make it optional, "without" is not needed. If no reasonable accommodation is needed, the optional language is omitted.
		We propose a similar change for element 5 of 2541, but since that instruction also addresses reassignment, it should include language encompassing union members who seek to use their bumping rights, as follows: To: That [*name of plaintiff*] was able to perform the essential job duties of [[his/her] current position or a vacant alternative position to which [he/she] could have been reassigned/the position for which [he/she] applied][or, if plaintiff was in a union and had seniority bumping rights, that plaintiff was able to perform the essential job duties of the job that they sought pursuant to those rights] with or without reasonable accommodation for [his/her] [e.g., physical condition];	The committee sees no reason to elevate one particular fact situation into the instruction. And since this is the "reasonable accommodation" instruction, there is no need for "or without," since it will always be "with."
2544, *Disability Discrimination—Affirmative Defense—*	California Employment Lawyers Association, by Craig T. Byrnes and Leonard H. Sansanowicz	The current Instruction 2544 relies on section 11067(c)-(e) of the California Code of Regulations for authority. Since the date this instruction originally was adopted, the Fair Employment and Housing Council substantially revised that section of the regulations. To date, the instruction has not been updated to reflect those revised regulations and the current proposed revision to the instruction does not	The comment is beyond the scope of matters considered by the committee. It will be addressed in the next release cycle.

Instruction	Commentator	Comment	Committee Response
Health or Safety Risk		account for those regulatory changes. Those considerations should be included in the jury instruction. (The comment then presents a complete revision of the instruction.)	
		Also add: "In determining whether [*name of defendant*]'s above defense has merit, you must consider the following factors: o The duration of the risk; o The nature and severity of the potential harm; o The likelihood that the potential harm would have occurred; o How imminent the potential harm was; and o Relevant information regarding [*name of plaintiff*]'s past work history. The analysis of these factors should be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."	This will be addressed in the next release cycle.
		Add to "Sources and Authority:" 2 CCR § 11067(b)-(e), which has this exact language.	This will be addressed in the next release cycle.
2704, *Damages—Waiting-Time Penalty for Nonpayment of Wages*	California Employment Lawyers Association, by Craig T. Byrnes and Leonard H. Sansanowicz	Change: "may be entitled to receive an award of a civil penalty" to "may be entitled to receive an award of a statutory penalty" The cases make a distinction between civil and statutory penalty. They can be cumulative. This penalty is a statutory one.	The committee believes that the jury does not need to know the difference between a civil penalty and a statutory penalty. However, the language has been changed to refer to an "additional penalty."
		Add to "Sources and Authority:" *Caliber Bodyworks, Inc., v. Sup. Ct.* (2005), 134 Cal.App.4th 365, 378 (referring to "the statutory penalty provided by section 203).	The committee agreed and has made this addition.

Instruction	Commentator	Comment	Committee Response
		Change: "That [*name of plaintiff*] [was terminated from/quit] [his/her] employment with [*name of defendant*];" To: ""That [*name of plaintiff*]'s employment with [*name of defendant*] ended" The statute requires only that the plaintiff's employment ended. There is no requirement to prove the nature of the end of employment as either a termination or a quit.	The committee agreed and has made this revision.
		Change: "The term 'willfully' means that the employer intentionally failed or refused to pay the wages" To: "The term 'willfully' means that the employer intentionally failed or refused to pay the wages <u>when owed. [*Name of plaintiff*] does not need to prove that [*name of defendant*] acted with malice or bad intent</u>."	"When owed" is not needed because "when due" is in element 2. The committee agreed to add the limitation on not having to prove malice or bad intent, which comes from the recent case of *Nishiki v. Danko Meredith, P.C.* (2018) 25 Cal.App.5th 883, 891. The opinion says that "'willful' … does not necessarily imply anything blamable." But the committee doubts that a jury will correctly understand the word "malice." It has added the following language: The term "willfully" means <u>only</u> that the employer intentionally failed or refused to pay the wages. <u>It does not imply a need for any additional bad motive.</u>
		In Directions for Use. change Labor Code section cites from "(see Lab. Code, §§ 201, 201.5, 201.7, 202, 205.5)" to "(see Lab. Code, §§ 201, <u>201.3</u>, 201.5, ~~201.7~~, <u>201.9</u>, 202, 205.5)" (These citations support the statement that "Final wages generally are due on the day an employee is discharged by the employer, but are not due for 72 hours if an employee quits without notice."	The "due when discharged" clause is from Labor Code § 201(a); the 72-hour "quit without notice" rule is in Labor Code § 202. Those are the only cites that are needed.

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		Add to "Sources and Authority:" "Currently, the question of whether meal period premium wages can serve as the predicate violation for Section 203 waiting time penalties where the employer does not include the premium wage in the employee's pay or pay statements during the course of the violations has been certified by the United States Court of Appeals, Ninth Circuit to the California Supreme Court. See *Stewart v. San Luis Ambulance, Inc.* (9th Cir. 2017) 878 F.3d 883 (request for certification granted March 28, 2018, S246255)."	The proposed addition is not an excerpt from an opinion.
		Add to "Sources and Authority:" "The purpose of section 203 is to compel the prompt payment of earned wages; the section is to be given a reasonable but strict construction. [Citation.] ... '[The] statute should have reasonable construction. Its design is to protect the employee and to promote the welfare of the community .... But it is to be observed that the most formidable objection to the statute derives its principal force from the supposed hardships of a hypothetical case wherein the employer is without fault or the employee is guilty of culpable conduct. The statute ... contemplates that the penalty shall be enforced against an employer who is at fault. It must be shown that he owes the debt and refuses to pay it. He is not denied any legal defense to the validity of the claim.' [¶] However, to be at fault within the meaning of the statute, the employer's refusal to pay need not be based on a deliberate evil purpose to defraud [employees] of wages which the employer knows to be due. As used in section 203, 'willful' merely means that the employer intentionally failed or refused to perform an act which was required to be done." Similarly, "[i]n civil cases the word "willful" as ordinarily used in courts of	The Sources and Authority already have the underlined part of the excerpt. The committee believes that is sufficient. If one clicks on the citation in an electronic product, one can read the rest of it on Lexis or Westlaw.

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		law, does not necessarily imply anything blameable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done, was done or omitted intentionally. It amounts to nothing more than this: "That the person knows what he is doing, intends to do what he is doing, and is a free agent." ' " (*Nishiki v. Danko Meridith, APC* (2018) 25 Cal.App.5th 883, 891 (citations omitted)	
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	As revised, the instruction essentially uses the term "willfully" and then defines "willfully" as "intentionally." We would use the term "intentionally" instead of "willfully" in the first item 3: 3. That [*name of defendant*] ~~willfully~~ intentionally failed to pay these wages."	The committee does not think that it should avoid the word "willfully" since it is in the statute. Note that the proposed rewrite would also remove "or refused." The committee believes that "or refused" is required; In fact, "refused" fits better with "intentionally" than does "failed."
		Nishiki v. Danko Meredith, P.C. (2018) 25 Cal.App.5th 1460, 1468, elaborates on the meaning of "willful" or "intentional." We would replace the sentence after the first element 3 with the following language based on *Nishiki*: "A person acts intentionally if the person knows what he or she is doing and intends to do what he or she is doing."	By replacing "willfully" with "intentionally," the language is now circular (acts intentionally if intends).
	Orange County Bar Association, by Deirdre Kelly, President	The language in the instruction that the Plaintiff must demonstrate the defendant failed to pay the wages "when due" creates unnecessary ambiguity, because it is not clear from the instruction when the payment was due. It is likely that, since this is an element of the claim, if the parties do not agree to the date on which the wages were due, the jurors will either be (1) unable to determine the answer or (2) seek guidance from the parties and the court, slowing down the process of them reaching a verdict. The instruction as it currently exists alleviates these problems	The committee saw the issue and has made a small change to address it. In the second part of the instruction as proposed, the jury must find the date on which employment ended. This has been revised to find the date on which the wages were due. Wages are not always due on the date when employment ends; for example, when a person quits without notice.

Instruction	Commentator	Comment	Committee Response
		by including the date that the wages were due as part of the instruction.	
3725, *Going-and-Coming Rule—Vehicle-Use Exception*	Association of Southern California Defense Counsel, by Edward L. Xanders, Greines, Martin, Stein & Richland, Los Angeles	The proposed revision should—indeed, must—be rejected. The proposed revision misstates the holding in *Newland v. County of L.A.* (2018) 24 Cal.App.5th 676, improperly denigrating it. What *Newland* holds is that the going and coming rule applies (and the Vehicle Use Exception to that rule does not apply) where the employer did not require the employee to have the vehicle available at work on the day of the accident and did not benefit from the vehicle being available *that day*. The proposed CACI revision fundamentally mischaracterizes *Newland's* actual language and holding. It characterizes *Newland* as holding that the employee must have been using the vehicle "to do the employer's business or provide a benefit for the employer at the time of the accident." That characterization of *Newland* makes no sense. If the issue in *Newland* were (as the proposal suggests) whether the employee was conducting the employee's business or benefitting the employer at the time of the accident, the Vehicle Use Exception would have been irrelevant. (The comment goes on to support this position with several pages of argument, but it all comes down to whether the holding is "day of accident" or "time of accident.")	There is language in *Newland* that could lead to one of two conclusions re: a temporal requirement. The words "time of the accident" appear many times. The committee sees no way to construe that language other than as meaning that the employee must have been driving within the scope of employment when the accident happened. But the words "day of the accident" also appear many times including this summation at the end: "There was no evidence that [employee] required a vehicle for work on the day of the accident, and no evidence that the [employer] received any direct or incidental benefit from [employee] driving to and from work that day." So under this construction as advanced by ASCDC, if the employee will need the car on Monday, Monday's commute is within the scope of employment whether or not the employee was engaged in the employer's business at the time of the accident. But if the employee will not need a car on Tuesday, then Tuesday's commute is not excepted. That would arguably be a reasonable limitation on the vehicle use exception, albeit not one clearly established before *Newland*. The committee now believes that both possible constructions of *Newland* need to be presented. The proposed additional language in the Directions for Use has been expanded to include the possibility that it is the day of the accident that must be looked to.

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	Association of Defense Counsel of Northern California and Nevada, by Don Willenburg, Chair, Amicus Brief Committee, Gordon & Reese, San Francisco	The proposed change focuses on "at the time of the accident." But as is clear from the larger quote (and the rest of the decision), the time frame is "that day:" whether the employer "required [the employee] to use his personal vehicle for work purposes that day" or "otherwise benefit[ted] from his use of a personal vehicle that day." The issue arose in *Newland* because the employee needed the car for work some but not all days.	See response above.
	Thomas Murray, Attorney at Law, San Francisco	If we are going to continue to whittle away at the going and coming rule, I suggest adding that "a benefit to the employer" does not include the employee showing up for work.	No citation has been provided for the proposed addition.
	Orange County Bar Association, by Deirdre Kelly, President	The proposed language in the Directions for Use is not helpful to the litigant or the judge relating to the time during which an employee or agent was using their vehicle. The proposed language is based on appellate court case *Newland v. County of L.A.* (2018) 24 Cal.App.5th 676. As the proposed language clearly points out, there is time-honored case law that differs from the reasoning in *Newland* that relates to the absence of any temporal requirement when upholding the use of the vehicle use exception to the going and coming rule. See e.g. *Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301; *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal.App.3d 803. As such, the addition of the proposed language will confuse and unnecessarily frustrate the application of the vehicle use exception to the going and coming rule.	The committee believes that it is better to flag the case for bench and bar and point out possible concerns than to ignore it.
		The timing by which a person is using their vehicle has been addressed is several precedential cases. In fact, case law has found that a person not using their vehicle at the time of the accident for the benefit of the employer to still be considered a vehicle use exception to the going and	The committee agrees with the comment if *Newland* means that the employee must be doing the employer's work "the time of the accident." But this is the point that the committee wants to make in the

Instruction	Commentator	Comment	Committee Response
		coming rule. (See *Richards v. Metropolitan Life Ins. Co.* (1941) 19 Cal.2d 236.) This general rule was expanded in *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal.App.3d 803 and *Lobo v. Tamco* (2010) 182 Cal.App.4th 297. Most recently, in *Sumrall v. Modern Alloys, Inc.* (2017) 10 Cal. App. 5th 961, though not a vehicle use exception case but rather a business errand case, the appellate court found that there was a triable issue of fact relating to whether a vehicle user was in the course and scope of his employment while in his personal vehicle on his way to drop off his vehicle to get into a work vehicle.	Directions for Use; that so construed, *Newland* is contra to a long line of authority.
3903Q, *Survival Damages (Economic Damage)*	Civil Justice Association of California, by Kim Stone, Interim President	Our members oppose the new proposed CACI 3903Q because the instruction circumvents case law that holds in the case of instantaneous death, punitive damages don't "survive' to be recovered by the estate or representative(s) in the survival action. Although the new instruction has a title of economic damages, the commentary includes reference to punitive damages. We think this instruction confuses wrongful death actions with survival actions. We suggest changing the language to the following: If you decide that [*name of plaintiff*] has proved [his/her] claim against [name of defendant] for the death of [*name of decedent*], you also must decide the amount of damages that [*name of decedent*] sustained before death and would have been entitled to recover because of [*name of defendant*]'s conduct ~~The recoverable damages are limited to the loss or damage that [name of decedent] sustained or that occurred before [his/her] death~~[, including any [penalties/ [or] punitive damages] as explained in the other instructions that I will give you]. [[[Specify other ~~types~~ categories of recoverable damage listed in CACI 3903 to the extent they are supported by	The committee does not believe that the instantaneous death point is needed in the instruction. In any event, the comment's proposed rewrite does not address the effect of instantaneous death. The committee agreed to delete the limitation sentence in favor of just saying "sustained before death" as proposed. The committee believes that changing "types" to "categories" is of no significance but has decided that neither word is really needed. The reference to CACI No. 3903 is of no value as 3903 is just a lead-in sentence to listing all items of economic damage. The committee is concerned that by telling the jury that it may not award damages for "pain, suffering, or disfigurement," it might award damages for grief, anxiety, humiliation, etc. – those aspects of noneconomic damages that are not expressly excepted in § 377.34. The committee has, however,

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		the evidence, but not including damages for pain, suffering, or disfigurement, and not including "lost years" future damages.	added a reference to the prohibition on pain, suffering or disfigurement in the Directions for Use. With regard to "lost years future damages," the committee has added this sentence to the end of the instruction: "You may not award damages for any loss for [*name of decedent*]'s shortened life span attributable to [his/her] death."
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We would revise the second sentence in the instruction for greater clarity: "The recoverable damages are limited to the loss or damage that [name of decedent] sustained ~~or that occurred~~ before [his/her] death, including . . . ."	The committee agreed and has removed "or that occurred."
		We would add to the Directions for Use a statement that if this instruction is given other instructions such as CACI Nos. 3903A, 3903C, and 3903E that might duplicate some of the items of damages should not be given.	The committee agreed with the comment and has addressed other possible damages instructions in the Directions for Use. If, for example, 3903A on past and future medicals were given, the future medicals language would have to be deleted. Optional item 1 says everything that the "past" part of 3903A says. The same is true for 3903C on lost income (past and future).
	Otis Elevator and PBF Holdings (same letter)	This is a long letter, which would be tedious to try to reproduce here. On pp. 6 and 7 is their proposed revised instruction. I'm going to take each proposed revision and address them one at a time. First: Change item 1 on medical expenses to read: 1. The ~~reasonable~~ cost of ~~health~~ medical care that [name of decedent] received from health care professionals;]	The committee believes that item 1 should mirror 3903A, which includes "reasonable," but uses "medical" instead of "health."

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		We object to the proposal because it Indicates that damages for medical expenses may be awarded for an amount that is reasonable rather than for the actual, out-of-pocket loss, even when those services are provided by a professional.	
		Add and make optional the following two items of potential recovery: [2. The reasonable value of health care services provided to [*name of decedent*] by family members;] [3. The reasonable value of health care services that [*name of decedent*] would have provided to [*name of family member*] prior to [*name of decedent*]'s death;] We object to the proposal because it omits to include a specific type of damage for the reasonable value of home health care services provided by the decedent before death. Both measures of damages related to health care services were expressly allowed by the court in *Williams v. The Pep Boys Manny Moe & Jack of California* (2018) 27 Cal.App.5th 225. The instruction would enable a jury to award all types of health care damage in a lump sum. For example, unless directed to do otherwise by a special verdict, a jury could render an unapportioned award for out-of-pocket medical expenses and gratuitously provided services, making any post-verdict or appellate challenge to the award virtually impossible.	The committee believes that family-provided medical services (comment additional item 2) would constitute "reasonably necessary medical care" per item 1 (with "health" changed to "medical") as item 1 is not limited to health care professionals. As the comment notes, separation can be addressed in the verdict form if there is a reason to get separate dollar amounts from the jury. The committee agreed to add a specific item for services that the decedent could have provided to someone else (comment additional item 3).
		The cases cited as authority for the instruction in the Sources and Authority are neither complete nor in an order that logically explains how distinct elements of damage should be included in the instruction. While the cases are cited accurately for their principles, they are not	It is not the purpose of the case extracts in the Sources and Authority to explain how and under what circumstances the instruction should be used. That is the function of the Directions for Use. Proposed additions to the Directions for Use in

Instruction	Commentator	Comment	Committee Response
		provided in a manner that best explains how and under what circumstances the instruction should be used and/or modified.	response to other comments above at least partially address this concern, which is not specific enough to address further.
4002, *"Gravely Disabled" Explained*, and 4003, *"Gravely Disabled" Minor Explained*	Orange County Public Defender, by Sara Ross, Assistant Public Defender	The proposed deletion is based on In *Conservatorship of M.B.* (2018) 27 Cal.App.5th 98 (M.B.), a recent case that represents a drastic sea change to the minor's definition of gravely disabled. *M.B.'s* determination that Section 5008, subdivision (h)(1)(A), is the appropriate definition for gravely disabled minors is problematic for several reasons. *M.B.* bases its rationale, in part, on the fact that Section 5585.25 is not located in the LPS Act and is instead found in the Children's Civil Commitment and Mental Health Treatment Act of 1998. There is little to support the *M.B.* court's conclusion that this fact should so drastically change the definition of "gravely disabled" for minors and thus result in the deletion of CACI 4003. Furthermore, while M.B. also bases its ruling on prior precedent, such precedent is questionable; in support of its holding, *M.B.* relies upon a footnote from *In re Michael E.* (1975) 14 Cal.3d 183, a case published nearly forty-five years ago which pre-dates the publication of CACI 4003.	The comment argues that the case is wrongly decided, so it shouldn't be addressed in CACI. If there were some authority contra, the committee would be sure to include that authority. But the comment points to no case that could be advanced as supporting a different result. And the committee believes that on the law if not on policy, the court's holding is correct. Courts shouldn't go outside of the Lanterman Petris Short Act to define terms that are expressly defined in the LPS.
		The decision to revoke CACI 4003 defies common sense. Put simply, children are different than adults. Indeed, children, even those who are not suffering from mental disorders, are not expected to provide their own food, clothing, and shelter. Instead, the analysis for whether a minor is gravely disabled is whether a minor is able to utilize resources provided to him or her for purposes of food, clothing, and shelter. In other words, the failure of a child to provide his or her own food, clothing, and shelter does not demonstrate that the child is "gravely disabled"; it reflects that the child is just *a child*. Thus, the original definition found in CACI 4003, based upon Section	While the committee sees some validity to the policy arguments presented, it is the province of the Legislature, not of a jury instructions committee, to improve the law.

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		5585.25, is appropriate because it reflects a minor's ability to utilize "those things that are essential to health, safety, and development, including food, clothing, and shelter, even if they are provided to the minor by others…" (CACI 4003.)	
4106, *Breach of Fiduciary Duty by Attorney—Essential Factual Elements*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We believe the word "intentional" encompasses "fraudulent" as that word is used in this context, so we would delete "or fraudulent" in the first sentence of the second paragraph in the Directions for Use.	The committee agrees that "intentional" and "fraudulent" do not mean the same thing. But the *Knutson* case (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1093–1094) on which the paragraph is based is a fraud case. The committee sees no harm in leaving "fraudulent" in.
	Paul R. Johnson, Attorney at Law, King & Spalding, Los Angeles	I write to express concern about the paragraph proposed to be added to the Directions for Use and would delete it. This paragraph presents a problem broader than this one instruction by suggesting a false dichotomy between the "substantial factor" test and basic "but for"/cause-in-fact causation. This could confuse the "substantial factor" test for any intentional tort. As explained by the California Supreme Court in *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1239–1240, the "substantial factor" test subsumes the requirement of "but for" causation (i.e., cause in fact), except in cases of concurrent independent causes. (See *ibid.* [citing Restatement Second of Torts, § 432]; accord CACI 430, Directions for Use.) That is, absent concurrent independent causes, conduct is not a "substantial factor" in causing harm unless it is a cause-in-fact of that harm. The meaning of "substantial factor" does not change depending on whether a cause of action involves conduct that is negligent as opposed to intentional. The Guide for Using Judicial Council of California Civil Jury	The new paragraph says that "substantial factor" is the test for intentional or fraudulent breach of fiduciary duty. The committee finds no suggestion that substantial factor is intended to be limited to negligence, here or anywhere. The issue to be spotted is that *Viner v. Sweet* (2003) 30 Cal.4th 1232 requires "but for" (would have happened anyway) causation for legal malpractice, and *Knutson* says that this applies to negligent breach of fiduciary duty.

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		Instructions that precedes all CACI instructions recognizes as much: "Substantial Factor: The instructions frequently use the term 'substantial factor' to state the element of causation, rather than referring to 'cause' and then defining that term in a separate instruction as a 'substantial factor.' An instruction that defines 'substantial factor' [CACI 430] is located in the Negligence series. *The use of the instruction is not intended to be limited to cases involving negligence.*" (CACI User Guide (2019 ed.), emphasis added.)	
		The recent Court of Appeal case cited in the proposed direction for CACI 4106, *Knutson v. Foster* (2018) 25 Cal.App.5th 1075, said that the "substantial factor" test applies to a fraud claim. It used the term "but for" as the equivalent of the "trial within a trial" standard in noting a more stringent causation test for legal-malpractice claims based on negligence. (*Id.* at pp. 1078–1079.) It is possible the *Knutson* court erroneously saw the "substantial factor" test as at odds with basic "but for" causation instead of subsuming it. (See *id.* at pp. 1091–1092.) But *Knutson* should be read more narrowly, as using "but for" in a specific application in the more stringent causation test for legal-malpractice claims based on negligence. The CACI 4106 Directions for Use should not suggest a false conflict between the "substantial factor" test and basic, commonly understood "but for"/cause-in-fact causation when the California Supreme Court has already shown there is no such conflict, absent the exception for concurrent independent causes. (*Viner v. Sweet, supra*, 30 Cal.4th at pp. 1239–1240.)	The committee does not believe that the court in *Knutson* was erroneous in any way. This extension of *Viner v. Sweet* to negligent breach of fiduciary duty in this instruction does not raise any of the concerns of the comment.
4570 et seq. *Right to*	Association of Defense Counsel	As a first impression of the Right to Repair Act instructions, it is our opinion that the proposed	A "functionality standard" is not plain language readily understood by a jury.

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Repair Act – General Comments	of Northern California and Nevada, by Bobby Dale Sims Jr., Sims, Lawrence & Arruti, Sacramento	instructions use language contrary to Civil Code § 895 et seq. For example, the title for Proposed CACI 4570 states "Right to Repair Act – Construction Defects." This is in opposition to Civil Code § 895, et seq., which use the terms "functionality standards" and not the terms "construction defects." Every claim/allegation is now judged by whether it meets the specified functionality standard. We respectfully proffer that a better title for CACI 4570 (and subsequent instructions) should read: "Right to Repair - Violation of Functionality Standards - Essential Factual Elements." And, the first sentence of 4570 should not have the term "defects" but should use the phrase "violation of functionality standards." The rest of the proposed instructions also use the word "defect" or the term "construction defects". As this is not the language of the Code, these misnomers should be replaced in each proposed instruction as described above.	
		There is no proposed instruction for each affirmative defense under Civil Code § 945.5. Our members have drafted jury instructions for use in prior cases and we would be happy to submit proposed instructions for those defenses if the Committee would allow such submission.	Proposed new CACI Nos. 4572-4574 are on the affirmative defenses of CC 945.5(a), (b) and (d). And ADC-NCN has submitted comments on 4573 and 4574. So the committee does understand why they would say that "there is no proposed instruction for each affirmative defense." It is true that no instruction is proposed at this time on Civil Code § 945.5(c), the affirmative defense of failure to follow specifications. The committee is continuing to work on that instruction, which it intends to propose in the next release cycle.
4570, *Right to Repair Act—Construction*	Association of Defense Counsel of Northern California and	The Association of Defense Counsel of Northern California and Nevada opposes the proposed "Directions for Use" in that this portion of the "Directions for Use"	The alleged limitation is not in Civil Code § 942, which on its face it would seem apply to all possible defendants. So the question is whether Civil Code § 936 qualifies § 942.

Instruction	Commentator	Comment	Committee Response
Defects—Essential Factual Elements	Nevada, by Bobby Dale Sims Jr., Sims, Lawrence & Arruti, Sacramento	accompanying draft instruction 4570 is not entirely accurate: "In order to make a claim for violation of the Act, a homeowner need only show that the home does not meet the applicable standard. No further showing of causation or damages is required to meet the burden of proof regarding a violation of the Act provided that the violation arises out of, pertains to, or is related to, the original construction. (Civ. Code, § 942.)" That is a true statement of the homeowner's claim is against a builder as that term is defined in Civil Code § 911, but not with respect to general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals. Those persons and entities are only responsible to the extent they caused a violation of a standard by their negligence or breach of contract. (Civ. Code § 936.) Moreover, a certificate of merit is still required for a claim against a design professional. (Civ. Code § 937.) However, the negligence standard in this section does not apply to any general contractor, subcontractor, material supplier, individual product manufacturer, or design professional with respect to claims for which strict liability would apply. [Civil Code § 911(a) defines a "builder" as follows: (a) For purposes of this title, except as provided in subdivision "builder" means any entity or individual, including, but not limited to a builder, developer, general contractor, contractor, or original seller, who, at the time of sale, was also in the business of selling residential units to the public for the property that is the subject of the	Section 936 says that negligence or breach of contract must be shown with regard to the specified group. Section 942 says that the plaintiff need not show causation or damages. Because causation and damages are elements of both negligence and breach of contract, the committee sees the possible validity of the comment. But the lack of specificity in § 942 doesn't answer the question. But Civil Code § 911 defining "builder" appears in the prelitigation process part of the Act. Further, the definition includes general contractors, who are also within the § 936 group. So the comment's distinction between builders but not general contractors being subject to 942 does not hold up. The committee has added a citation to § 936 with a parenthetical. It has also added "original construction" to the paragraph as § 942 specifies it.

Instruction	Commentator	Comment	Committee Response
		homeowner's claim or was in the business of building, developing, or constructing residential units for public purchase for the property that is the subject of the homeowner's claim.	
	Orange County Bar Association, by Deirdre Kelly, President	This instruction must combine the statutory intent behind Civil Code § 895 (definitions), §896 (standards), and relevant court cases including *Gillotti vs Stewart* (2017) 11 Cal.App. 5th 875 and *McMillin Albany LLC vs Superior Court* (2018) 4 Cal. 5th 241. The OCBA recommends the following modifications: (1) change the first sentence of the instruction to read: "[*Name of plaintiff*] claims that he/she/it has been harmed because of defects in [*name of defendant*]'s original construction of [*name of plaintiff*]'s home, <u>residential property, condominium, common area, or any improvements located on the lot or common area;</u>	It is not necessary to be this precise in an introductory sentence. Civil Code § 896 says; "This title applies to original construction intended to be sold as an individual dwelling unit." The committee believes that that "home" is a good plain-language translation of "individual dwelling unit."
		Modify the Directions for Use to more accurately reference the definitions of Civil Code § 895, which makes the Act applicable to the owners of all single-family homes, individual owners of attached dwellings, and any common-interest association defined in Civil Code § 4080 (Davis-Stirling Common Interest Development Act) – currently the instruction only makes reference to "the plaintiff's home."	This is more information than is needed for the Directions for Use.
		Add the reference from CACI 4571 to the *Gillotti* case which makes the Act applicable not only to the "home" but also any improvements such as landscaping, driveways, and the lot itself.	The committee added an excerpt from *Gillotti*.
		Delete the reference to CACI 4575 as we can find no such instruction;	The reference has been deleted.
		In the Sources and Authority add references to Civil Code § 895 (definitions) and Civil Code § 897 (intent of standards).	The references have been added.

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	Thomas Olsen, Lorber, Greenfield & Polito, Poway	The law is clear - a claimant who does not reasonably go through the right to repair procedures listed in Civil Code Section 910 et seq. is not allowed to pursue their claim and may not recover damages for it in court. The problem with proposed instruction 4570 is that it assumes that a claimant will automatically prevail if it establishes a violation of the standards set forth in Civil Code Sections 896 and 897. However, that instruction is missing crucial language saying that the claimant must first have gone through the procedures set forth in Civil Code Section 910 et seq. in order to prevail. That language needs to be included in the instruction for it to be an accurate statement of the law. Otherwise, a jury would be misled into believing that a claimant could prevail on their claims without having gone through such a procedure first.	The committee believes that a failure to follow the required prefiling process would be resolved on summary judgment and never be a jury issue. If there might be an issue of fact as to whether the procedures were followed, that would have to be a separate instruction. But until there is a case in which the jury is given that issue to resolve, the committee does not think that such an instruction would be appropriate.
4571, *Right to Repair Act—Damages*	Orange County Bar Association, by Deirdre Kelly, President	This instruction must track the language of both Civil Code §943(b) and §944 together. The proposal tracks Civic Code § 944 but appears to misstate the language of Civil Code §943(b). The OCBA recommends adding to the beginning of the last optional sentence the following: "[Optional Language Applicable Only to Detached Single-Family Homes];"	This is stated in the Directions for Use.
		The last sentence of the Directions for Use needs a better explanation of "the common-law personal use exception," which is being preserved by this statute – neither the statute nor the instructions provide any guidance in these regards.	While the committee would like to accommodate this comment, it is not sure what the "common-law personal use exception" is." Without some assistance from the Legislature as to what is meant, the committee cannot speculate. The reference could be taken out entirely, but that would not flag the issue.
4572, *Right to Repair*	California Lawyers	Although Civil Code section 945.5(a) defines an "unforeseen act of nature" to include manmade events	The committee agrees that there is imprecise statutory drafting in mixing nature and manmade

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Act—Affirmative Defense—Act of Nature	Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	such as war, terrorism, and vandalism, the jury might be perplexed by an instruction that first states the defendant claims the harm was caused by an unforeseen act of nature and later states the defendant must prove that a manmade event such as war, terrorism, or vandalism caused the damage (if the second bracketed option is selected). We would avoid this by revising the instruction: "[*Name of defendant*] claims that [he/she/it] is not responsible for [*name of plaintiff*]'s harm because it was caused by an ~~unforeseen act of nature~~ event. To establish this defense, [*name of defendant*] must prove ."	events and has made some revisions. But the key word is "unforeseen," which would apply to a manmade event also and should not be in the brackets. The committee does agree, however, the comment's substitution of "event" for "unforeseen act of nature" is better given that some events are manmade. The committee also agrees that the "such as war, terrorism, or vandalism" language qualifying "manmade event" is not needed. There's no need to put in examples that wouldn't necessarily be involved in the case. The event will show up in the "specify" line.
	Orange County Bar Association, by Deirdre Kelly, President	The OCBA recommends that the language of CACI No. 4572 be modified as follows in order to more accurately track the statute: (a) add to the end of the first sentence: "or a manmade event as described"	Changing to "event" resolves this issue.
		Change the end of the last sentence to read: "was caused by a weather condition, earthquake, etc. which was an unforeseen act of nature or by a manmade event such as war, terrorism, or vandalism, that was in excess of the design criteria in effect at the time of the original construction."	The proposed revision would remove the specification of the actual event, which is really more important than the statutory category that the event comes from. Also, "unforeseen" is not used with "manmade event." The committee has elect not to address "design criteria" because it is not sure what it means. The Directions for Use say to modify the instruction if there is an issue.
4573, *Right to Repair Act—*	Association of Defense Counsel of Northern	This instruction provides a listing of things that a defendant must prove to establish an affirmative defense for what amounts to failure to mitigate under Civil Code §	CACI No. 3931 is a general instruction on the rule of mitigation. The mitigation points in this instruction are specific; a and b are directly from the statute.

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Affirmative Defense—Unreasonable Failure to Minimize or Prevent Damage	California and Nevada, by Bobby Dale Sims Jr., Sims, Lawrence & Arruti, Sacramento	945.5(b). We question the efficacy of paragraph c. of this instruction – c. [Specify other act or omission of plaintiff that is alleged to constitute failure to minimize or prevent damage.]. This provision is not a part of Civil Code § 945.5(b) and appears to be an abbreviation of CACI 3931 Mitigation of Damages (Property Damage). It is our opinion that CACI 3931 is the appropriate instruction and that paragraph c. of the proposed CACI 4573 should not be substituted for the failure to mitigate as instructed in CACI 3931.	The statute also says: "a homeowner's unreasonable failure to minimize or prevent those damages in a timely manner, *including*…" . So the statutory failures are not exclusive. So if, for example, homeowners, knowing the roof is leaking, go on a month-long vacation during the rainy season. In this instruction under (c), one would specifically say exactly that. One would not in 3931. The committee has, however, added a cross reference to CACI No. 3931.
	Thomas Olsen, Lorber, Greenfield & Polito, Poway	The issue with proposed instruction 4573 is that it incorrectly characterizes the failure of the claimant to go through the right to repair process as an affirmative defense – it's not. It's a required prelitigation remedy. Second, it fails to include an important point - per the *Standard Pacific Corporation v. Superior Court* (2009) 176 Cal. App. 4th 828 case, the burden is on the plaintiff to prove that they went through the right to repair process. Third, another issue is the last sentence of the instruction which is extremely poorly written, and certain to confuse a jury. What is an untimely or inadequate response? Per the *KB Home* case, if plaintiffs failed to reasonably go through the right to repair process then they are barred from pursuing their claim. Thus an accurate statement of the law, and an accurate jury instruction would state that the plaintiffs have the burden of proof to show that they went through the right to repair process set forth in Civil Code Section 910 et seq. in order to prevail upon their claim, unless they were excused from completing such process by the failure of the defendant to follow such procedures.	See response to this commenter's comment to 4570, regarding the role of the prefiling requirements. This instruction is on the affirmative defense of failure to mitigate, not the prefiling requirement. There is no dispute but that the plaintiff must prove compliance with the prefiling requirements. But that is irrelevant to this instruction.

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4574, *Right to Repair Act—Affirmative Defense—Plaintiff's Subsequent Acts or Omissions*	Association of Defense Counsel of Northern California and Nevada, by Bobby Dale Sims Jr., Sims, Lawrence & Arruti, Sacramento	Civil Code § 945.5(d) reads: (d) To the extent it is caused by the homeowner or his or her agent's or an independent third party's alterations, ordinary wear and tear, misuse, abuse, or neglect, or by the structure's use for something other than its intended purpose. The title of proposed CACI 4574 uses the word "subsequent" and the instruction itself uses the word "later." To establish this defense [name of defendant] must prove that the harm was caused by [[name of plaintiff]'s *later* [alterations/ordinary wear and tear/misuse/abuse/[or] neglect]/ [or] the structure's use for something other than its intended purpose]. One must ask, "Subsequent" to what? "Later" than what? The Code does not use either word in characterizing the activities by the homeowner or his or her agent or by a third party that constitute an affirmative defense. It is our opinion that those words should be removed.	While it is correct that neither "subsequent" nor "later" is in the statute, the committee believes that it could not be otherwise. All of these words, "alterations/ordinary wear and tear/misuse/abuse/[or] neglect]/ [or] the structure's use for something other than its intended purpose" require that there be something in place to act on. There must be something there to alter, wear and tear, misuse, abuse, or neglect. Or there has to be a structure to use for something other than its intended purpose. So including "later" adds clarity.

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	Orange County Bar Association, by Deirdre Kelly, President	This statutory affirmative defense is based upon Civil Code §945.5(d). The instruction should accurately track the language of the statute in order to reflect its intent. The OCBA recommends changing the title to "Right To Repair Act" – Affirmative Defense – Plaintiff's or Others' Subsequent Acts [Civil Code§ 945.5(d)] Add to the end of the first sentence to read: "later acts or omissions described next or those of the plaintiff's agent or some independent third party. Change the last sentence of the Directions for Use to read: "The defendant is relieved of responsibility for any such acts or omissions undertaken by any of plaintiff's agents or by any independent third parties [Civil Code §945.5(d)]."	All three changes are based on the correct view that the statute covers subsequent acts not only of the plaintiff, but also of the plaintiff's agents or independent third parties. This point is noted in the Directions for Use, but the instruction itself is limited to the plaintiff's acts. The committee believes that this approach is sufficient. An instruction does not have to cover every possible scenario in which the claim might arise. However, a sentence has been added to modify the instruction if it is an agent or third party who made the modifications.
User Guide	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We agree with the concept, but find the proposed language verbose and would revise it to state: "Absence of Instruction: The absence of a CACI instruction on a particular rule of law does not indicate that no instruction would be appropriate."	The committee finds the comment's language to be somewhat better but prefers retaining "claim, defense, rule, or situation" instead of "rule of law."
All other instructions except as noted above	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.

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All other instructions except as noted above	Orange County Bar Association, by Deidre Kelly, President	Agree	No response is necessary.