JUDICIAL COUNCIL OF CALIFORNIA

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# REPORT TO THE JUDICIAL COUNCIL

*Item No.: 21-171*
For business meeting on November 19, 2021

**Title**
Jury Instructions: Civil Jury Instructions (Release 40)

**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**
November 19, 2021

**Date of Report**
October 8, 2021

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## Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approval of new and revised civil jury instructions prepared by the committee. These changes bring the instructions up to date with developments in the law over the previous six months. Upon Judicial Council approval, the instructions will be published in the official 2022 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 November 19, 2021, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court the following civil jury instructions prepared by the committee:

1. Addition of 7 new instructions: CACI Nos. 2750, 2752, 2753, 2754, 3046, 3714, and 4330; and

2. Revisions to 20 instructions and verdict forms: CACI Nos. 2334, 2521A, 2521B, 2521C, 2522A, 2522B, 2522C, VF-2506A, VF-2506B, VF-2506C, VF-2507A, VF-2507B, VF-2507C, 2702, 2704, 2705, 3041, 3050, 3709, and 4304.

A table of contents and the proposed new and revised civil jury instructions and verdict forms are attached at pages 7–107.

## 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 that 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 40 of *CACI*. The council approved release 39 at its July 2021 meeting.

## Analysis/Rationale

A total of 27 instructions are presented in this release. The Judicial Council's Rules Committee has also approved, at its meeting on October 8, 2021, changes to 10 additional instructions under a delegation of authority from the council to the Rules Committee.[2]

The instructions were revised and added based on comments or suggestions from justices, judges, attorneys, and bar associations; 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.

### New instructions

The committee proposes adding seven new instructions, four of which pertain to employment and labor law.

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

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

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

**CACI series 2700.** Based on suggestions from an employment lawyers bar association, the committee proposes four new instructions for claims under the Labor Code and the Industrial Welfare Commission's wage orders:

- No. 2750, *Failure to Reimburse Employee for Necessary Expenditures or Losses—Essential Factual Elements (Lab. Code, § 2802(a))*;
- No. 2752, *Tip Pool Conversion—Essential Factual Elements (Lab. Code, § 351)*;
- No. 2753, *Failure to Pay All Vested Vacation Time—Essential Factual Elements (Lab. Code, § 227.3)*; and
- No. 2754, *Reporting Time Pay—Essential Factual Elements*.

The committee's expansion into this area recognizes the prevalence of lawsuits against employers for wage and hour violations and other statutory violations. The committee will continue to monitor closely developments in this area, and will consider developing additional instructions, including new instructions on meal periods and rest periods.

**CACI No. 3046, *Violation of Pretrial Detainee's Federal Civil Rights—Fourteenth Amendment—Medical Care and Conditions of Confinement (42 U.S.C. § 1983)*.** Based on Supreme Court authority,[3] the Ninth Circuit has clarified that a different standard for deliberate indifference applies to individuals who are detained but who have not yet been convicted of a crime.[4] The committee recommends a new instruction addressing the Fourteenth Amendment standard applicable to pretrial detainees under section 1983.

**CACI No. 3714, *Ostensible Agency—Physician-Hospital Relationship*.** Citing two appellate court decisions,[5] the Directions for Use of CACI's ostensible agent instruction (CACI No. 3709) had noted that a different instruction was required to hold a hospital responsible for the acts of a physician under ostensible agency when the physician is actually an employee of a different entity. The committee now proposes a new instruction for use in that context. One commenter objected to the new instruction, but the committee believes that the instruction correctly states the requirements of the cases cited by the commenter.

**CACI No. 4330, *Denial of Requested Accommodation*.** In release 39, the council approved a new affirmative defense instruction in the unlawful detainer series relating to reasonable accommodation requests by tenants or other household members. In public comments during that last cycle, the California Apartment Association observed that the California Code of Regulations, title 2, section 12176(b) also specifies reasons for denying an accommodation. The committee believes the regulation is too fact specific to propose standard language on the

[3] *Kingsley v. Hendrickson* (2015) 576 U.S. 389 [135 S.Ct. 2466, 192 L.Ed.2d 416].

[4] *Gordon v. County of Orange* (9th Cir. 2018) 888 F.3d 1118, 1124–1125.

[5] *Markow v. Rosner* (2016) 3 Cal.App.5th 1027 [208 Cal.Rptr.3d 363] and *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1454 [122 Cal.Rptr.2d 233].

exceptions, but agrees that an instruction directing users to specify the relevant factors listed in section 12179(b) would be useful.

### Revised instructions

**CACI No. 2334, *Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits—Essential Factual Elements*.** When this instruction was last revised in 2016, the invitation to comment resulted in more than 170 comments.[6] A recent case, *Pinto v. Farmers Insurance Exchange*,[7] brought the committee's attention back to CACI No. 2334. The court in *Pinto* held that the instruction "lacks a crucial element: Bad faith."[8] The court went on to explain that an insurer's failure to accept a settlement demand must be unreasonable; "it must act or fail to act without proper cause, for example by placing its own interests above those of its insured."[9]

Recognizing that this instruction's prior revision caused substantial commentary, the committee considered at some length how best to state the bad faith element.[10] The committee opted to state the element in the way advanced by the insurer in *Pinto*, which the court said would have been the correct question: "[the defendant's] failure to accept [the plaintiff's] settlement offer was 'the result of unreasonable conduct by [the defendant]' "[11] And because jurors may be inclined to think *conduct* requires an affirmative act, the committee thought it important to note, as the court in *Pinto* observed, that bad faith conduct may involve action or failure to act.

Three commenters (an attorney and two bar associations) agreed with the proposed changes; two of those three offered minor suggestions. Four commenters representing the insurance defense bar contended that the instruction required more substantial revisions and suggested that the bad faith element would be better framed as whether the insurer "unreasonably refused a settlement offer." As set forth in more detail in the attached comment chart, the committee finds the commenter's preferred language too narrow. Many cases discuss an insurer's unreasonable refusal of a settlement demand, but the cases also refer to an insurer's "failure to accept" and "rejection" of a demand. The committee chose "failure to accept" because it is inclusive of both an insurer's refusal and rejection (affirmative acts) as well as an insurer's inaction, and because

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[6] See Judicial Council of Cal., Advisory Com. Rep., *Jury Instructions: Revised Civil Jury Instruction No. 2334—Supplemental Report* (June 24, 2016), https://jcc.legistar.com/View.ashx?M=F&ID=4496094&GUID=53DBD55C-AF07-498F-B665-D6BDD6DEFB28.

[7] (2021) 61 Cal.App.5th 676 [276 Cal.Rptr.3d 13].

[8] 61 Cal.App.5th at p. 692.

[9] *Id.*

[10] The committee's omission of the bad faith element was not an oversight. The instruction's Directions for Use discussed the state of the law in four paragraphs and acknowledged that the issue remained unresolved. (See *supra* note 6 at p. 16.) Because the court in *Pinto* directly addressed the issue, the committee recommends striking that discussion from the Directions for Use in this release.

[11] 61 Cal.App.5th at p. 694.

the court in *Pinto* expressly endorsed the language proposed by the committee in element 3.[12] The commenters who opposed the committee's proposed language for element 3 made several other suggestions.

Based on the comments, the committee proposes refining language in the instruction itself and in the Directions for Use. Several of the commenters suggested changes that are beyond the scope of the invitation to comment, such as (1) suggestions to revise the reasonable-offer element, (2) suggestions to add causation and harm elements, and (3) suggestions to reference "the totality of the circumstances" and the possibility of mistakes, errors, and negligence in the final paragraph addressing the reasonableness of an insurer's conduct. The committee takes no position on these suggestions now. They will be considered at the committee's next meeting.

**CACI Nos. 2521A, 2521B, 2521C, 2522A, 2522B, 2522C, and related verdict forms (Fair Employment and Housing Act series).** At the prompting of a commenter in the last public comment cycle, the committee recommends revising these six work environment harassment instructions and the accompanying verdict forms to include applicants because the governing statute covers them.[13] All three commenters agreed with the proposed revisions, but one attorney questioned whether a claim of sexual favoritism harassment (CACI Nos. 2521C and 2522C) would ever apply to applicants. The committee appreciates the attorney's concern given the nature of these harassment claims, but the committee believes an applicant could be impacted by favoritism based on sex. The committee therefore recommends including applicants in the favoritism instructions and their related verdict forms.

**CACI No. 4304, *Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements*.** Upon posting for public comment, the committee proposed revisions to the Directions for Use noting the potential need for users to modify the instruction if the Tenant Protection Act of 2019's dual-notice requirement applied to the facts of the case. Two commenters urged the committee to include more information. Based on the commenters' suggestions, the committee recommends adding an optional bracketed element that addresses the second notice required under the act, and adding a discussion to the Directions for Use about the duration of the tenancies the act requires for the dual-notice requirement to apply.

### Policy implications

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

### Comments

The proposed additions and revisions in *CACI* circulated for comment from July 21 through September 2, 2021. Comments were received from ten different commenters. Four commenters submitted comments on multiple instructions. Seven comments were received on an insurer's

[12] See *id.*

[13] See Gov. Code, § 12940(j).

bad faith refusal to accept a reasonable settlement demand (CACI No. 2334). Except for that insurance instruction, no other instructions garnered a particularly large number of comments.

The committee evaluated all comments and proposes refining 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 108–170.

### Alternatives considered

Rules 2.1050(d) and 10.58(a) of the California Rules of Court require the committee to update, revise, and add topics to *CACI* on a regular basis and to submit its recommendations to the council for approval. There are no alternative actions for the committee to consider. The committee did, however, consider suggestions received from members of the legal community that did not result in recommendations for this release. Some suggestions were deferred for further consideration while others were declined for lack of support.

## 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 2022 version 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 online document assembly software.

## Attachments and Links

1. Jury instructions, at pages 7–107
2. Chart of comments, at pages 108–170

# TABLE OF CONTENTS
# CIVIL JURY INSTRUCTIONS
# Release 40: November 2021

**LABOR CODE ACTIONS**



**CIVIL RIGHTS**



**VICARIOUS RESPONSIBILITY**



**UNLAWFUL DETAINER**

## 2334. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits—Essential Factual Elements

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**[***Name of plaintiff***] claims that ~~[he/she/*nonbinary pronoun*/it] was harmed by~~ [***name of defendant***]~~'s~~ breached ~~of~~ the obligation of good faith and fair dealing because [***name of defendant***] failed to accept a reasonable settlement demand ~~in a lawsuit~~ for a claim against [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [*name of plaintiff*] was insured under a policy of liability insurance issued by [*name of defendant*];**

2. **That [*name of plaintiff in underlying case*] ~~brought a lawsuit~~ made a claim against [*name of plaintiff*] ~~for a claim~~ that was covered by [*name of defendant*]'s insurance policy;**

3. **That [*name of defendant*] failed to accept a reasonable settlement demand for an amount within policy limits;**

4. **That [*name of defendant*]'s failure to accept the settlement demand was the result of unreasonable conduct by [*name of defendant*]; and**

5. **That a monetary judgment was entered against [*name of plaintiff*] for a sum greater than the policy limits.**

**"Policy limits" means the highest amount of insurance coverage available under the policy for the claim against [*name of plaintiff*].**

**A settlement demand for an amount within policy limits is reasonable if [*name of defendant*] knew or should have known at the time the demand was rejected that ~~the~~ a potential judgment against [*name of plaintiff*] was likely to exceed the amount of the demand based on [*name of plaintiff in underlying case*]'s injuries or losses and [*name of plaintiff*]'s probable liability. However, the demand may be unreasonable for reasons other than the amount demanded.**

**An insurance company's unreasonable conduct may be shown by action or by the failure to act. An insurance company's conduct is unreasonable when, for example, it does not give at least as much consideration to the interests of the insured as it gives to its own interests.**

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*New September 2003; Revised December 2007, June 2012, December 2012, June 2016, November 2021*

### Directions for Use

This instruction is for use in an "excess judgment" case; that is one in which judgment was against the insured for an amount over the policy limits, after the insurer rejected a settlement demand within policy limits.

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case. For example, if the plaintiff is the insured's assignee, modify the instruction as needed to reflect the underlying facts and relationship between the parties.

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

If it is alleged that a demand was made in excess of limits and there is a claim that the defendant should have contributed the policy limits, then this instruction will need to be modified.

This instruction should also be modified if the insurer did not accept the policy-limits demand because of potential remaining exposure to the insured, such as a contractual indemnity claim or exposure to other claimants.

~~Under this instruction, if the jury finds that the policy-limits demand was reasonable, then the insurer is automatically liable for the entire excess judgment. Language from the California Supreme Court supports this view of what might be called insurer "strict liability" if the demand is reasonable. (See *Johansen v. California State Auto. Assn. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288, 538 P.2d 744] ["[W]henever it is likely that the judgment against the insured will exceed policy limits 'so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest *requires the insurer to settle* the claim,' " italics added].)~~

~~However, there is language in numerous cases, including several from the California Supreme Court, that would require the plaintiff to also prove that the insurer's rejection of the demand was "unreasonable." (See, e.g., *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 724–725 [117 Cal.Rptr.2d 318, 41 P.3d 128] ["An *unreasonable* refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits," italics added]; *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425 [179 Cal.Rptr.3d 717] [claim for bad faith based on an alleged wrongful refusal to settle *also* requires proof the insurer *unreasonably* failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance, italics added].) Under this view, even if the policy-limits demand was reasonable, the insurer may assert that it had a legitimate reason for rejecting it. However, this option, if it exists, is not available in a denial of coverage case. (*Johansen, supra,* 15 Cal.3d at pp. 15–16.)~~

~~None of these cases, however, neither those seemingly creating strict liability nor those seemingly providing an opportunity for the insurer to assert that its rejection was reasonable, actually discuss, analyze, and apply this standard to reach a result. All are determined on other issues, leaving the pertinent language as arguably dicta.~~

~~For this reason, the committee has elected not to change the elements of the instruction at this time. Hopefully, someday there will be a definitive resolution from the courts. Until then, the need for an additional element requiring the insurer's rejection of the demand to have been unreasonable is a plausible, but unsettled, requirement. For a thorough analysis of the issue, see the committee's report to~~

~~the Judicial Council for its June 2016 meeting, found at https://jcc.legistar.com/View.ashx?M=F&ID=4496094&GUID=53DBD55C-AF07-498F-B665-D6BDD6DEFB28~~

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## Sources and Authority

- "[T]he implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty. [¶] The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659 [328 P.2d 198], citation omitted.)

- "Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." (*Crisci v. Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173].)

- "In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer." (*Crisci*, *supra,* 66 Cal.2d at p. 429.)

- "[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. ... [T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Johansen v. California State Auto. Assn. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288, 538 P.2d 744]~~, *supra,* 15 Cal.3d at p. 16~~, internal citation omitted.)

- "[A]n insurer is required to act in good faith in dealing with its insured. Thus, in deciding whether or not to settle a claim, the insurer must take into account the interests of the insured, and when there is a great risk of recovery beyond the policy limits, a good faith consideration of the insured's interests may require the insurer to settle the claim within the policy limits. An unreasonable refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits." (*Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 724–725 [117 Cal.Rptr.2d 318, 41 P.3d 128]~~, *supra,* 27 Cal.4th at 724–725~~.)

- "The size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim." (*Crisci*, *supra,* 66 Cal.2d at p. 431.)

- "The covenant of good faith and fair dealing implied in every insurance policy obligates the insurer,

among other things, to accept a reasonable offer to settle a lawsuit by a third party against the insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits. The insurer must evaluate the reasonableness of an offer to settle a lawsuit against the insured by considering the probable liability of the insured and the amount of that liability, without regard to any coverage defenses. An insurer that fails to accept a reasonable settlement offer within policy limits will be held liable in tort for the entire judgment against the insured, even if that amount exceeds the policy limits. An insurer's duty to accept a reasonable settlement offer in these circumstances is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble—on which only the insured might lose." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 836 [53 Cal.Rptr.3d 245], internal citations omitted.)

- "An insured's claim for bad faith based on an alleged wrongful refusal to settle first requires proof the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. The offer satisfies this first element if (1) its terms are clear enough to have created an enforceable contract resolving all claims had it been accepted by the insurer, (2) all of the third party claimants have joined in the demand, (3) it provides for a complete release of all insureds, and (4) the time provided for acceptance did not deprive the insurer of an adequate opportunity to investigate and evaluate its insured's exposure." (*Graciano* v. *Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425 [179 Cal.Rptr.3d 717]~~, *supra,* 231 Cal.App.4th at p. 425~~, internal citations omitted.)

- "An insurer's duty to accept a reasonable settlement offer is not absolute. ' "[I]n deciding whether or not to settle a claim, the insurer must take into account the interests of the insured, and when there is a great risk of recovery beyond the policy limits, a good faith consideration of the insured's interests *may* require the insurer to settle the claim within the policy limits. An *unreasonable* refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits." ' [¶] Therefore, failing to accept a reasonable settlement offer does not necessarily constitute bad faith. '[T]he crucial issue is … the basis for the insurer's decision to reject an offer of settlement.' " *(Pinto v. Farmers Ins. Exchange* (2021) 61 Cal.App.5th 676, 688 [276 Cal.Rptr.3d 13], internal citations omitted, original italics.)

- "A claim for bad faith based on the wrongful refusal to settle thus requires proof the insurer unreasonably failed to accept an offer. [¶] Simply failing to settle does not meet this standard." (*Pinto, supra,* 61 Cal.App.5th at p. 688, internal citation omitted.)

- "To be liable for bad faith, an insurer must not only cause the insured's damages, it must act or fail to act without proper cause, for example by placing its own interests above those of its insured." (*Pinto, supra,* 61 Cal.App.5th at p. 692.)

- "A bad faith claim requires 'something beyond breach of the contractual duty itself, and that something more is ' "refusing, *without proper cause,* to compensate its insured for a loss covered by the policy … ." [Citation.] Of course, the converse of "without proper cause" is that declining to perform a contractual duty under the policy *with proper cause* is not a breach of the implied covenant.' " (*Graciano, supra,* 231 Cal.App.4th at p. 433, original italics.)

- "Determination of the reasonableness of a settlement offer for purposes of a reimbursement action is based on the information available to [the insurer] at the time of the proposed settlement." (*Isaacson*

*v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793 [244 Cal.Rptr. 655, 750 P.2d 297].)

- "The third party is entitled to set a reasonable time limit within which the insurer must accept the settlement proposal … ." (*Graciano, supra,* 231 Cal.App.4th at p. 434.)

- "Whether [the insurer] 'refused' the 'offer,' and whether it could reasonably have acted otherwise in light of the 11-day deadline imposed by the offer's terms, were questions for the jury." (*Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 994 [136 Cal.Rptr. 331].)

- "A cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits. ... Until judgment is actually entered, the mere possibility or probability of an excess judgment does not render the refusal to settle actionable." (*Safeco Ins. Co. of Am. v. Superior Court* (1999) 71 Cal.App.4th 782, 788 [84 Cal.Rptr.2d 43], internal citations omitted.)

- "An insurer's wrongful failure to settle may be actionable even without rendition of an excess judgment. An insured may recover for bad faith failure to settle, despite the lack of an excess judgment, where the insurer's misconduct goes beyond a simple failure to settle within policy limits or the insured suffers consequential damages apart from an excess judgment." (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 527 [115 Cal.Rptr.3d 42], internal citations omitted.)

- " 'An insurer who denies coverage *does so at its own risk and although its position may not have been entirely groundless,* if the denial is found to be wrongful it is liable for the full amount which will compensate the insured for all the detriment caused by the insurer's breach of the express and implied obligations of the contract.' Accordingly, contrary to the defendant's suggestion, an insurer's 'good faith,' though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer's refusal to accept a reasonable settlement offer." (*Johansen, supra,* 15 Cal.3d at pp. 15−16, original italics, footnotes and internal citation omitted.)

- "[W]here the *kind* of claim asserted is not covered by the insurance contract (and not simply the *amount* of the claim), an insurer has no obligation to pay money in settlement of a noncovered claim, because 'The insurer does not … insure the entire range of an insured's well-being, outside the scope of and unrelated to the insurance policy, with respect to paying third party claims.…' " (*Dewitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 244 [138 Cal.Rptr.3d 705], original italics.)

- "A good faith belief in noncoverage is not relevant to a determination of the reasonableness of a settlement offer." (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 243 [178 Cal.Rptr. 343, 636 P.2d 32], internal citation omitted.)

- "An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits. Where the underlying action has proceeded to trial and a judgment in excess of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment, excluding any punitive damages awarded." (*Hamilton, supra,* 27 Cal.4th at p. 725, internal citations omitted.)

- "[I]nsurers do have a 'selfish' interest (that is, one that is peculiar to themselves) in imposing a

blanket rule which effectively precludes disclosure of policy limits, and that interest can adversely affect the possibility that an excess claim against a policyholder might be settled within policy limits. Thus, a palpable conflict of interest exists in at least one context where there is no formal settlement offer. We therefore conclude that a formal settlement offer is not an absolute prerequisite to a bad faith action in the wake of an excess verdict when the claimant makes a request for policy limits and the insurer refuses to contact the policyholder about the request." (*Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, 1398−1399 [93 Cal.Rptr.3d 763].)

- "For bad faith liability to attach to an insurer's failure to pursue settlement discussions, in a case where the insured is exposed to a judgment beyond policy limits, there must be, at a minimum, some evidence either that the injured party has communicated to the insurer an interest in settlement, or some other circumstance demonstrating the insurer knew that settlement within policy limits could feasibly be negotiated. In the absence of such evidence, or evidence the insurer by its conduct has actively foreclosed the possibility of settlement, there is no "'opportunity to settle'" that an insurer may be taxed with ignoring." (*Reid v. Mercury Ins. Co.* (2013) 220 Cal.App.4th 262, 272 [162 Cal.Rptr.3d 894].)

~~"(4) [12:245] Insurer culpability required? A number of cases suggest that some degree of insurer 'culpability' is required before an insurer's refusal to settle a third party claim can be found to constitute 'bad faith.' " [(*Howard v. American Nat'l Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 529 [, 115 Cal.Rptr.3d 42].), 69 (quoting text)]~~

- "[F]ailing to accept a reasonable settlement offer does not necessarily constitute bad faith. '[T]he crucial issue is … the basis for the insurer's decision to reject an offer of settlement.' '[M]ere errors by an insurer in discharging its obligations to its insured " 'does not necessarily make the insurer liable in tort for violating the covenant of good faith and fair dealing; to be liable in tort, the insurer's conduct must also have been *unreasonable*.' " ' " (*Pinto, supra,* 61 Cal.App.5th at p. 688, internal citations omitted, original italics.)

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~~• (a) [12:246] **Good faith or mistake as excuse:** 'If the insurer has exercised good faith in all of its dealings … and if the settlement which it has rejected has been fully and fairly considered and has been based upon an *honest belief* that the insurer could defeat the action or keep any possible judgment within the limits of the policy, and its judgments are based on a fair review of the evidence after reasonable diligence in ascertaining the facts, and upon sound legal advice, a court should not subject the insurer to further liability if it ultimately turns out that its judgment is a mistaken judgment.' [See *Brown v. Guarantee Ins. Co.* (1957) 155 CA2d 679, 684, 319 P2d 69, 72 (emphasis added); *Howard v. American Nat'l Fire Ins. Co.,* supra, 187 CA4th at 529, 115 CR3d at 69 — 'an insurer may reasonably underestimate the value of a case, and thus refuse settlement' on this basis (acknowledging but not applying rule)]~~

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~~• "'~~In short, so long as insurers are not subject to a strict liability standard, there is still room for an honest, innocent mistake.~~'" ([~~,~~*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1460 [~~,~~7 Cal.Rptr.2d 513, 521].)~~1) [12:246.1] **Comment: These cases are difficult to reconcile with the 'only permissible consideration' standard of a 'reasonable settlement demand' set out in *Johansen* and CACI 2334 (see ¶12:235.1). A possible explanation is that**

~~**these cases address the 'reasonableness' of the insurer's refusal to settle based on a dispute as to the value of the case (or other matters unrelated to coverage), whereas *Johansen* addressed 'reasonableness' in the context of a coverage dispute (see ¶12:235). [See *Howard v. American Nat'l Fire Ins. Co.*, supra, 187 CA4th at 529, 115 CR3d at 69 (quoting text)]" (**Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-B, *Bad Faith Refusal To Settle*, ¶¶ 12:245–12:246.1 (The Rutter Group), bold in original.)~~

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***Secondary Sources***

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, §§ 366–368

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-A, *Implied Covenant Liability—Introduction*, ¶¶ 12:202–12:224 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-B, *Bad Faith Refusal To Settle*, ¶¶ 12:226–12:548 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-C, *Bad Faith Liability Despite Settlement Of Third Party Claims*, ¶¶ 12:575–12:581.12 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-D, *Refusal To Defend Cases*, ¶¶ 12:582–12:686~~,~~ (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Settle, §§ 26.1–26.35

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.07[1]–[3] (Matthew Bender)

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

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.195, 120.199, 120.205, 120.207 (Matthew Bender)

## 2521A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

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**[***Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was subjected to harassment based on [his/her/***nonbinary pronoun***] [***describe protected status, e.g., race, gender, or age***] at [***name of defendant***] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive.**

**To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

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

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

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

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

   **[That a supervisor engaged in the conduct;]**

   **[***or***]**

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

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

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

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*Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018, July 2019, May 2020, November 2021*

**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. If the defendant is a labor organization, employment agency, apprenticeship training program or any training program leading to employment (rather than an employer), the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1).) The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See *ibid.*) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] ["[A]s long as the harassment occurs in a work-related context, the employer is liable"].)

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

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

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

## Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).

- Harassment Because of Sex. Government Code section 12940(j)(4)(C).

- Person Providing Services Under Contract. Government Code section 12940(j)(5).

- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).

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

- "To establish a prima facie case of a hostile work environment, [the plaintiff] must show that (1) [plaintiff] is a member of a protected class; (2) [plaintiff] was subjected to unwelcome harassment; (3) the harassment was based on [plaintiff's] protected status; (4) the harassment unreasonably interfered with [plaintiff's] work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment." (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 581 [250 Cal.Rptr.3d 1].)

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- "[A]n employer is strictly liable for all acts of sexual harassment by a supervisor." (*State Dept. of Health Servs., supra,* 31 Cal.4th at p. 1042.)

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

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

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of

the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

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

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

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

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

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

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

- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same

standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

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

- "The stray remarks doctrine … allows a court to weigh and assess the remarks in isolation, and to disregard the potentially damaging nature of discriminatory remarks simply because they are made by 'nondecisionmakers, or [made] by decisionmakers unrelated to the decisional process.' [Defendant] also argues that ambiguous remarks are stray, irrelevant, prejudicial, and inadmissible. However, 'the task of disambiguating ambiguous utterances is for trial, not for summary judgment.' Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540–541 [113 Cal.Rptr.3d 327, 235 P.3d 988], internal citations omitted.)

- "[I]n reviewing the trial court's grant of [defendant]'s summary judgment motion, the Court of Appeal properly considered evidence of alleged discriminatory comments made by decision makers and coworkers along with all other evidence in the record." (*Reid, supra,* 50 Cal.4th at p. 545.)

- "[M]any employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment, however liberalized it be." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 286 [100 Cal.Rptr.3d 296].)

- "In contending that the 'subjectively offensive' element was not proven, a defendant 'will assert that a plaintiff consented to the conduct through active participation in it, or was not injured because the plaintiff did not subjectively find it abusive.' [¶] [Evidence Code] Section 1106 limits the evidence the defendant may use to support this assertion. It provides that '[i]n any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff … .' This general rule is, however, subject to the exception that it 'does not apply to evidence of the plaintiff's sexual conduct with the alleged perpetrator.' The term 'sexual conduct' within the meaning of section 1106 has been broadly construed to include 'all active or passive behavior (whether statements or actions), that either directly or through reasonable inference establishes a plaintiff's willingness to engage in sexual activity,' including 'racy banter, sexual horseplay, and statements concerning prior, proposed, or planned sexual exploits.' " (*Meeks v. AutoZone, Inc.* (2018) 24 Cal.App.5th 855, 874 [235 Cal.Rptr.3d 161], internal citations omitted.)

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

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

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

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

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

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

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

***Secondary Sources***

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

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

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

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

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

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

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

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

## 2521B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

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**[***Name of plaintiff***] claims that coworkers at [***name of defendant***] were subjected to harassment based on [***describe protected status, e.g., race, gender, or age***] and that this harassment created a work environment for [***name of plaintiff***] that was hostile, intimidating, offensive, oppressive, or abusive.**

**To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/an applicant for a position with/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 harassing conduct, personally witnessed harassing conduct that took place in [his/her/***nonbinary pronoun***] 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, intimidating, offensive, oppressive, or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile, intimidating, offensive, oppressive, 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/***nonbinary pronoun***/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**

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

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

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*Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018, July 2019, November 2021*

**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. If the defendant is a labor organization, employment agency, apprenticeship training program or any training program leading to employment (rather than an employer), the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1).) The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See *ibid.*) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] ["[A]s long as the harassment occurs in a work-related context, the employer is liable"].)

For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522B, *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, *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, *Work Environment Harassment—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, *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, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

**Sources and Authority**

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).

- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C),
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- "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. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

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

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

***Secondary Sources***

3 Witkin, Summary of California Law (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, 3.21, 3.36, 3.45

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

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

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

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

## 2521C. Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

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**[***Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was subjected to harassment based on sexual favoritism at [***name of defendant***] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant those preferences.**

**To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/an applicant for a position with/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 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, intimidating, offensive, oppressive, or abusive because of the sexual favoritism;**

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

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

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

   **[***or***]**

   **[That [***name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] knew or should have known of the 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.**

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*Derived from former CACI No. 2521 December 2007; Revised December 2015, May 2018, July 2019, May 2020, November 2021*

## Directions for Use

This instruction is for use in a hostile work environment case involving sexual favoritism when the defendant is an employer or other entity covered by the FEHA. If the defendant is a labor organization, employment agency, apprenticeship training program or any training program leading to employment (rather than an employer), the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1).) The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See *ibid.*) If the facts of the case support it, the instruction should be modified as appropriate for the applicant's circumstances.

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

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

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

## Sources and Authority

- Declaration of Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).

- Person Providing Services Under Contract. Government Code section 12940(j)(5).

- Harassment Because of Sex. Government Code section 12940(j)(4)(C).

- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).

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

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

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

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

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

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

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

negligence standard only for harassment 'by an employee other than an agent or supervisor', by implication the FEHA makes the employer strictly liable for harassment by a supervisor." (*State Dep't of Health Servs., supra,* 31 Cal.4th at pp. 1040–1041, original italics.)

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

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

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

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

***Secondary Sources***

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

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

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

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

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity*

*Laws*, § 43.01[10][g][i] (Matthew Bender)

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

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

## 2522A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

**[***Name of plaintiff***] claims that [***name of defendant***] subjected [him/her/***nonbinary pronoun***] to harassment based on [***describe protected status, e.g., race, gender, or age***] at [***name of employer***] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive.**

**To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

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

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

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

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

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

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

*Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018, July 2019, May 2020, November 2021*

### 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. The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See Gov. Code, § 12940(j)(1).) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] ["[A]s long as the harassment occurs in a work-related context, the employer is liable"].)

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

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

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

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

**Sources and Authority**

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).

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

- "To establish a prima facie case of a hostile work environment, [the plaintiff] must show that (1) [plaintiff] is a member of a protected class; (2) [plaintiff] was subjected to unwelcome harassment; (3) the harassment was based on [plaintiff's] protected status; (4) the harassment unreasonably interfered with [plaintiff's] work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment." (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 581 [250 Cal.Rptr.3d 1].)

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

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

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

***Secondary Sources***

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

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

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

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

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

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

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

## 2522B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

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**[*Name of plaintiff*] claims that coworkers at [*name of employer*] were subjected to harassment based on [*describe protected status, e.g., race, gender, or age*] and that this harassment created a work environment for [*name of plaintiff*] that was hostile, intimidating, offensive, oppressive, or abusive.**

**To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. **That [*name of plaintiff*] was [an employee of/an applicant for a position with/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 harassing conduct, personally witnessed harassing conduct that took place in [his/her/*nonbinary pronoun*] 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, intimidating, offensive, oppressive, or abusive;**

5. **That [*name of plaintiff*] considered the work environment to be hostile, intimidating, offensive, oppressive, 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.**

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*Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018, July 2019, November 2021*

### 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. The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See Gov. Code, § 12940(j)(1).) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] ["[A]s long as the harassment occurs in a work-

related context, the employer is liable"].)

For an employer defendant, see CACI No. 2521B, *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, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Work Environment Harassment—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, *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, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

**Sources and Authority**

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).

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

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- "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.)

- "[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***

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

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

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

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

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

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

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

## 2522C. Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

**[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was subjected to harassment based on sexual favoritism at [*name of employer*] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant these preferences.**

**To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. **That [*name of plaintiff*] was [an employee of/an applicant for a position with/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 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, intimidating, offensive, oppressive, or abusive because of the sexual favoritism;**

5. **That [*name of plaintiff*] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the 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, July 2019, May 2020, November 2021*

### Directions for Use

This instruction is for use in a hostile work environment case involving sexual favoritism when the defendant is an individual such as the alleged harasser or plaintiff's coworker. The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (Gov. Code, § 12940(j)(1).) If the facts of the case support it, the instruction should be modified as appropriate to the applicant's circumstances.

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

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

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

## Sources and Authority

- Declaration of Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the

harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

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

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

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

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

***Secondary Sources***

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

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

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68,

2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

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

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

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

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

**VF-2506A. Work Environment Harassment—Conduct Directed at Plaintiff—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))**

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**We answer the questions submitted to us as follows:**

1. **Was [***name of plaintiff***] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***]?**
   **____ Yes ____ No**

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

2. **Was [***name of plaintiff***] subjected to harassing conduct because [he/she/***nonbinary pronoun***] was [***protected status, e.g., a woman***]?**
   **____ Yes ____ No**

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

3. **Was the harassment severe or pervasive?**
   **____ Yes ____ No**

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

4. **Would a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   **____ Yes ____ No**

   **If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

5. **Did [***name of plaintiff***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   **____ Yes ____ No**

   **If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

**6. Did [***name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] know or should [he/she/***nonbinary pronoun***/it/they] have known of the harassing conduct?**

**____ Yes ____ No**

**If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

**7. Did [***name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] fail to take immediate and appropriate corrective action?**

**____ Yes ____ No**

**If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

**8. Was the harassing conduct a substantial factor in causing harm to [***name of plaintiff***]?**

**____ Yes ____ No**

**If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

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

**[a. Past economic loss**

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

**[b. Future economic loss**

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

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

**$ _____]**

**[d. Future noneconomic loss, including [physical**

**pain/mental suffering:]**

**$ _____]**

**TOTAL $ _____**

**Signed: _____**
**Presiding Juror**

**Dated: _____**

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

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*Derived from former CACI No. VF-2506 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021*

**Directions for Use**

This verdict form is based on CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

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

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521A. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

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

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

any factual findings that are required in order to calculate the amount of prejudgment interest.

**VF-2506B. Work Environment Harassment—Conduct Directed at Others—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))**

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**We answer the questions submitted to us as follows:**

1. **Was [***name of plaintiff***] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***]?**
   **____ Yes ____ No**

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

2. **Did [***name of plaintiff***] personally witness harassing conduct that took place in [his/her/***nonbinary pronoun***] immediate work environment?**
   **____ Yes ____ No**

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

3. **Was the harassment severe or pervasive?**
   **____ Yes ____ No**

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

4. **Would a reasonable [***describe member of protected group, e.g.,* **woman] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   **____ Yes ____ No**

   **If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

5. **Did [***name of plaintiff***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [***e.g., women***]?**
   **____ Yes ____ No**

   **If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

**6. Did [***name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] know or should [he/she/***nonbinary pronoun***/it/they] have known of the harassing conduct?**

**____ Yes ____ No**

**If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

**7. Did [***name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] fail to take immediate and appropriate corrective action?**

**____ Yes ____ No**

**If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

**8. Was the harassing conduct a substantial factor in causing harm to [***name of plaintiff***]?**

**____ Yes ____ No**

**If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

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

**[a. Past economic loss**

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

**[b. Future economic loss**

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

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

**$ _____]**

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

**$ _____]**

**TOTAL $ _____**

**Signed: _____**
**Presiding Juror**

**Dated: _____**

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

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*Derived from former CACI No. VF-2506 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021*

**Directions for Use**

This verdict form is based on CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*.

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

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521B. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

**VF-2506C. Work Environment Harassment—Sexual Favoritism—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))**

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**We answer the questions submitted to us as follows:**

1. **Was [***name of plaintiff***] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***]?**
   **____ Yes ____ No**

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

2. **Was there sexual favoritism in the work environment?**
   **____ Yes ____ No**

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

3. **Was the sexual favoritism severe or pervasive?**
   **____ Yes ____ No**

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

4. **Would a reasonable [***describe member of protected group, e.g.,* **woman] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   **____ Yes ____ No**

   **If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

5. **Did [***name of plaintiff***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism?**
   **____ Yes ____ No**

   **If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

**6. Did [***name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] know or should [he/she/***nonbinary pronoun***/it/they] have known of the sexual favoritism?**
**____ Yes ____ No**

**If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

**7. Did [***name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] fail to take immediate and appropriate corrective action?**
**____ Yes ____ No**

**If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

**8. Was the sexual favoritism a substantial factor in causing harm to [***name of plaintiff***]?**
**____ Yes ____ No**

**If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

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

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

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

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

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

**$ _____]**

**TOTAL $ _____**

**Signed: _____**
**Presiding Juror**

**Dated: _____**

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

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*Derived from former CACI No. VF-2506 December 2007; Revised December 2010, December 2016, May 2020, May 2021, November 2021*

**Directions for Use**

This verdict form is based on CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*.

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

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521C. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

**VF-2507A. Work Environment Harassment—Conduct Directed at Plaintiff—Individual Defendant (Gov. Code, §§ 12923, 12940(j))**

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**We answer the questions submitted to us as follows:**

1. **Was [***name of plaintiff***] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of employer***]?**
   **____ Yes ____ No**

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

2. **Was [***name of plaintiff***] subjected to harassing conduct because [he/she/***nonbinary pronoun***] was [***protected status, e.g., a woman***]?**
   **____ Yes ____ No**

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

3. **Was the harassment severe or pervasive?**
   **____ Yes ____ No**

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

4. **Would a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   **____ Yes ____ No**

   **If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

5. **Did [***name of plaintiff***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   **____ Yes ____ No**

   **If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

**6. Did [*name of defendant*] [participate in/assist/ [or] encourage] the harassing conduct?**
**____ Yes ____ No**

**If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

**7. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?**
**____ Yes ____ No**

**If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

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

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

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

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

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

**TOTAL $ _____**

**Signed: _____**
**Presiding Juror**

**Dated: _____**

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

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*Derived from former CACI No. VF-2507 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021*

**Directions for Use**

This verdict form is based on CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*.

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

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2522A.

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

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

**VF-2507B. Work Environment Harassment—Conduct Directed at Others—Individual Defendant (Gov. Code, §§ 12923, 12940(j))**

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**We answer the questions submitted to us as follows:**

1. **Was [***name of plaintiff***] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of employer***]?**
   **____ Yes ____ No**

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

2. **Did [***name of plaintiff***] personally witness harassing conduct that took place in [his/her/***nonbinary pronoun***] immediate work environment?**
   **____ Yes ____ No**

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

3. **Was the harassment severe or pervasive?**
   **____ Yes ____ No**

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

4. **Would a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   **____ Yes ____ No**

   **If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

5. **Did [***name of plaintiff***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [***e.g., women***]?**
   **____ Yes ____ No**

   **If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

**6. Did [*name of defendant*] [participate in/assist/ [or] encourage] the harassing conduct?**
**____ Yes ____ No**

**If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

**7. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?**
**____ Yes ____ No**

**If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

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

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

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

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

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

**TOTAL $ _____**

**Signed:** _____
**Presiding Juror**

**Dated:** _____

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

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*Derived from former CACI No. VF-2507 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021*

**Directions for Use**

This verdict form is based on CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*.

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

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

**VF-2507C. Work Environment Harassment—Sexual Favoritism—Individual Defendant (Gov. Code, §§ 12923, 12940(j))**

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**We answer the questions submitted to us as follows:**

1. **Was [***name of plaintiff***] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of employer***]?**
   **____ Yes ____ No**

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

2. **Was there sexual favoritism in the work environment?**
   **____ Yes ____ No**

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

3. **Was the sexual favoritism severe or pervasive?**
   **____ Yes ____ No**

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

4. **Would a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   **____ Yes ____ No**

   **If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

5. **Did [***name of plaintiff***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism?**
   **____ Yes ____ No**

   **If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

**6. Did [*name of defendant*] [participate in/assist/ [or] encourage] the sexual favoritism?**
**____ Yes ____ No**

**If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

**7. Was the sexual favoritism a substantial factor in causing harm to [*name of plaintiff*]?**
**____ Yes ____ No**

**If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

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

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

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

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

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

**TOTAL $ _____**

**Signed: _____**

**Presiding Juror**

**Dated: _____**

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

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*Derived from former CACI No. VF-2507 December 2007; Revised December 2010, December 2014, December 2016, May 2020, May 2021, November 2021*

**Directions for Use**

This verdict form is based on CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant*.

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

Relationships other than employer/employee can be substituted in question 1, as in element 1 in CACI No. 2521C. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

## 2702. Nonpayment of Overtime Compensation—Essential Factual Elements (Lab. Code, § 1194)

**[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her/*nonbinary pronoun*] overtime pay as required by state law. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. **That [*name of plaintiff*] performed work for [*name of defendant*];**
2. **That [*name of plaintiff*] worked overtime hours;**
3. **That [*name of defendant*] knew or should have known that [*name of plaintiff*] had worked overtime hours;**
4. **That [*name of plaintiff*] was [not paid/paid less than the overtime rate] for some or all of the overtime hours worked; and**
5. **The amount of overtime pay owed.**

**Overtime hours are the hours worked longer than [*insert applicable definition(s) of overtime hours*].**

**Overtime pay is [*insert applicable formula*].**

**An employee is entitled to be paid the legal overtime pay rate even if the employee agrees to work for a lower rate.**

*New September 2003; Revised June 2005, June 2014, June 2015, May 2020, November 2021*

### Directions for Use

The court must determine the overtime compensation rate under applicable state or federal law. (See, e.g., Lab. Code, §§ 1173, 1182; Cal. Code Regs., tit. 8, § 11000, subd. 2, § 11010, subd. 4(A), and § 11150, subd. 4(A).) If an employee earns a flat sum bonus during a pay period, under state law the overtime pay rate is calculated using the actual number of nonovertime hours worked by the employee during the pay period. (*Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 573 [229 Cal.Rptr.3d 347, 411 P.3d 528].) The jury must be instructed ~~accordingly~~on the applicable overtime pay formula. It is possible that the overtime rate will be different over different periods of time.

Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code, and a series of 18 wage orders adopted by the Industrial Welfare Commission. (See *Mendiola v. CPS Security Solutions, Inc.* (2014) 60 Cal.4th 833, 838 [182 Cal.Rptr.3d 124, 340 P.3d 355].) Both the Labor Code and the IWC wage orders provide for certain exemptions from overtime laws. (See, e.g., Lab. Code, § 1171 [outside salespersons are exempt from overtime requirements]). The assertion of an employee's exemption is an affirmative defense, which presents a mixed question of law and fact. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2].) For instructions on exemptions, see CACI No. 2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption*,

and CACI No. 2721, *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption*.

**Sources and Authority**

- Employee Right to Recover Minimum Wage or Overtime Compensation. Labor Code section 1194(a).
- Recovery of Liquidated Damages. Labor Code section 1194.2.
- "Wages" Defined. Labor Code section 200.
- Payment of Uncontested Wages Required. Labor Code section 206(a).
- What Hours Worked Are Overtime. Labor Code section 510.
- Rate of Compensation. Labor Code section 515(d).
- Action by Department to Recover Unpaid Minimum Wage or Overtime Compensation. Labor Code section 1193.6(a).
- "[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." (*Ramirez, supra,* 20 Cal.4th at pp. 794–795.)
- "[W]here an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation … ." (*Jong v. Kaiser Foundation Health Plan, Inc.* (2014) 226 Cal.App.4th 391, 395 [171 Cal.Rptr.3d 874] [applying rule under federal Fair Labor Standards Act to claims under California Labor Code].)
- "[A]n employer's actual or constructive knowledge of the hours its employees work is an issue of fact … ." (*Jong, supra,* 226 Cal.App.4th at p. 399.)
- "The question whether [plaintiff] was an outside salesperson within the meaning of applicable statutes and regulations is … a mixed question of law and fact." (*Ramirez, supra,* 20 Cal.4th at p. 794.)
- "The FLSA [federal Fair Labor Standards Act] requires overtime pay only if an employee works more than 40 hours per week, regardless of the number of hours worked during any one day. California law, codified at Labor Code section 510, is more stringent and requires overtime compensation for '[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek.' " (*Flowers v. Los Angeles County Metropolitan Transportation Authority* (2015) 243 Cal.App.4th 66, 83 [196 Cal.Rptr.3d 352], internal citation omitted.)
- "We conclude that the flat sum bonus at issue here should be factored into an employee's regular rate of pay by dividing the amount of the bonus by the total number of nonovertime hours actually worked

during the relevant pay period and using 1.5, not 0.5, as the multiplier for determining the employee's overtime pay rate." (*Alvarado, supra,* 4 Cal.5th at p. 573.)

***Secondary Sources***

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 417, 420, 421, 437, 438, 439

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Payment Of Wages*, ¶¶ 11:456, 11:470.1 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-F, *Payment Of Overtime Compensation*, ¶¶ 11:730, 11:955 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Enforcing California Laws Regulating Employee Compensation*, ¶¶ 11:1342, 11:1478.5 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 3, *Overtime Compensation and Regulation of Hours Worked*, §§ 3.03[1], 3.04[1], 3.07[1], 3.08[1], 3.09[1]; Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.72 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.40 (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4:67, 4:76 (Thomson Reuters)

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

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

**[***Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] is entitled to recover a penalty based on [***name of defendant***]'s failure to pay [his/her/***nonbinary pronoun***] [wages/***insert other claim***] when due after [***name of plaintiff***]'s employment ended. [***Name of defendant***] was required to pay [***name of plaintiff***] all wages owed [on the date that/within 72 hours of the date that] [***name of plaintiff***]'s employment ended.**

**You must decide whether [***name of plaintiff***] has proved [he/she/***nonbinary pronoun***] is entitled to recover a penalty. I will decide the amount of the penalty, if any, to be imposed. To recover this penalty, [***name of plaintiff***] must prove ~~all~~ both of the following:**

1. **That [***name of plaintiff***]'s employment with [***name of defendant***] ended; and**

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

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

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

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

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

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

~~[~~3~~2~~. **[The date on which [***name of defendant***] finally paid [***name of plaintiff***] all wages due/That [***name of defendant***] never paid [***name of plaintiff***] all 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.]**

*New September 2003; Revised June 2005, May 2019, May 2020, November 2021*

**Directions for Use**

The first part of this instruction sets forth the elements required to obtain a waiting time penalty under Labor Code section 203. The second part is intended to instruct the jury on the facts required to assist the court in calculating the amount of waiting time penalties. Some or all of these facts may be stipulated, in which case they may be omitted from the instruction. ~~Give the third optional fact if the employer eventually paid all wages due, but after their due date.~~Select between the factual scenarios in element 2 of the second part: the employer eventually paid all wages due or the employer never paid the wages due.

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

If there is a factual dispute, for example, whether plaintiff gave advance notice of the intention to quit, or whether payment of final wages by mail was authorized by plaintiff, the court may be required to give further instruction to the jury.

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

## Sources and Authority

- Wages of Discharged Employee Due Immediately. Labor Code section 201.
- Wages of Employee on Quitting. Labor Code section 202.
- Willful Failure to Pay Wages of Discharged Employee. Labor Code section 203.
- Right of Action for Unpaid Wages. Labor Code section 218.
- "Wages" Defined. Labor Code section 200.
- Payment for Accrued Vacation of Terminated Employee. Labor Code section 227.3.
- Wages Partially in Dispute. Labor Code section 206(a).
- Exemption for Certain Governmental Employers. Labor Code section 220(b).
- "Labor Code section 203 empowers a court to award 'an employee who is discharged or who quits' a penalty equal to up to 30 days' worth of the employee's wages '[i]f an employer *willfully* fails to pay' the employee his full wages immediately (if discharged) or within 72 hours (if he or she quits). It is called a waiting time penalty because it is awarded for effectively making the employee wait for his or her final paycheck. A waiting time penalty may be awarded when the final paycheck is for less than the applicable wage—whether it be the minimum wage, a prevailing wage, or a living wage." (*Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 867 [233 Cal.Rptr.3d 524], original italics, internal citations omitted.)
- " '[T]he public policy in favor of full and prompt payment of an employee's earned wages is

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

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

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

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

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

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

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

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

- "A 'good faith dispute' excludes defenses that 'are unsupported by any evidence, are unreasonable, *or* are presented in bad faith.' Any of the three precludes a defense from being a good faith dispute.

Thus, [defendant]'s good faith does not cure the objective unreasonableness of its challenge or the lack of evidence to support it." (*Diaz, supra,* 23 Cal.App.5th at pp. 873–874, original italics, internal citations omitted.)

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

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

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

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

***Secondary Sources***

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

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

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

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

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

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

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

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

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

## 2705. Independent Contractor—Affirmative Defense ~~to Labor Code, Unemployment Insurance Code, and Wage Order Violations—Plaintiff~~ Worker Was Not ~~Defendant's~~ Hiring Entity's Employee (Lab. Code, § 2775)

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**[***Name of defendant***] claims that ~~[he/she/*nonbinary pronoun*/it] is not liable for [*specify violation(s) of the Labor Code, the Unemployment Insurance Code, and/or wage order(s), e.g., failure to pay minimum wage*] because~~ [***name of plaintiff***] was not [his/her/*nonbinary pronoun*/its] employee, but rather an independent contractor. To establish ~~this defense~~ that [*name of plaintiff*] was an independent contractor, [*name of defendant*] must prove all of the following:**

~~a~~1. **That [*name of plaintiff*] is under the terms of the contract and in fact free from the control and direction of [*name of defendant*] in connection with the performance of the work that [*name of plaintiff*] was hired to do;**

~~b~~2. **That [*name of plaintiff*] performs work for [*name of defendant*] that is outside the usual course of [*name of defendant*]'s business; and**

~~c~~3. **That [*name of plaintiff*] is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed for [*name of defendant*].**

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*New November 2018; Revised May 2020, May 2021, November 2021*

### Directions for Use

This instruction may be used if a hiring entity claims that the worker is an independent contractor and not an employee, and is primarily intended for use in cases involving claims under the Labor Code, the Unemployment Insurance Code, or a wage order. Any person providing services or labor for remuneration is presumptively an employee. (Lab. Code, § 2775 ~~This instruction may be needed if there is a dispute as to whether the defendant was the plaintiff's employer for purposes of a claim covered by the Labor Code, the Unemployment Insurance Code, or a California wage order. (Lab. Code, § 2775~~; see *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 913–914, & fn. 3 [232 Cal.Rptr.3d 1, 416 P.3d 1].) The ~~defendant~~ hiring entity has the burden to prove independent contractor status. (Lab. Code, § 2775(b)(1); *Dynamex, supra,* 4 Cal.5th at p. 916.) This instruction may not be appropriate if the ~~defendant~~ hiring entity claims independent contractor status based on Proposition 22 (Bus. & Prof. Code, § 7451) or one of the many exceptions listed in Labor Code sections 2776–2784. For an instruction on employment status under the *Borello* test, see CACI No. 3704, *Existence of "Employee" Status Disputed*.

The ~~rule on employment status has been that if there are disputed facts, it's for the~~ jury ~~to~~ only decides whether ~~one~~ a worker is an employee or an independent contractor when there are disputed issues of fact material to the determination. (*Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 342 [221 Cal.Rptr.3d 1].) However, on undisputed facts, the court ~~may~~ decides ~~that~~ whether the relationship is

employment as a matter of law. (*Dynamex, supra,* 4 Cal.5th at p. 963.) ~~The court may address the three factors in any order when making this determination, and if the defendant's undisputed facts fail to prove any one of them, the inquiry ends; the plaintiff is an employee as a matter of law and the question does not reach the jury.~~

~~If, however, there is no failure of proof as to any of the three factors without resolution of disputed facts, the determination of whether the plaintiff was defendant's employee should be resolved by the jury using this instruction. If the court concludes based on undisputed facts that the defendant *has* proved one or more of the three factors, that factor (or factors) should be removed from the jury's consideration and the jury should only consider whether the employer has proven those factors that cannot be determined without further factfinding.~~

## Sources and Authority

- Worker Status: Employees. Labor Code section 2775.

- "The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity's business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." (*Dynamex, supra,* 4 Cal.5th at pp. 955–956.)

- "A business that hires any individual to provide services to it can always be said to knowingly 'suffer or permit' such an individual to work for the business. A literal application of the suffer or permit to work standard, therefore, would bring within its reach even those individuals hired by a business--including unquestionably independent plumbers, electricians, architects, sole practitioner attorneys, and the like--who provide only occasional services unrelated to a company's primary line of business and who have traditionally been viewed as working in their own independent business." (*Dynamex, supra,* 4 Cal.5th at pp. 948–949.)

- "A multifactor standard--like the economic reality standard or the *Borello* standard--that calls for consideration of all potentially relevant factual distinctions in different employment arrangements on a case-by-case, totality-of-the-circumstances basis has its advantages. A number of state courts, administrative agencies and academic commentators have observed, however, that such a wide-ranging and flexible test for evaluating whether a worker should be considered an employee or an independent contractor has significant disadvantages, particularly when applied in the wage and hour context." (*Dynamex, supra,* 4 Cal.5th at p. 954.)

- "Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. On the other hand, when a clothing manufacturing company hires work-at-

home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. In the latter settings, the workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor." (*Dynamex, supra,* 4 Cal.5th at pp. 959–960, internal citations omitted.)

- "A company that labels as independent contractors a class of workers who are not engaged in an independently established business in order to enable the company to obtain the economic advantages that flow from avoiding the financial obligations that a wage order imposes on employers unquestionably violates the fundamental purposes of the wage order. The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself." (*Dynamex, supra,* 4 Cal.5th at p. 962.)

- "The trial court's determination of employee or independent contractor status is one of fact if it depends upon the resolution of disputed evidence or inferences and, as such, must be affirmed on appeal if supported by substantial evidence. The question is one of law only if the evidence is undisputed. 'The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.' " (*Espejo, supra,* 13 Cal.App.5th at pp. 342–343.)

- "It bears emphasis that in order to establish that a worker is an independent contractor under the ABC standard, the hiring entity is required to establish the existence of each of the three parts of the ABC standard. Furthermore, inasmuch as a hiring entity's failure to satisfy any one of the three parts itself establishes that the worker should be treated as an employee for purposes of the wage order, *a court* is free to consider the separate parts of the ABC standard in whatever order it chooses. Because in many cases it may be easier and clearer for *a court* to determine whether or not part B or part C of the ABC standard has been satisfied than for *the court* to resolve questions regarding the nature or degree of a worker's freedom from the hiring entity's control for purposes of part A of the standard, the significant advantages of the ABC standard--in terms of increased clarity and consistency--will often be best served by first considering one or both of the latter two parts of the standard in resolving the employee or independent contractor question." (*Dynamex, supra,* 4 Cal.5th at p. 963, italics added.)

- "An entity that controls the business enterprise may be an employer even if it did not 'directly hire, fire or supervise' the employees. Multiple entities may be employers where they 'control different aspects of the employment relationship.' 'This occurs, for example, when one entity (such as a temporary employment agency) hires and pays a worker, and another entity supervises the work.' 'Supervision of the work, in the specific sense of exercising control over how services are performed, is properly viewed as one of the "working conditions" … .' " (*Castaneda v. Ensign Group, Inc.* (2014) 229 Cal.App.4th 1015, 1019 [177 Cal.Rptr.3d 581].)

***Secondary Sources***

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 29A

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-B, Coverage and Exemptions—In General, ¶ 11:115 et seq. (The Rutter Group)

Wilcox, California Employment Law, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.13 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 1, *Overview of Wage and Hour Laws*, § 1.04 (Matthew Bender)

## 2750. Failure to Reimburse Employee for Necessary Expenditures or Losses—Essential Factual Elements (Lab. Code, § 2802(a))

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**[***Name of plaintiff***] claims that [***name of defendant***] failed to reimburse [him/her/***nonbinary pronoun***] for necessary [expenditures/ [and] losses]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] incurred [expenditures/ [and] losses] as a direct consequence of [discharging [his/her/***nonbinary pronoun***] job duties/obeying the directions of [***name of defendant***]];**

2. **That the [expenditures/ [and] losses] were necessary and reasonable;**

3. **That [***name of defendant***] failed to reimburse [***name of plaintiff***] for the full amount of the [expenditures/ [and] losses]; and**

4. **The amount of the [expenditures/ [and] losses] that [***name of defendant***] failed to compensate.**

**["Necessary [expenditures/ [and] losses]" may include [expenditures/ [and] losses] [***name of plaintiff***] would have incurred even if [he/she/***nonbinary pronoun***] did not also incur them as a direct consequence of discharging [his/her/***nonbinary pronoun***] job duties or obeying the directions of [***name of defendant***].]**

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*New November 2021*

### Directions for Use

This instruction assumes the plaintiff is an employee and the defendant is the employer. The instruction will need to be modified if there is a dispute about the defendant's status as an employer or the plaintiff's status as an employee of the defendant. Labor Code section 2802 covers necessary expenditures and losses. If only one of those is at issue, select the appropriate option.

If there is an argument that the directions of the employer were unlawful, modify the instruction as necessary. (See Lab. Code, § 2802(a).)

Necessary expenditures and losses may include some personal expenses, for example, the cost of a personal cellphone that is used to make work-related calls. (See *Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137, 1144 [176 Cal.Rptr.3d 407].) Omit the final paragraph if personal expenses are not at issue.

### Sources and Authority

- Obligations of Employer to Indemnify. Labor Code section 2802(a).

- "We conclude that an employer may satisfy its statutory reimbursement obligation by paying employees enhanced compensation in the form of increases in base salary or increases in commission rates, or both, provided there is a means or method to apportion the enhanced compensation to determine what amount is being paid for labor performed and what amount is reimbursement for business expenses." (*Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 559 [67 Cal.Rptr.3d 468, 169 P.3d 889].)

- "Does an employer always have to reimburse an employee for the reasonable expense of the mandatory use of a personal cell phone, or is the reimbursement obligation limited to the situation in which the employee incurred an extra expense that he or she would not have otherwise incurred absent the job? The answer is that reimbursement is always required. Otherwise, the employer would receive a windfall because it would be passing its operating expenses on to the employee. Thus, to be in compliance with section 2802, the employer must pay some reasonable percentage of the employee's cell phone bill." (*Cochran, supra,* 228 Cal.App.4th at p. 1144.)

- "In calculating the reimbursement amount due under section 2802, the employer may consider not only the actual expenses that the employee incurred, but also whether each of those expenses was 'necessary,' which in turn depends on the reasonableness of the employee's choices. For example, an employee's choice of automobile will significantly affect the costs incurred. An employee who chooses an expensive model and replaces it frequently will incur substantially greater depreciation costs than an employee who chooses a lower priced model and replaces it less frequently. Similarly, some vehicles use substantially more fuel or require more frequent or more costly maintenance and repairs than others. The choice of vehicle will also affect insurance costs. Other employee choices, such as the brand and grade of gasoline or tires and the shop performing maintenance and repairs, will also affect the actual costs. Thus, calculation of automobile expense reimbursement using the actual expenses method requires not only detailed recordkeeping by the employee and complex allocation calculations, but also the exercise of judgment (by the employer, the employee, and officials charged with enforcement of § 2802) to determine whether the expenses incurred were reasonable and therefore necessary." (*Gattuso, supra,* 42 Cal.4th at p. 568.)

***Secondary Sources***

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 440, 442

2 Wilcox, California Employment Law, Ch. 30, *Employer's Tort Liability to Third Parties for Conduct of Employees*, § 30.09 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.21 (Matthew Bender)

## 2752. Tip Pool Conversion—Essential Factual Elements (Lab. Code, § 351)

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**[***Name of plaintiff***] claims that [***name of defendant***] [took money/allowed [***specify ineligible individual(s) or class(es) of individuals***] to take money] from a tip pool that [***name of plaintiff***] was entitled to receive. [The court has determined that [***specify ineligible individual(s) or class(es) of individuals***] [was/were] not eligible to receive money from a tip pool.]**

**To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of plaintiff***] was an employee of [***name of defendant***];**

3. **That [***name of defendant***] maintained a tip pool in which money left by patrons in an amount over and above the actual amount due for [***specify services rendered or goods, food, drink, or articles sold***] was pooled to be distributed among employees including [***name of plaintiff***]; and**

4. **[That [***name of defendant***] took money from the tip pool that [***name of plaintiff***] was entitled to receive.]**

   **[***or***]**

   **[That [***name of defendant***] allowed [***specify ineligible individual(s) or class(es) of individuals***] to take money from the tip pool that [***name of plaintiff***] was entitled to receive.]**

**[***Name of plaintiff***] does not have to prove the exact amount of money that was taken.**

**[***Name of defendant***] is required to keep accurate records of all tips or gratuities received by [him/her/***nonbinary pronoun***/it] for [his/her/***nonbinary pronoun***/its] employees.**

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*New November 2021*

### Directions for Use

This instruction sets forth the elements required for an employee to establish wrongful conversion of tip pool money.

Element 1 may be omitted if there is no dispute regarding the defendant's status as an employer.

Element 5 presents alternative factual scenarios: the defendant's direct conversion of tip pool money and the defendant's misallocation of tip pool money to any individual who should not be included in the tip pool, for example, the employer, the owner, managers, and supervisors. For the second option, the court must determine as a matter of law whether an individual was properly included in the tip pool. (See Lab.

Code, § 350(a), (d) [defining employer and agent to include "every person other than the employer having the authority to hire or discharge any employee or supervise, direct, or control the acts of employees"], § 351 [prohibiting employers and agents from receiving any gratuity paid to an employee by a patron]. Include the optional sentence in the introductory paragraph if the court has determined that the defendant allowed ineligible individuals to partake in the tip pool.

**Sources and Authority**

- "Employer" Defined. Labor Code section 350(a).
- "Employee" Defined. Labor Code section 350(b).
- "Gratuity" Defined. Labor Code section 350(e).
- Employee Gratuities. Labor Code section 351.
- Employer's Duty to Keep Records. Labor Code section 353.
- "The purpose of section 351, as spelled out in the language of the statute, is to prevent an employer from collecting, taking or receiving gratuity income or any part thereof, as his own as part of his daily gross receipts, from deducting from an employee's wages any amount on account of such gratuity, and from requiring an employee to credit the amount of the gratuity or any part thereof against or as a part of his wages. And the legislative intent reflected in the history of the statute, was to ensure that employees, not employers, receive the full benefit of gratuities that patrons intend for the sole benefit of those employees who serve them." (*Leighton v. Old Heidelberg, Ltd.* (1990) 219 Cal.App.3d 1062, 1068 [268 Cal.Rptr. 647].)
- "[W]hen a customer leaves a tip in a collective tip box, the customer necessarily understands the tip is not intended for a particular person and the tip will be divided among the behind-the-counter service employees. It is undisputed that these employees consist of baristas and shift supervisors. It would be inconsistent with the purpose of the statute to *require* an employer to disregard the customer's intent and to instead compel the employer to redirect the tips to only some of the service personnel." (*Chau v. Starbucks Corp.* (2009) 174 Cal.App.4th 688, 699 [94 Cal.Rptr.3d 593], original italics.)

***Secondary Sources***

3 Witkin, Summary of California Law (11th ed. 2017) Agency, § 456

1 Wilcox, California Employment Law, Ch. 4, *Payment of Wages*, § 4.10 (Matthew Bender)

**2753. Failure to Pay All Vested Vacation Time—Essential Factual Elements (Lab. Code, § 227.3)**

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**[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her/*nonbinary pronoun*] compensation for unpaid vacation time that [*name of plaintiff*] earned but did not use before being terminated.**

**To establish this claim, [*name of plaintiff*] must prove all of the following:**

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

2. **That [*name of plaintiff*] was an employee of [*name of defendant*];**

3. **That [*name of defendant*] did not pay [him/her/*nonbinary pronoun*] for all earned and unused vacation time at [his/her/*nonbinary pronoun*] final rate of pay in accordance with the [contract of employment/employer policy]; and**

4. **The amount owed to [*name of plaintiff*] for earned and unused vacation time.**

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*New November 2021*

## Directions for Use

Element 1 may be omitted if there is no dispute regarding the defendant's status as an employer.

An employee's proportionate right to a paid vacation vests as the labor is rendered. (*Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, 784 [183 Cal.Rptr. 846, 647 P.2d 122].) If there is a dispute as to the amount of vested vacation time, the jury should be instructed to determine a pro rata share of vested vacation time. "[A]n employment contract or employer policy shall not provide for forfeiture of vested vacation upon termination." (Lab. Code, § 227.3.)

## Sources and Authority

- Payment of Vested Vacation Wages Upon Termination. Labor Code section 227.3.
- "Employer" Defined. Labor Code section 350(a).
- "Employee" Defined. Labor Code section 350(b).
- "The right to a paid vacation, when offered in an employer's policy or contract of employment, constitutes deferred wages for services rendered. Case law from this state and others, as well as principles of equity and justice, compel the conclusion that a proportionate right to a paid vacation 'vests' as the labor is rendered. Once vested, the right is protected from forfeiture by section 227.3. On termination of employment, therefore, the statute requires that an employee be paid in wages for a pro rata share of his vacation pay." (*Suastez, supra,* 31 Cal.3d at p. 784.)

- "Under Labor Code section 227.3, an employee has the right to be paid for unused vacation only after the 'employee is terminated without having taken off his vested vacation time.' Thus, termination of employment is the event that converts the employer's obligation to allow an employee to take vacation from work into the monetary obligation to pay that employee for unused vested vacation time. Consequently, [the plaintiff's] cause of action to enforce his statutory right to be paid for vested vacation did not accrue until the date his employment was terminated." (*Church v. Jamison* (2006) 143 Cal.App.4th 1568, 1576–1577 [50 Cal.Rptr.3d 166], footnote omitted.)

***Secondary Sources***

3 Witkin, Summary of California Law (11th ed. 2017) Agency, §§ 461–463

1 Wilcox, California Employment Law, Ch. 4, *Payment of Wages*, § 4.10; 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 (Matthew Bender)

## 2754. Reporting Time Pay—Essential Factual Elements

**[***Name of plaintiff***] claims that [***name of defendant***] scheduled or otherwise required [him/her/***nonbinary pronoun***] to [report to work/report to work for a second shift] but when [***name of plaintiff***[ reported to work, [***name of defendant***] [failed to put [***name of plaintiff***] to work/furnished a shortened [workday/shift]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of plaintiff***] was an employee of [***name of defendant***];**

3. **That [***name of defendant***] required [***name of plaintiff***] to report to work for one or more [workdays/second shifts];**

4. **That [***name of plaintiff***] reported for work; and**

5. **That [***name of defendant***] [failed to put [***name of plaintiff***] to work/furnished less than [half of the usual day's work/two hours of work on a second shift]].**

**If you find that [***name of plaintiff***] has proved all of the above elements, you must determine the amount of wages [***name of defendant***] must pay to [***name of plaintiff***]. For each workday when an employee reports to work, as required, but is either not put to work or furnished with less than half the usual day's work, the employer must pay wages for half the usual or scheduled day's work at the employee's regular rate of pay (and in no event for less than two hours or more than four hours).**

**[***Name of plaintiff***]'s regular rate of pay in this case is [***specify amount***].**

**[For each occasion when an employee is required to report for a second shift in the same workday but is furnished less than two hours of work, the employer must pay wages for two hours at the employee's regular rate of pay.]**

**"Workday" means any consecutive 24-hour period beginning at the same time each calendar day.**

*New November 2021*

### Directions for Use

This instruction is intended to instruct the jury on factual determinations required for the judge to then calculate damages for the defendant's failure to pay reporting time under section 5 of the Industrial Welfare Commission's wage orders. (Cal. Code Regs., tit. 8, § 11010, subd. 5, § 11020, subd. 5, § 11030, subd. 5, § 11040, subd. 5, § 11050, subd. 5, § 11060, subd. 5, § 11070, subd. 5, § 11080, subd. 5, § 11090, subd. 5, § 11100, subd. 5, § 11110, subd. 5, § 11120, subd. 5, § 11130, subd. 5, § 11140, subd. 5, § 11150, subd. 5, and § 11160, subd. 5.)

Select the appropriate bracketed language in the introductory paragraph and elements 3 and 4, and indicate whether the plaintiff was not provided work at all or was provided a shortened shift, or both, in the introductory paragraph and element 4. If the case involves both first and second shifts, the instruction will need to be modified.

Element 1 may be omitted if there is no dispute regarding the defendant's status as an employer.

Include the final bracketed sentence in the penultimate paragraph only if the plaintiff claims that the defendant required the plaintiff to report for work a second time in a single workday.

## Sources and Authority

- "Employee" and "Employer" Defined. Title 8 California Code of Regulations sections 11010–11160.
- "Person" Defined. Lab. Code section 18.
- Reporting Time Pay. Title 8 California Code of Regulations sections11010–11160 (subd. 5 of each section).

***Secondary Sources***

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 432

1 Wilcox, California Employment Law, Ch. 1, *Overview of Wage and Hour Laws*, § 1.05; Ch. 3, *Determining Compensable Hours and Proper Payment Amounts*, § 3.13 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.71 (Matthew Bender)

## 3041. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care (42 U.S.C. § 1983)

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**[***Name of plaintiff***] claims that [***name of defendant***] provided [him/her/***nonbinary pronoun***] with inadequate medical care in violation of [his/her/***nonbinary pronoun***] constitutional rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] had a serious medical need;**

2. **That [***name of defendant***] knew that [***name of plaintiff***] faced a substantial risk of serious harm if [his/her/***nonbinary pronoun***] medical need went untreated;**

3. **That [***name of defendant***] consciously disregarded that risk by not taking reasonable steps to treat [***name of plaintiff***]'s medical need;**

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

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

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

**A serious medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and pointless infliction of pain.**

**Neither medical negligence alone, nor a difference of opinion between medical personnel or between doctor and patient, is enough to establish a violation of [***name of plaintiff***]'s constitutional rights.**
**[In determining whether [***name of defendant***] consciously disregarded a substantial risk, you should consider the personnel, financial, and other resources available to [him/her/***nonbinary pronoun***] or those that [he/she/***nonbinary pronoun***] could reasonably have obtained. [***Name of defendant***] is not responsible for services that [he/she/***nonbinary pronoun***] could not provide or cause to be provided because the necessary personnel, financial, and other resources were not available or could not be reasonably obtained.]**

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*New September 2003; Revised December 2010; Renumbered from CACI No. 3012 December 2012; Revised June 2014, December 2014, June 2015, May 2020, November 2021*

### Directions for Use

Give this instruction in a case involving the deprivation of medical care to a prisoner. For an instruction on a pretrial detainee's claim of inadequate medical care, see CACI No. 3046, *Violation of Pretrial Detainee's Federal Civil Rights—Fourteenth Amendment—Medical Care and Conditions of*

*Confinement.*

For an instruction on the creation of a substantial risk of serious harm, see CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*. For an instruction involving the deprivation of necessities, see CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Deprivation of Necessities*.

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to the inmate's health or safety. In a medical-needs case, deliberate indifference requires that the prison officials have known of and disregarded an excessive risk to the inmate's health or safety. Negligence is not enough. (*Farmer v. Brennan* (1994) 511 U.S. 825, 834−837 [114 S.Ct. 1970, 128 L.Ed.2d 811].) Elements 2 and 3 express deliberate indifference.

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

The Ninth Circuit has held that in considering whether an individual prison medical provider was deliberately indifferent, the jury should be instructed to consider the economic resources made available to the prison health care system. (See *Peralta v. Dillard* (9th Cir. 2014) 744 F.3d 1076, 1084 [*en banc*].) Although this holding is not binding on California courts, the last optional paragraph may be given if the defendant has presented evidence of lack of economic resources and the court decides that this defense should be presented to the jury.

## Sources and Authority

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

- "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under section 1983." (*Estelle v. Gamble* (1976) 429 U.S. 97, 104–105 [97 S.Ct. 285, 50 L.Ed.2d 251], internal citation and footnotes omitted.)

- "Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety ... ." (*Farmer, supra,* 511 U.S. at p. 834, internal citations omitted.)

- " 'To set forth a constitutional claim under the Eighth Amendment predicated upon the failure to provide medical treatment, first the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, a plaintiff must show the defendant's response to the need was deliberately indifferent.' The 'deliberate indifference' prong requires '(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need, and (b) harm caused by the indifference.' 'Indifference may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown in the way in which prison [officials] provide medical care.' '[T]he indifference to [a prisoner's] medical needs must be substantial. Mere "indifference," "negligence," or "medical malpractice" will not support this [claim].' Even gross negligence is insufficient to establish deliberate indifference to serious medical needs." (*Lemire v. Cal. Dep't of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1081−1082, internal citations omitted.)

  "Indications that a plaintiff has a serious medical need include '[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain.' " (*Colwell v. Bannister* (9th Cir. 2014) 763 F.3d 1060, 1066.)

- "Consistent with that concept and the clear connections between mental health treatment and the dignity and welfare of prisoners, the Eighth Amendment's prohibition against cruel and unusual punishment requires that prisons provide mental health care that meets 'minimum constitutional requirements.' When the level of a prison's mental health care 'fall[s] below the evolving standards of decency that mark the progress of a maturing society,' the prison fails to uphold the constitution's dignitary principles." (*Disability Rights Montana, Inc. v. Batista* (9th Cir. 2019) 930 F.3d 1090, 1097, internal citation omitted.)

- "We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer, supra,* 511 U.S. at p. 837.)

- "The subjective standard of deliberate indifference requires 'more than ordinary lack of due care for the prisoner's interests or safety.' The state of mind for deliberate indifference is subjective recklessness. But the standard is 'less stringent in cases involving a prisoner's medical needs . . . because "the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns." ' " (*Snow v. McDaniel* (9th Cir. 2012) 681 F.3d 978, 985, internal citations omitted.)

- "[D]eliberate indifference 'may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.'. … '[A] prisoner need not show his harm was substantial.' " (*Wilhelm v. Rotman* (9th Cir. 2012) 680 F.3d 1113, 1122, internal citation omitted.)

- "[A]llegations that a prison official has ignored the instructions of a prisoner's treating physician are sufficient to state a claim for deliberate indifference." (*Wakefield v. Thompson* (9th Cir. 1999) 177

F.3d 1160, 1165.)

- "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." (*Estelle, supra,* 429 U.S. at p. 106.)

- " 'A difference of opinion between a physician and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference.' Rather, '[t]o show deliberate indifference, the plaintiff "must show that the course of treatment the doctors chose was medically unacceptable under the circumstances" and that the defendants "chose this course in conscious disregard of an excessive risk to plaintiff's health." ' " (*Colwell, supra,* 763 F.3d at p. 1068.)

- "It has been recognized ... that inadequate medical treatment may, in some instances, constitute a violation of 42 United States Code section 1983. In *Sturts v. City of Philadelphia,* for example, the plaintiff alleged that defendants acted 'carelessly, recklessly and negligently' when they failed to remove sutures from his eye, neck and face. The court concluded that although plaintiff was alleging inadequate medical treatment, he had stated a cause of action under section 1983: '... where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments. In some cases, however, the medical attention rendered may be so woefully inadequate as to amount to no treatment at all, thereby rising to the level of a § 1983 claim. ...' " (*Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 176-177 [216 Cal.Rptr. 661, 703 P.2d 1], internal citations omitted.)

- "Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citation omitted.)

- "[T]here is a two-pronged test for evaluating a claim for deliberate indifference to a serious medical need: First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, the plaintiff must show the defendant's response to the need was deliberately indifferent. This second prong . . . is satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." (*Akhtar v. Mesa* (9th Cir. 2012) 698 F.3d 1202, 1213.)

- "Where a plaintiff alleges systemwide deficiencies, 'policies and practices of statewide and systematic application [that] expose all inmates in [the prison's] custody to a substantial risk of serious harm,' we assess the claim through a two-pronged inquiry. The first, objective, prong requires that the plaintiff show that the conditions of the prison pose 'a substantial risk of serious harm.' The second, subjective, prong requires that the plaintiff show that a prison official was deliberately indifferent by being 'aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists,' and 'also draw[ing] the inference.' " (*Disability Rights Montana, Inc., supra,* 930 F.3d at p. 1097, internal citations and footnote omitted.)

- "A prison medical official who fails to provide needed treatment because he lacks the necessary resources can hardly be said to have intended to punish the inmate. The challenged instruction properly advised the jury to consider the resources [defendant] had available in determining whether he was deliberately indifferent." (*Peralta, supra,* 744 F.3d at p. 1084.)

- "We recognize that prison officials have a 'better grasp' of the policies required to operate a correctional facility than either judges or juries. For this reason, in excessive force and conditions of confinement cases, we instruct juries to defer to prison officials' judgments in adopting and executing policies needed to preserve discipline and maintain security. [¶] Such deference is generally absent from serious medical needs cases, however, where deliberate indifference 'can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates.' " (*Mendiola-Martinez v. Arpaio* (9th Cir. 2016) 836 F.3d 1239, 1254, internal citations omitted.)

- "[T]rial judges in prison medical care cases should not instruct jurors to defer to the adoption and implementation of security-based prison policies, unless a party's presentation of the case draws a plausible connection between a security-based policy or practice and the challenged medical care decision." (*Chess v. Dovey* (9th Cir. 2015) 790 F.3d 961, 962.)

- "Although claims by pretrial detainees arise under the Fourteenth Amendment and claims by convicted prisoners arise under the Eighth Amendment, our cases do not distinguish among pretrial and postconviction detainees for purposes of the excessive force, conditions of confinement, and medical care deference instructions." (*Shorter v. Baca* (9th Cir. 2018) 895 F.3d 1176, 1182, fn. 4.)

- "We now turn to the second prong of the inquiry, whether the defendants were deliberately indifferent. This is not a case in which there is a difference of medical opinion about which treatment is best for a particular patient. Nor is this a case of ordinary medical mistake or negligence. Rather, the evidence is undisputed that [plaintiff] was denied treatment for his monocular blindness solely because of an administrative policy, even in the face of medical recommendations to the contrary. A reasonable jury could find that [plaintiff] was denied surgery, not because it wasn't medically indicated, not because his condition was misdiagnosed, not because the surgery wouldn't have helped him, but because the policy of the [defendant] is to require an inmate to endure reversible blindness in one eye if he can still see out of the other. This is the very definition of deliberate indifference." (*Colwell, supra,* 763 F.3d at p. 1068.)

- "[C]laims for violations of the right to adequate medical care 'brought by pretrial detainees against individual defendants under the Fourteenth Amendment' must be evaluated under an objective deliberate indifference standard. Based thereon, the elements of a pretrial detainee's medical care claim against an individual defendant under the due process clause of the Fourteenth Amendment are: (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries. 'With respect to the third element, the defendant's conduct

must be objectively unreasonable, a test that will necessarily "turn[ ] on the facts and circumstances of each particular case." ' The ' "mere lack of due care by a state official" does not deprive an individual of life, liberty, or property under the Fourteenth Amendment.' Thus, the plaintiff must 'prove more than negligence but less than subjective intent—something akin to reckless disregard.' " (*Gordon v. County of Orange* (9th Cir. 2018) 888 F.3d 1118, 1124–1125, internal citations omitted.)

- "A 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.' The 'routine discomfort' that results from incarceration and which is 'part of the penalty that criminal offenders pay for their offenses against society' does not constitute a 'serious' medical need." (*Doty v. County of Lassen* (9th Cir. 1994) 37 F.3d 540, 546, internal citations and footnote omitted.)

***Secondary Sources***

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 244

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 901

Schwarzer, et al., California Practice Guide: Federal Civil Procedure Before Trial, Ch. 2E-10, *Special Jurisdictional Limitations--Eleventh Amendment As Limitation On Actions Against States*, ¶ 2:4923 (The Rutter Group)

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law-Prisons*, ¶ 11.09 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.15 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.183 (Matthew Bender)

## 3046. Violation of Pretrial Detainee's Federal Civil Rights—Fourteenth Amendment—Medical Care and Conditions of Confinement (42 U.S.C. § 1983)

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**[***Name of plaintiff***] claims that [***name of defendant***] failed to provide [him/her/***nonbinary pronoun***] [safe conditions of confinement/needed medical care] in violation of [his/her/***nonbinary pronoun***] constitutional rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] made an intentional decision regarding the [conditions of confinement/denial of needed medical care];**

2. **That the [conditions of confinement/denial of needed medical care] put [***name of plaintiff***] at substantial risk of serious harm;**

3. **That [***name of defendant***] did not take reasonable available measures to prevent or reduce the risk of serious harm, even though a reasonable officer under the same or similar circumstances would have understood the high degree of risk involved;**

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

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

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

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*New November 2021*

### Directions for Use

Give this instruction in a case involving a pretrial detainee's conditions of confinement, including access to medical care. (See *Gordon v. County of Orange* (9th Cir. 2018) 888 F.3d 1118, 1124–25.)

The instruction may be modified for use in a failure to protect case. (See *Castro v. County of Los Angeles* (9th Cir. 2016) 833 F.3d 1060 (en banc).) The instruction may also be modified to specify the condition of confinement at issue. For example, if the plaintiff claims that the defendant delayed or intentionally interfered with needed medical treatment, it may not be sufficiently clear to describe the defendant's conduct in the introductory paragraph and in elements 1 and 2 as a denial of needed medical care.

### Sources and Authority

- Deprivation of Civil Rights. Title 42 United States Code section 1983.
- "Inmates who sue prison officials for injuries suffered while in custody may do so under the Eighth

Amendment's Cruel and Unusual Punishment Clause or, if not yet convicted, under the Fourteenth Amendment's Due Process Clause. Under both clauses, the plaintiff must show that the prison officials acted with 'deliberate indifference.' " (*Castro, supra,* 833 F.3d at pp. 1067–1068, internal citation omitted.)

- "[W]e hold that claims for violations of the right to adequate medical care 'brought by pretrial detainees against individual defendants under the Fourteenth Amendment' must be evaluated under an objective deliberate indifference standard." (*Gordon, supra,* 888 F.3d at pp. 1124–25.)

- "[C]laims for violations of the right to adequate medical care 'brought by pretrial detainees against individual defendants under the Fourteenth Amendment' must be evaluated under an objective deliberate indifference standard. Based thereon, the elements of a pretrial detainee's medical care claim against an individual defendant under the due process clause of the Fourteenth Amendment are: (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries. 'With respect to the third element, the defendant's conduct must be objectively unreasonable, a test that will necessarily "turn[ ] on the facts and circumstances of each particular case." ' The ' "mere lack of due care by a state official" does not deprive an individual of life, liberty, or property under the Fourteenth Amendment.' Thus, the plaintiff must 'prove more than negligence but less than subjective intent—something akin to reckless disregard.' " (*Gordon, supra,* 888 F.3d at pp. 1124–1125, internal citations omitted.)

- "Our cases make clear that prison officials violate the Constitution when they 'deny, delay or intentionally interfere' with needed medical treatment. The same is true when prison officials choose a course of treatment that is 'medically unacceptable under the circumstances.' " (*Sandoval v. County of San Diego* (9th Cir. 2021) 985 F.3d 657, 679.]

***Secondary Sources***

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 356

7 Civil Rights Actions, Ch. F10, *Prisoner's Rights* (Matthew Bender)

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.16 (Matthew Bender)

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

## 3050. Retaliation—Essential Factual Elements (42 U.S.C. § 1983)

**[*Name of plaintiff*] claims that [*name of defendant*] retaliated against [him/her/*nonbinary pronoun*] for exercising a constitutional right. To establish retaliation, [*name of plaintiff*] must prove all of the following:**

**1. That [he/she/*nonbinary pronoun*] was engaged in a constitutionally protected activity[, which I will determine after you, the jury, decide certain facts];**

**[2. That [*name of defendant*] did not have probable cause for the [arrest/prosecution][, which I will determine after you, the jury, decide certain facts];]**

**3. That [*name of defendant*] [*specify alleged retaliatory conduct*];**

**4. That [*name of plaintiff*]'s constitutionally protected activity was a substantial or motivating factor for [*name of defendant*]'s acts;**

**5. That [*name of defendant*]'s acts would likely have deterred a reasonable person ~~of ordinary firmness~~ from [*specify ~~engaging in that~~ protected activity, e.g., filing a lawsuit*]; and**

**6. That [*name of plaintiff*] was harmed as a result of [*name of defendant*]'s conduct.**

**The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] has proven element 1 [and element 2] above.**

**[But before I can do so, you must decide whether [*name of plaintiff*] has proven the following: [*list all factual disputes that must be resolved by the jury~~-~~*].]**

**[*or*]**

**[The court has determined that by [*specify conduct*], [*name of plaintiff*] was exercising [his/her/*nonbinary pronoun*] constitutionally protected right of [*insert right, e.g., privacy*].]**

**[*or*]**

**[The court has determined that [*name of defendant*] did not have probable cause for the [arrest/prosecution].]**

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*New June 2010; Revised December 2010~~,~~; Renumbered from CACI No. 3016 and Revised December 2012; Revised June 2013, May 2020, May 2021, November 2021*

### Directions for Use

Give this instruction along with CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements*, if the claimed civil rights violation is retaliation for exercising

constitutionally protected rights, including exercise of free speech rights as a private citizen. For a claim by a public employee who alleges that they suffered an adverse employment action in retaliation for their speech on an issue of public concern, see CACI No. 3053, *Retaliation for Exercise of Free Speech Rights—Public Employee—Essential Factual Elements*.

The retaliation should be alleged generally in element 1 of CACI No. 3000. The constitutionally protected activity refers back to the right alleged to have been violated in element 3 of CACI No. 3000.

Element 2 applies only in retaliatory arrest and prosecution cases. Omit element 2 if the retaliation alleged is not based on an arrest or prosecution.

Whether plaintiff was engaged in a constitutionally protected activity and, if applicable, whether probable cause for arrest or prosecution was absent (or whether the no-probable-cause requirement does not apply because of an exception) will usually have been resolved by the court as a matter of law before trial. (See *Nieves v. Bartlett* (2019) __ U.S. __ [139 S.Ct. 1715, 1724, 1727, 204 L.Ed.2d 1] [requiring a plaintiff to plead and prove the absence of probable cause for arrest but stating an exception to the no-probable-cause requirement "when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been"].) If there is a question of fact that the jury must resolve, include the optional bracketed language with element 1 and/or element 2, and give the first bracketed option of the final paragraph, identifying with specificity all disputed factual issues the jury must resolve for the court to determine the contested element or elements. If the court has determined element 1 or element 2, omit the optional bracketed language of the element and instruct the jury that the element has been determined as a matter of law by giving the second and/or third optional sentence(s) in the final paragraph. If there are contested issues of fact regarding the exception to the no-probable-cause requirement, this instruction may be augmented to include the specific factual findings necessary for the court to determine whether the exception applies.

The plaintiff must show that the defendant acted with a retaliatory motive and that the motive was a "but for" cause of the plaintiff's injury, i.e., that the retaliatory action would not have been taken absent the retaliatory motive. (See *Nieves, supra,* 139 S.Ct. at p. 1722.) A plaintiff may prove causal connection with circumstantial evidence but establishing a causal connection between a defendant's animus and a plaintiff's injury will depend on the type of retaliation case. (*Id.* at pp. 1722–1723 [distinguishing straightforward cases from more complex cases].)

If the defendant claims that the response to the plaintiff's constitutionally protected activity was prompted by a legitimate reason, the defendant may attempt to persuade the jury that the defendant would have taken the same action even in the absence of the alleged impermissible, retaliatory reason. See CACI No. 3055, *Rebuttal of Retaliatory Motive*. (*Id.* at p. 1727.)

**Sources and Authority**

- "Where, as here, the plaintiff claims retaliation for exercising a constitutional right, the majority of federal courts require the plaintiff to prove that (1) he or she was engaged in constitutionally protected activity, (2) the defendant's retaliatory action caused the plaintiff to suffer an injury that would likely deter a person of ordinary firmness from engaging in that protected activity, and (3) the retaliatory action was motivated, at least in part, by the plaintiff's protected activity."

(*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1062–1063 [99 Cal.Rptr.3d 661].)

- "[A]ctions that are otherwise proper and lawful may nevertheless be actionable if they are taken in retaliation against a person for exercising his or her constitutional rights." (*Tichinin, supra,* 177 Cal.App.4th at p. 1084.)

- "The plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation." (*Nieves, supra,* 139 S.Ct. at p. 1725, internal citation omitted.)

- "To state a First Amendment retaliation claim, a plaintiff must plausibly allege 'that (1) he was engaged in a constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct.' To ultimately 'prevail on such a claim, a plaintiff must establish a "causal connection" between the government defendant's "retaliatory animus" and the plaintiff's "subsequent injury." Specifically, a plaintiff must show that the defendant's retaliatory animus was 'a "but-for" cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.' " (*Capp v. County of San Diego* (9th Cir. 2019) 940 F.3d 1046, 1053, internal citations omitted.)

- "For a number of retaliation claims, establishing the causal connection between a defendant's animus and a plaintiff's injury is straightforward. Indeed, some of our cases in the public employment context 'have simply taken the evidence of the motive and the discharge as sufficient for a circumstantial demonstration that the one caused the other,' shifting the burden to the defendant to show he would have taken the challenged action even without the impermissible motive. But the consideration of causation is not so straightforward in other types of retaliation cases." *Nieves, supra,* 139 S.Ct. at pp. 1722–1723.)

- "To demonstrate retaliation in violation of the First Amendment, [the plaintiff] must ultimately prove first that [defendant] took action that 'would chill or silence a person of ordinary firmness from future First Amendment activities.' " (*Skoog v. County of Clackamas* (9th Cir. 2006) 469 F.3d 1221, 1231–1232, footnote and citation omitted.)

- "The plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest." (*Nieves, supra,* 139 S.Ct. at p. 1724.)

- "[W]e conclude that the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." (*Nieves, supra,* 139 S.Ct. at p. 1727.)

- "[T]he evidence of [plaintiff]'s alleged injuries, if believed, is sufficient to support a finding that the retaliatory action against him would deter a person of ordinary firmness from exercising his or her First Amendment rights. [¶] [Defendant] argues that plaintiff did not suffer any injury—i.e., [defendant]'s action did not chill [plaintiff]'s exercise of his rights—because he continued to litigate against [defendant]. However, that [plaintiff] persevered despite [defendant]'s action is not

determinative. To reiterate, in the context of a claim of retaliation, the question is not whether the plaintiff was actually deterred but whether the defendant's actions would have deterred a person of ordinary firmness." (*Tichinin, supra,* 177 Cal.App.4th at p. 1082.)

- "Intent to inhibit speech, which 'is an element of the [retaliation] claim,' can be demonstrated either through direct or circumstantial evidence." (*Mendocino Envtl. Ctr. v. Mendocino County* (9th Cir. 1999) 192 F.3d 1283, 1300–1301, internal citation omitted.)

- "[Defendant] may avoid liability if he shows that a 'final decision maker's independent investigation and termination decision, responding to a biased subordinate's initial report of misconduct, . . . negate[s] any causal link' between his retaliatory motive and the adverse employment action. This is because a final decision maker's wholly independent investigation and decision establish that 'the employee's protected speech was not a but-for cause of the adverse employment action.' " (*Karl v. City of Mountlake Terrace* (9th Cir. 2012) 678 F.3d 1062, 1072–1073, internal citation omitted.)

- "While the scope, severity and consequences of [their] actions are belittled by defendants, we have cautioned that 'a government act of retaliation need not be severe . . . [nor] be of a certain kind' to qualify as an adverse action." (*Marez v. Bassett* (9th Cir. 2010), 595 F.3d 1068, 1075.)

***Secondary Sources***

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 894, 895, 978

2 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Opportunity Laws*, § 40.26 (Matthew Bender)

3 Civil Rights Actions, Ch. 17, *Discrimination in Federally Assisted Programs*, ¶ 17.24B (Matthew Bender)

4 Civil Rights Actions, Ch. 21A, *Employment Discrimination Based on Race, Color, Religion, Sex, or National Origin*, ¶ 21.22(1)(f) (Matthew Bender)

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

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 (Matthew Bender)

## 3709. Ostensible Agent

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**[*Name of plaintiff*] claims that [*name of defendant*] is responsible for [*name of agent*]'s conduct because ~~[~~~~he/she~~~~/nonbinary pronoun]~~ [*name of agent*] was [*name of defendant*]'s apparent [employee/agent]. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. **That [*name of defendant*] intentionally or carelessly created the impression that [*name of agent*] was [*name of defendant*]'s [employee/agent];**

2. **That [*name of plaintiff*] reasonably believed that [*name of agent*] was [*name of defendant*]'s [employee/agent]; and**

3. **That [*name of plaintiff*] reasonably relied on [his/her/*nonbinary pronoun*] belief.**

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*New September 2003; Revised November 2019, November 2021*

### Directions for Use

Give this instruction with CACI No. 3701, *Tort Liability Asserted Against Principal—Essential Factual Elements,* if the plaintiff is relying on the doctrine of ostensible agency to establish the principal-agent relationship in CACI No. 3701.

For an instruction on ostensible agency in the physician-hospital context, see CACI No. 3714, *Ostensible Agency—Physician-Hospital Relationship.* ~~A somewhat different instruction is required to hold a hospital responsible for the acts of a physician under ostensible agency when the physician is actually an employee of a different entity. In that context, it has been said that the only relevant factual issue is whether the patient had reason to know that the physician was not an agent of the hospital. (See *Markow v. Rosner* (2016) 3 Cal.App.5th 1027 [208 Cal.Rptr.3d 363]; see also *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1454 [122 Cal.Rptr.2d 233].)~~

### Sources and Authority

- Agency Is Actual or Ostensible. Civil Code section 2298.
- "Ostensible Agency" Defined. Civil Code section 2300.
- "Ostensible Authority" Defined. Civil Code section 2317.
- When Principal is Bound by Ostensible Agent. Civil Code section 2334.
- " '[O]stensible authority arises as a result of conduct of the principal which causes the *third party* reasonably to believe that the agent possesses the authority to act on the principal's behalf.' 'Ostensible authority may be established by proof that the principal approved prior similar acts of the agent.' ' "[W]here the principal knows that the agent holds himself out as clothed with certain

authority, and remains silent, such conduct on the part of the principal may give rise to liability." ..." ...' " (*Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 426–427 [115 Cal.Rptr.3d 707], original italics, internal citations omitted.)

- "Whether an agent has ostensible authority is a question of fact and such authority may be implied from circumstances." (*Pierson v. Helmerich & Payne Internat. Drilling Co.* (2016) 4 Cal.App.5th 608, 635 [209 Cal.Rptr.3d 222].)

- " 'It is elementary that there are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence.' " (*Associated Creditors' Agency v. Davis* (1975) 13 Cal.3d 374, 399 [118 Cal.Rptr. 772, 530 P.2d 1084], internal citations omitted.)

- "Ostensible agency cannot be established by the representations or conduct of the purported agent; the statements or acts of the principal must be such as to cause the belief the agency exists." (*American Way Cellular, Inc. v. Travelers Property Casualty Co. of America* (2013) 216 Cal.App.4th 1040, 1053 [157 Cal.Rptr.3d 385].)

- "Liability of the principal for the acts of an ostensible agent rests on the doctrine of 'estoppel,' the essential elements of which are representations made by the principal, justifiable reliance by a third party, and a change of position from such reliance resulting in injury." (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761 [269 Cal.Rptr. 617], internal citation omitted.)

- ~~"But the adequacy of the notice is only one of the many fact questions that arise under ostensible agency. The jury must also determine whether the patient entrusted herself to the hospital, whether the hospital selected the doctor, and whether the patient reasonably believed the doctor was an agent of the hospital." (*Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 631, 641 [188 Cal.Rptr.3d 246].)~~

- ~~"Where a patient seeks to hold a hospital liable for the negligence of a physician, the doctrine of ostensible agency is now commonly expressed as having two elements: '(1) conduct by the hospital that would cause a reasonable person to believe that the physician was an agent of the hospital, and (2) reliance on that apparent agency relationship by the plaintiff.' Generally, the first element is satisfied 'when the hospital "holds itself out" to the public as a provider of care,' 'unless it gave the patient contrary notice.' Nonetheless, a hospital's 'contrary notice' may be insufficient 'to avoid liability in an emergency room context, where an injured patient in need of immediate medical care cannot be expected to understand or act upon that information.' Reliance upon an apparent agency is demonstrated 'when the plaintiff "looks to" the hospital for services, rather than to an individual physician.' Ultimately, 'there is really only one relevant factual issue: whether the patient had reason to know that the physician was not an agent of the hospital. As noted above, hospitals are generally deemed to have held themselves out as the provider of services unless they gave the patient contrary notice, and the patient is generally presumed to have looked to the hospital for care unless he or she was treated by his or her personal physician. Thus, unless the patient had some reason to know of the true relationship between the hospital and the physician—i.e., because the hospital gave the patient~~

~~actual notice or because the patient was treated by his or her personal physician—ostensible agency is readily inferred.' " (*Markow, supra,* 3 Cal.App.5th at p. 1038, internal citations omitted.)~~

***Secondary Sources***

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 154–159

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, *Vicarious Liability*, ¶¶ 2:676, 2:677 (The Rutter Group)

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.04[6] (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, §§ 427.11, 427.22 (Matthew Bender)

18 California Points and Authorities, Ch. 182, *Principal and Agent*, §§ 182.04, 182.120 et seq. (Matthew Bender)

California Civil Practice: Torts § 3:29 (Thomson Reuters)

## 3714. Ostensible Agency—Physician-Hospital Relationship

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**[*Name of plaintiff*] claims that [*name of hospital*] is responsible for [*name of physician*]'s conduct because [*name of physician*] was [*name of hospital*]'s apparent [employee/agent]. To establish this claim, [*name of plaintiff*] must prove both of the following:**

1. **That [*name of hospital*] held itself out to the public as a provider of care; and**

2. **That [*name of plaintiff*] looked to [*name of hospital*] for services, rather than selecting [*name of physician*] for services.**

**[A hospital holds itself out to the public as a provider of care unless the hospital gives notice to a patient that a physician is not an [employee/agent] of the hospital. However, the notice may not be adequate if a patient in need of medical care cannot be expected to understand or act on the information provided. In deciding whether [*name of plaintiff*] has proved element 1, you must take into consideration [*name of plaintiff*]'s condition at the time and decide whether any notice provided was adequate to give a reasonable person in [*name of plaintiff*]'s condition notice of the disclaimer.]**

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*New November 2021*

### Directions for Use

Use this instruction only if a patient claims that a hospital defendant is responsible for a physician's negligence or other wrongful conduct. Give this instruction with CACI No. 3701, *Tort Liability Asserted Against Principal—Essential Factual Elements*, if the plaintiff is relying on the doctrine of ostensible agency to establish the principal-agent relationship in CACI No. 3701.

Include the bracketed paragraph only if the hospital claims it notified the plaintiff that the physician was not its employee or agent.

### Sources and Authority

- Agency Is Actual or Ostensible. Civil Code section 2298.
- "Ostensible Agency" Defined. Civil Code section 2300.
- "Ostensible Authority" Defined. Civil Code section 2317.
- When Principal is Bound by Ostensible Agent. Civil Code section 2334.
- "Where a patient seeks to hold a hospital liable for the negligence of a physician, the doctrine of ostensible agency is now commonly expressed as having two elements: '(1) conduct by the hospital that would cause a reasonable person to believe that the physician was an agent of the hospital, and (2) reliance on that apparent agency relationship by the plaintiff.' Generally, the first element is

satisfied 'when the hospital "holds itself out" to the public as a provider of care,' 'unless it gave the patient contrary notice.' Nonetheless, a hospital's 'contrary notice' may be insufficient 'to avoid liability in an emergency room context, where an injured patient in need of immediate medical care cannot be expected to understand or act upon that information.' Reliance upon an apparent agency is demonstrated 'when the plaintiff "looks to" the hospital for services, rather than to an individual physician.' Ultimately, 'there is really only one relevant factual issue: whether the patient had reason to know that the physician was not an agent of the hospital. As noted above, hospitals are generally deemed to have held themselves out as the provider of services unless they gave the patient contrary notice, and the patient is generally presumed to have looked to the hospital for care unless he or she was treated by his or her personal physician. Thus, unless the patient had some reason to know of the true relationship between the hospital and the physician—i.e., because the hospital gave the patient actual notice or because the patient was treated by his or her personal physician—ostensible agency is readily inferred.' " (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1038 [208 Cal.Rptr.3d 363], internal citations omitted.)

- "It is well established in California that a hospital may be liable for the negligence of physicians on the staff, unless the hospital has clearly notified the patient that the treating physicians are not hospital employees and there is no reason to believe the patient was unable to understand or act on the information. This rule is founded on the theory of ostensible agency." (*Wicks v. Antelope Valley Healthcare Dist.* (2020) 49 Cal.App.5th 866, 882 [263 Cal.Rptr.3d 397].)

- "[T]he adequacy of the notice is only one of the many fact questions that arise under ostensible agency. The jury must also determine whether the patient entrusted herself to the hospital, whether the hospital selected the doctor, and whether the patient reasonably believed the doctor was an agent of the hospital." (*Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 631, 641 [188 Cal.Rptr.3d 246].)

- "Effectively, all a patient needs to show is that he or she sought treatment at the hospital, which is precisely what plaintiff alleged in this case. Unless the evidence conclusively indicates that the patient should have known that the treating physician was not the hospital's agent, such as when the patient is treated by his or her personal physician, the issue of ostensible agency must be left to the trier of fact." (*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1458 [122 Cal.Rptr.2d 233].)

- "Neither *Mejia*, *Whitlow*, nor *Markow* is factually on point with this case. Yet all three opinions inform our decision in this case. They rest on the same principle of California law, that although a hospital may not control, direct or supervise physicians on its staff, a hospital may be liable for their negligence on an ostensible agency theory, unless (1) the hospital gave the patient actual notice that the treating physicians are not hospital employees, and (2) there is no reason to believe the patient was unable to understand or act on the information, or (3) the patient was treated by his or her personal physician and knew or should have known the true relationship between the hospital and physician." (*Wicks, supra,* 49 Cal.App.5th at p. 884.)

***Secondary Sources***

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 1–4

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.45 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, § 295.13 et seq. (Matthew Bender)

## 4304. Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements

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**[***Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has failed to perform [a] requirement(s) under [his/her/***nonbinary pronoun***/its] [lease/rental agreement/sublease]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**

2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***];**

3. **That under the [lease/rental agreement/sublease], [***name of defendant***] agreed [***insert required condition(s) that were not performed***];**

4. **That [***name of defendant***] failed to perform [that/those] requirement(s) by [***insert description of alleged failure to perform***];**

5. **That [***name of plaintiff***] properly gave [***name of defendant***] [and [***name of subtenant***]] three days' written notice to [either [***describe action to correct failure to perform***] or] vacate the property; [and]**

**[6. That [***name of defendant***] did not [***describe action to correct failure to perform***]; [and]]**

**[7. That [***name of plaintiff***] properly gave [***name of defendant***] [and [***name of subtenant***]] three days' written notice to vacate the property; and]**

**~~7~~8. That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

**[[***Name of defendant***]'s failure to perform the requirement(s) of the [lease/rental agreement/sublease] must not be trivial, but must be a substantial violation of [an] important obligation(s).]**

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*New August 2007; Revised June 2010, December 2010, June 2011, December 2011, May 2020, November 2021*

### Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph, in element 5, and in element ~~7~~8 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the opening paragraph and in element 3, "owns" in element 1, and "rented" in element 2. Commercial

documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease" in the opening paragraph and in element 3, "leases" in element 1, and "subleased" in element 2. (Code Civ. Proc., § 1161(3).)

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 5.

If the violation of the condition or covenant involves assignment, sublet, or waste, or if the breach cannot be cured, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4); *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 [64 Cal.Rptr. 246].) In such a case, omit the bracketed language in element 5 and also omit element 6. If the violation involves nuisance or illegal activity, give CACI No. 4308, *Termination for Nuisance or Unlawful Use—Essential Factual Elements*.

~~Include the last paragraph if the tenant alleges that the violation was trivial. (See *Boston LLC v. Juarez* (2016) 245 Cal.App.4th 75, 81 [199 Cal.Rptr.3d 452].) It is not settled whether the landlord must prove the violation was substantial or the tenant must prove triviality as an affirmative defense. (See *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051 [241 Cal.Rptr. 487]; *Keating v. Preston* (1940) 42 Cal.App.2d 110, 118 [108 P.2d 479].)~~

The Tenant Protection Act of 2019 and/or local or federal law may impose additional requirements for the termination of a rental agreement based on breach of a condition. (See, e.g., Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable. For example, the Tenant Protection Act of 2019 requires a separate three-day notice to quit after the initial three-day notice to cure that is expressed in element 5. (See Civ. Code, § 1946.2(c).)

Element 7 applies only to a just cause eviction under the Tenant Protection Act of 2019, which governs certain residential real property tenancies of specified durations. (See *id.*, subd. (a) [stating occupancy requirement of 12 months of continuous tenancy, or, if any tenants have been added to the lease, after all tenants have lived at the property for a year or if the original tenant has lived there for 24 months or more], subd. (c) ["Before an owner of residential real property issues a notice to terminate a tenancy for just cause that is a curable lease violation, the owner shall first give notice of the violation to the tenant with an opportunity to cure the violation pursuant to paragraph (3) of Section 1161 of the Code of Civil Procedure. If the violation is not cured within the time period set forth in the notice, a three-day notice to quit without an opportunity to cure may thereafter be served to terminate the tenancy"].)

Include the last paragraph if the tenant alleges that the violation was trivial. (See *Boston LLC v. Juarez* (2016) 245 Cal.App.4th 75, 81 [199 Cal.Rptr.3d 452].) It is not settled whether the landlord must prove the violation was substantial or the tenant must prove triviality as an affirmative defense. (See *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051 [241 Cal.Rptr. 487]; *Keating v. Preston* (1940) 42 Cal.App.2d 110, 118 [108 P.2d 479].)

See CACI No. 4305, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement*, for an instruction on proper written notice.

See also CACI No. 312, *Substantial Performance*.

## Sources and Authority

- Unlawful Detainer Based on Failure to Perform Conditions. Code of Civil Procedure section 1161(3), (4).
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- Dual Notice Requirement for Certain Residential Tenancies. Civil Code section 1946.2(c).
- Conversion of Unlawful Detainer to Ordinary Civil Action ~~i~~If Possession No Longer at Issue. Civil Code section 1952.3(a).
- "[Code of Civil Procedure section 1161(3)] provides, that where the conditions or covenants of a lease can be performed, a lessee may within three days after the service of the notice perform them, and so save a forfeiture of his lease. By performing, the tenant may defeat the landlord's claim for possession. Where, however, the covenants cannot be performed, the law recognizes that it would be an idle and useless ceremony to demand their performance, and so dispenses with the demand to do so. And this is all that it does dispense with. It does not dispense with the demand for the possession of the premises. It requires that in any event. If the covenants can be performed, the notice is in the alternative, either to perform them or deliver possession. When the covenants are beyond performance an alternative notice would be useless, and demand for possession alone is necessary. Bearing in mind that the object of

this statute is to speedily permit a landlord to obtain possession of his premises where the tenant has violated the covenants of the lease, the only reasonable interpretation of the statute is, that before bringing suit he shall take that means which should be most effectual for the purpose of obtaining possession, which is to demand it. If upon demand the tenant surrenders possession, the necessity for any summary proceeding is at an end, and by the demand is accomplished what the law otherwise would accord him under the proceeding." (*Schnittger v. Rose* (1903) 139 Cal. 656, 662 [73 P. 449].)

- "It is well settled that the notice required under [Code Civ. Proc., § 1161] subdivisions 2 and 3 (where the condition or covenant assertedly violated is capable of being performed) must be framed in the alternative, viz., pay the rent *or* quit, perform the covenant *or* quit, and a notice which merely directs the tenant to quit is insufficient to render such tenant guilty of unlawful detainer upon his continued possession." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 27 [341 P.2d 749], original italics.)

- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman, supra,* 172 Cal.App.2d at p. 29.)

- "The law sensibly recognizes that although every instance of noncompliance with a contract's terms constitutes a breach, not every breach justifies treating the contract as terminated. Following the lead of the Restatements of Contracts, California courts allow termination only if the breach can be classified as 'material,' 'substantial,' or 'total.' " (*Superior Motels, Inc., supra,* 195 Cal.App.3d at p. 1051, internal citations omitted.)

- " '[A] lease may be terminated only for a substantial breach thereof, and not for a mere technical or trivial violation.' This materiality limitation even extends to leases which contain clauses purporting to dispense with the materiality limitation." (*Boston LLC, supra,* 245 Cal.App.4th at p. 81, internal citation omitted.)

- " 'Normally the question of whether a breach of an obligation is a material breach … is a question of fact,' however ' "if reasonable minds cannot differ on the issue of materiality, the issue may be resolved as a matter of law." ' " (*Boston LLC, supra,* 245 Cal.App.4th at p. 87.)

- "As to the substantiality of the violation, the evidence shows that the violation was wilful. Therefore, the court will not measure the extent of the violation." (*Hignell v. Gebala* (1949) 90 Cal.App.2d 61, 66 [202 P.2d 378].)

- "Where a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action." (*Salton Community Services Dist., supra,* 256 Cal.App.2d at p. 529.)

- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra,* 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

***Secondary Sources***

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 753, 759

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.50–8.54

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.38–6.49

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 12-G, *Termination of Section 8 Tenancies*, ¶ 12:200 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶ 7:93 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.28 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.20 (Matthew Bender)

Miller & Starr California Real Estate 4th, § 34.182 (Thomson Reuters)

## 4330. Denial of Requested Accommodation

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**[***Name of plaintiff***] claims that the requested accommodation for [[***name of defendant***]'s/a member of [***name of defendant***]'s household's] disability was properly denied because of an exception to [***name of plaintiff***]'s duty to reasonably accommodate a tenant's disability. To defeat [***name of defendant***]'s accommodation defense, [***name of plaintiff***] must prove:**

> **[***Specify the provision(s) at issue from California Code of Regulations, title 2, section 12179, e.g., that the requested accommodation would impose an undue financial and administrative burden on the plaintiff***].**

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*New November 2021*

### Directions for Use

This instruction is for use with CACI No. 4329, *Affirmative Defense—Failure to Provide Reasonable Accommodation*. Give this instruction only if the plaintiff in an unlawful detainer case claims that the requested accommodation was properly denied. (See Cal. Code Regs., tit. 2, § 12179.) Include only factors from the regulation that are at issue.

### Sources and Authority

- Denial of Reasonable Accommodation in Unlawful Detainer Case. Title 2 California Code of Regulations section 12179.

***Secondary Sources***

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 734-738, 752

3 California Real Estate Law and Practice, Ch. 63, *Duties and Liabilities of Brokers*, § 63.121 (Matthew Bender)

| Instruction(s) | Commenter | Comment | Committee Response |
|---|---|---|---|
| 2334. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits—Essential Factual Elements (Revise) | Association of Southern California Defense Counsel by David P. Pruett<br>Carroll, Kelly, Trotter & Franzen<br>Sacramento | "In response to the Invitation to Comment, the Association of Southern California Defense Counsel ('ASCDC') writes to join in the comments submitted by the letter of Karen M. Bray, of Horvitz & Levy, dated August 27, 2021." | See the committee's responses to the comments of Karen M. Bray, below. |
| | Karen M. Bray<br>Attorney Horvitz & Levy<br>Burbank | "We write to provide comments on the Committee's proposed changes to CACI No. 2334, the jury instruction that addresses an insurer's potential liability for bad faith refusal to accept a reasonable settlement demand.<br>Our firm represented the insurer in *Pinto v. Farmers Insurance Exchange* (2021) 61 Cal.App.5th 676 (*Pinto*), the recent appellate case that served as the impetus for the Committee's proposed changes to CACI No. 2334. We are therefore very familiar with the law governing claims that allege bad faith refusal of a policy limits settlement demand, as well as the law governing bad faith more broadly. We are also familiar with some of the difficulties trial judges have had attempting to tailor the text of CACI No. 2334 to the facts of a particular case.<br><br>In part I of this letter, we set forth our suggested text for CACI No. 2334, followed by a copy of the version proposed by the Committee that is redlined to reflect the changes we suggest. We then explain our suggested changes. Parts II and III of this letter provide comments on the 'Directions for Use' and 'Sources and Authorities' sections following CACI No. 2334." | No response required.<br><br>See the committee's responses to specific comments below. |
| | | "[Proposed text of CACI No. 2334B, without redlines, omitted]<br>**B. Committee's proposed text, redlined to reflect the changes incorporated above** | See the committee's responses to specific comments below. |

| Instruction(s) | Commenter | Comment | Committee Response |
|---|---|---|---|
| | | 2334. Faith (Third Party)—Refusal to Accept Reasonable Settlement Offer Within Liability Policy Limits—Essential Factual Elements<br>[*Name of plaintiff*] contendsclaims that [he/she/nonbinary pronoun/it] was harmed by [*name of defendant*]'s breached of the obligation of good faith and fair dealing because [*name of defendant*] did notfailed to accept a reasonable settlement demandoffer on a claim in a lawsuit against [*name of plaintiff*]. To prevail on establish this cause of actionclaim, [*name of plaintiff*] must prove all of the following:<br>1. [*Name of plaintiff*] was insured under a policy of liability insurance issued by [*name of defendant*];<br>21. That [*Name of claimantplaintiff in underlying case*] madebrought a claimlawsuit against [*name of plaintiff*] for a claim that was covered by [*name of defendant*]'s insurance policy;<br>3. [*Name of claimant*] made a reasonable offer to settle this claim against [*name of plaintiff*] for an amount that was within the limits of the insurance coverage;<br>42. That [*nName of defendant*] unreasonably refusedfailed to accept the a reasonable settlement offerdemand for an amount within policy limits; and<br>3. That [*name of defendant*]'s failure to accept the settlement, whether by action or by failure to act, was the result of unreasonable conduct by [*name of defendant*]; and<br>54. The unreasonable refusal to accept the settlement offer caused That a monetary judgment to be was entered against [*name of plaintiff*] for a sum of money greater than the policy limits. The "Policy limits" of insurance coverage means the highest amount available under the policy for the claim against [*name of plaintiff*]. A settlement offerdemand for an amount within policy limits of coverage may beis reasonable if [*name of defendant*] knew or should have known at the time the offerdemand was rejected that athe potential judgment against [*name of plaintiff*] was likely to exceed the limits of insurance coverageamount of the demand based on | |

| Instruction(s) | Commenter | Comment | Committee Response |
|---|---|---|---|
| | | [*name of claimant~~plaintiff in underlying case~~*]'s injuries or losses and [*name of plaintiff*]'s probable liability. However, ~~the~~an offer~~demand~~ may be unreasonable for reasons other than the amount demanded. For example, an offer may be unreasonable if it does not allow sufficient time to respond or if it includes conditions that are unnecessarily cumbersome.<br>[*Name of defendant*]'s refusal to accept the settlement offer is unreasonable if, in light of all of the circumstances, the refusal was without proper cause. Mere errors or mistakes do not demonstrate a lack of proper cause.~~An insurer's conduct is unreasonable when, for example, it places its own interests above those of the insured.~~ | |
| | | "**C. Explanation of our proposed text for CACI No. 2334**<br>Title and throughout–use 'offer' instead of 'demand': In the title and throughout the instruction, we suggest using the word 'offer' instead of "demand" because it is more accurate to refer to an acceptance of an 'offer' than acceptance of a 'demand.' " | The committee sees no improved clarity with the suggested language. In this context, an offer is commonly sent in the form of a settlement demand. |
| | | "Opening paragraph and throughout—use 'claim' instead of referring to an underlying lawsuit: In the opening paragraph and as appropriate throughout the instruction, we suggest revisions to reflect the fact that some causes of action arising under this jury instruction involve circumstances in which a claim is made *before* any lawsuit is filed. (E.g., *Pinto*, *supra*, 61 Cal.App.5th at pp. 683-686.)<br>Thus, for example, we suggest referring to a 'claim' and a 'claimant,' rather than a 'lawsuit' or a 'plaintiff in the underlying case.' " | The committee agrees in part, and has changed "lawsuit" to "claim" as appropriate throughout the instruction. The committee, however, believes that the bracketed content ("*name of plaintiff in underlying case*") is sufficiently clear because the bracket calls for specification of a person's name. |

| Instruction(s) | Commenter | Comment | Committee Response |
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| | | "Elements 1 and 2–address the existence of a policy and the coverage of the claim separately: As currently written, element one in CACI No. 2334 combines two separate factors: (a) the existence of a liability policy under which the plaintiff was an insured, and (b) the existence of coverage for the claim made against the insured. Because either of these points may be contested, we suggest breaking the factors into separate elements. This should be easier for the jury to follow and will serve as a better model for a verdict form based on the instruction." | The committee agrees, and has separated element 1 into two elements. The committee will consider developing a related verdict form in a future release. |
| | | "Elements 3 and 4—separately address the reasonableness of the offer and the reasonableness of the insurer's response: As explained in *Pinto, supra,* 61 Cal.App.5th at pages 687–688, 692, a plaintiff must prove both that the claimant's offer was reasonable and that the insurer's response to the offer was unreasonable. (Accord, *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425–426 (*Graciano*).) These are very different inquiries. The first centers upon the terms of the offer such as the time allotted for a response, the conditions imposed, and the clarity of the terms. The second centers upon the efforts by the insurer to respond to the offer and the decisions made in doing so. However, the version of CACI No. 2334 proposed by the Committee does not adequately set forth the requirement that the settlement offer must be reasonable. Instead, the 'reasonable offer' requirement is buried within an element focused on the insurer's conduct, i.e., its failure to accept the offer. To clarify the requirements for the tort and guide the jury's deliberations, we suggest separating the requirements into individual elements, with one addressing the reasonableness of the offer and the other addressing the reasonableness of the insurer's response." | To the extent that the commenter is advocating for revisions to the reasonable-demand element (re-numbered as element 3 in this report), the comment is beyond the scope of the invitation to comment. The committee notes that the reasonable-demand element has been expressed in this way since 2007. The committee will consider the suggestion in a future release. |
| | | "Element 4–streamline and clarify the terms: With respect to the Committee's new proposed element, we suggest revisions that serve three purposes: | The committee agrees in part as set forth below. |

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| | | (a) Clarify that the cause of action addresses an insurer's response to a particular 'settlement *offer*' presented by the claimant, not merely to 'settlement' as a general matter. | The committee has added "demand" to clarify that a *settlement demand* is at issue. |
| | | (b) Streamline the element by removing the awkward and unnecessary clause 'whether by action or by failure to act' from the middle of the sentence. | To streamline the language of the element, the committee has moved the language contained in the clause to a paragraph following the elements. |
| | | (c) Simplify the element by focusing the jury's attention upon the question whether the insurer 'unreasonably refused' a settlement offer rather than whether the failure to accept 'was the result of unreasonable conduct.' " | The committee does not see improved clarity with the proposed phrasing. The commenter's language suggests that the defendant has affirmatively "refused" a demand, which may not be the situation in all cases. Among other terms, the cases refer to an insurer's "failure to accept," "refusal," and "rejection." The committee has chosen "failure to accept" because it is inclusive of both refusal and rejection, as well as inaction. |

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| | | | Moreover, in selecting this language, the committee looked to the insurer's proposed language in *Pinto* that the court expressly said would have been correct: "Farmers proposed that a special verdict question mirroring CACI No. 2334 be modified to ask whether Farmers's failure to accept Pinto's settlement offer was 'the result of unreasonable conduct by Farmers,' which Farmers at all times argued was essential to Pinto's bad faith failure-to-settle theory. **This would have been the correct question**[.]" (*Pinto, supra,* 61 Cal.App.5th at p. 694, emphasis added.) |
| | | "Element 5—add causation requirement: Like any other bad faith claim, a plaintiff may not recover for a bad faith refusal to accept a settlement offer absent proof that the insurer's bad faith caused the damages plaintiff seeks to recover.<br>(E.g., *Pinto*, *supra*, 61 Cal.App.5th at p. 687; accord, *Hamilton v. Maryland Cas. Co*. (2002) 27 Cal.4th 718, 725; *PPG Industries, Inc. v. Transamerica Ins. Co*. (1999) 20 Cal.4th 310, 312, 315; *Graciano*, *supra*, 231 Cal.App.4th at p. 425.) | This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle. |

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| | | However, as currently written, CACI No. 2334 does not include any causation requirement. We accordingly suggest adding causation language to the instruction." | |
| | | "Second paragraph following list of elements—provide examples of factors that may render an offer unreasonable: We suggest identifying some of the factors a jury may consider in evaluating the reasonableness of a settlement offer. (See *Graciano*, *supra*, 231 Cal.App.4th at pp. 425-426 [listing factors and identifying cases in which they were considered].)" | The committee believes that adding examples like cumbersome conditions or tight deadlines might create confusion if they do not have relevance to the case. |

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| | | "New final paragraph—eliminate and substitute with clarifying text:<br>Whether an insurer's conduct amounts to bad faith must be evaluated under all of the circumstances pertinent to a particular case. (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 723 (*Wilson*); *Walbrook Ins. Co. v. Liberty Mutual Ins. Co.* (1992) 5 Cal.App.4th 1445, 1455–1456 (*Walbrook*).)<br>The final paragraph of the instruction proposed by the Committee conflicts with that principle by making a single factor determinative, i.e., an insurer has acted unreasonably if it 'places its own interests above those of the insured.' But that may not always be true.<br>For example, an insurer may refuse a settlement offer because (1) there is a dispute whether the claim is covered, and (2) it wants to avoid paying policy limits for one insured when there is another insured under the policy. The first reason is improper and unreasonable because it places the interests of the insurer in avoiding paying out on a policy over the interests of the insured in avoiding personal liability. (*Blue Ridge Ins. Co. v. Jacobsen* (2001) 25 Cal.4th 489, 502; *Samson v. Transamerica Ins. Co.* (1981) 30 Cal.3d 220, 237; *Johansen v. California State Auto. Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 15–16; *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658, 660.)<br>The second reason, however, is an independently proper basis to refuse a settlement offer, because an insurer's duty of good faith extends to all of its insureds, and it cannot pay policy limits to settle a claim against one insured when doing so would leave another insured without coverage. (*Shell Oil Co. v. National Union Fire Ins. Co.* (1996) 44 Cal.App.4th 1633, 1645; *Lehto v. Allstate Ins. Co.* (1994) 31 Cal.App.4th 60, 72–75; *Strauss v. Farmers Ins. Exchange* (1994) 26 Cal.App.4th 1017, 1019,1021–1022; *Palmer v. Financial Indem. Co.* (1963) 215 Cal.App.2d 419, 426–427, 431.)<br>Nevertheless, the final paragraph of CACI No. 2334 proposed by the Committee would erroneously direct the jury to find that the insurer acted unreasonably notwithstanding the fact that the insurer had a legally valid basis for refusing an offer." | The committee believes that the final paragraph is a correct statement of the law. (See *Pinto, supra,* p. 692.) The committee, however, has revised the paragraph to explain that element 4 can be proved by action or inaction, as noted above, and has rephrased the sentence to conform to the phrasing of CACI No. 2330. |

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| | | "Moreover, the requirement that an insurer give equal consideration to the interests of its insureds is a broad, general concept that is already addressed in CACI No. 2330, the introductory instruction that provides an overview of the obligation of good faith and fair dealing: 'To fulfill its implied obligation of good faith and faith dealing, an insurance company must give at least as much consideration to the interests of the insured as it gives to its own interests.' Reiterating that principle in CACI No. 2334 does not provide the jury with any guidance or clarification concerning the specific conduct that a plaintiff must prove to demonstrate the form of bad faith the plaintiff has alleged, i.e., a refusal of a settlement offer without proper cause."<br><br>We therefore suggest alternative text for the final paragraph of CACI No. 2334 that is consistent with the "totality of the circumstances" principle and focuses on the specific conduct at issue under the instruction, i.e., the basis for the insurer's decision. (*Walbrook*, *supra*, 5 Cal.App.4th at p. 1460 ["the crucial issue is . . . the basis for the insurer's decision to reject an offer of settlement"].)<br><br>We further suggest language clarifying that a mere error or mistake by an insurer is not sufficient to demonstrate that its conduct was unreasonable. (*Wilson*, *supra*, 42 Cal.4th at p. 726; *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 819; *Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 689; *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.*" | The committee has rephrased the sentence as noted above.<br><br>The committee believes the instruction is wholly consistent with the jury's need to consider all relevant facts and circumstances.<br><br>The suggestion is beyond the scope of the invitation to comment. The committee will consider this suggestion in a future release. |

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| | | "**II. Directions for Use**<br>*Pinto* illustrates a common scenario: An injured claimant presents a settlement offer to an insured, contends that the offer was not accepted, pursues litigation against the insured, secures a judgment in excess of policy limits, obtains an assignment from the insured of any potential claims against the insurer in exchange for a covenant not to enforce the judgment, and then sues the insurance company for bad faith refusal to accept a reasonable settlement demand. (*Pinto, supra,* 61 Cal.App.5th at pp. 683-686.)<br>As the second paragraph in the Directions for Use of CACI No. 2334 states, the instruction "assume[s] that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case."<br>We suggest further clarifying this direction by adding: "For example, if the plaintiff in the bad faith action is the insured's assignee, the name of the claimant should be substituted in place of the name of the plaintiff as needed throughout the instruction to accurately reflect the underlying facts and relationship between the parties." | As suggested, the committee has added a sentence to the Directions for Use about modifying the instruction if the plaintiff is the insured's assignee. |
| | | "**III. Sources and Authority**<br>*Pinto* resolved the question previously posed by the Committee concerning whether insurer culpability must be proved to establish a claim for bad faith refusal to accept a settlement offer—it must. (*Pinto, supra,* 61 Cal.App.5th at pp. 687–688.)<br>We accordingly concur with (1) the references to *Pinto* among the sources and authority supporting the instruction, (2) the deletion of the text posing the question 'Insurer culpability required?', and (3) the deletion of the boldface text at the end of the section quoting the comment from the California Practice Guide: Insurance Litigation." | No response required. |
| | | "However, we see no reason to delete the reference to the sources and authorities stating that mere errors, negligence, or mistakes are insufficient to establish that an insurer acted in bad faith, i.e., | The committee has deleted out-of-format content, specifically |

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| | | without proper cause. Indeed, this is an important point that we have suggested be included within the body of the instruction itself. Otherwise, a jury may interpret the term 'unreasonable' in the instruction to mean mere negligence, which the caselaw has explained does not support a claim for bad faith." | material from the California Practice Guide: Insurance Litigation (a/k/a the Rutter Group guide), which is not authoritative. CACI's Sources and Authority are direct quotes from published cases or other authoritative sources. |
| | | "I suggest that the following be included in the 'Sources and Authority' section for CACI No. 2334:<br>To prove that an insurer acted unreasonably, it must be shown that the insurer's 'decision was prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations' of the insured and thereby 'depriv[es] [the insured] of the benefits of the agreement.' (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 726, internal quotation marks omitted; *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 346; accord, *Walbrook Ins. Co. v. Liberty Mutual Ins. Co.* (1992) 5 Cal.App.4th 1445, 1460." | The suggested content is not a complete quote from any of the cases cited, and the committee does not add editorial content to clarify quotations. The committee, however, has added a direct quote from *Walbrook*. |
| | Civil Justice Association of California (CJAC) and American Property Casualty Insurance Association (APCIA) by Jaime | "Thank you for the opportunity for our organizations to comment on proposed revisions to California Civil Jury Instructions – CACI 21-02. Civil Justice Association of California (CJAC) is a more than 40-year-old nonprofit organization representing a broad and diverse array of businesses and professional associations. A trusted source of expertise in legal reform and advocacy, CJAC confronts legislation, laws, and regulations that create unfair litigation burdens on California businesses, employees, and communities. American | No response required. |

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| | Huff, Vice President and Counsel, Public Policy (CJAC) and Mark Sektnan, Vice President, State Government Relations (APCIA) Sacramento | Property Casualty Insurance Association (APCIA) is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers. APCIA members represent all sizes, structures, and regions – protecting families, communities, and businesses in the U.S. and across the globe. Our members have concerns about proposed changes as well as existing language set forth in CACI 2334 - Bad Faith (Third Party) - Refusal to Accept Reasonable Settlement Within Liability Policy Limits - Essential Factual Elements. We respectfully request that you consider and address these concerns as outlined below.<br><br>The proposed changes to CACI 2334 appear to be intended to capture the legal principles set forth in the recent California Court of Appeal decision, *Pinto v. Farmers Insurance* (2021) 61 Cal.App.5th 676, as newly referenced in the Sources and Authority for the instruction. However, CACI 2334, even with proposed amendments, does not adequately follow *Pinto* and other established case law and could create confusion for the jury. Specific concerns with the proposed CACI 2334 instruction are as follows:" | See the committee's responses to specific proposed changes below. |
| | | "1. **The Proposed Amendment That Provides the Example of 'Bad Faith' Is Inadequate and Disregards Well Established Law**. Though perhaps well-intended, this proposed amendment (a proposed new sentence at the end of the Instruction) sets out an example of unreasonable insurer conduct--when an insurer 'places its own interests above those of the insured'--without recognizing that the jury should also consider the totality of circumstances, as directed by the California Supreme Court: "An insurer's good or bad faith must be evaluated in light of the totality of circumstances surrounding its actions." (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 723. | See the committee's response to the comment of Karen M. Bray, above. To the extent that commenter is advocating for references to the "totality of circumstances" and mere errors, negligence, or honest mistakes, the comment is beyond the scope of the invitation to comment. The committee |

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| | | There is also no indication of what is *not* unreasonable conduct, such as negligence. Yet, the *Pinto* case makes clear that mere errors and honest mistakes are not unreasonable conduct. (*Pinto* at 688.)<br>We respectfully submit that if the new sentence is included, additional instruction must be added as follows:<br>In deciding whether the insurer responded unreasonably to the settlement demand, you should consider the totality of the circumstances. An insurer's conduct may be unreasonable when, for example, it places its own interests above those of the insured. Mere errors, negligence, and honest mistakes are not enough to constitute unreasonable behavior." | will consider the suggestions in a future release. |
| | | "2. **CACI 2334 May Be Misinterpreted as Eliminating a Plaintiff's Need to Demonstrate 'Proximate Causation' as an Element of Proving Bad Faith.**<br>*Pinto* and other case law authority confirm that 'proximate causation' is an element of a third-party bad faith claim. Yet, one may misread C2334 as lacking the element of causation.<br>Further, CACI 2334 fails to provide a clear, distinct presentation of two elements of a "bad faith" claim that should be considered by jurors separately:<br>a. whether the claimant made a 'reasonable offer' and<br>b. whether the insurer 'unreasonably refused to accept.'<br>Instead, the focus of the instruction is on the insurer's conduct, without clear treatment of whether the claimant made a "reasonable offer." [Language of element omitted]<br>The jury should determine the reasonableness of the claimant. It should not be permitted or provided the opportunity to assume that the demand made was reasonable. To address our concerns (including the potential for confusion, or even, bias with the jury instruction), we recommend that the Committee on California Civil Jury Instructions Council revise CACI 2334, using language from former BAJI: 12.95(4), (6), [footnote quoting BAJI 12.95 omitted] | To the extent the commenter suggests a discrete causation element be added, the comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle. With respect to a reasonable-offer element, the instruction does not assume the reasonableness of the settlement demand. In addition to element 3 (as renumbered in this report), there is a paragraph following the definition of policy limits |

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| | | to align the instruction more fully and consistently with *Pinto* and other case law authority. We also propose some clarifications below to the labels used to refer to the parties:<br>To establish this claim, [*name of plaintiff*] must prove all of the following:<br>1. That [*name of plaintiff in underlying case*] brought a lawsuit against [*name of ~~plaintiff~~ defendant in underlying case*] for a claim that was covered by [*name of ~~defendant~~ insurer*]'s insurance policy;<br>2. That [*name of plaintiff in underlying case*] made a reasonable offer to settle this claim for an amount within policy limits;<br>23. That [*name of ~~defendant~~ insurer*] ~~failed~~ rejected a reasonable settlement demand for an amount within policy limits;<br>34. That [*name of ~~defendant~~ insurer*]'s ~~failure~~ rejection of the settlement demand, whether by action or by failure to act, was the result of unreasonable conduct by [*name of ~~defendant~~ insurer*] in light of the totality of the circumstances; and<br>5. The refusal by [*name of insurer*] was a cause of injury, damage, loss or harm to [*name of defendant in underlying case*].<br>46. That a monetary judgment was entered against [name of plaintiff defendant in underlying case] for a sum greater than the policy limits.<br>"Policy limits" means the highest amount available under the policy for the claim against [*name of ~~plaintiff~~ defendant in underlying case*].<br>A settlement demand for an amount within policy limits is reasonable if [*name of defendant*] knew or should have known at the time the demand was rejected that the potential judgment was likely to exceed the amount of the demand based on [*name of plaintiff in underlying case*]'s injuries or | that instructs the jury on the determination of the reasonableness of the settlement demand. To the extent that the commenter is advocating for revisions to the reasonable-demand element, the committee will consider the suggestion in a future release. |

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| | | loss and [*name of ~~plaintiff~~ defendant in underlying case*]'s probable liability. However, the demand may be unreasonable for reasons other than the amount demanded." | |
| | | "3. **CACI 2334 Deletes References Under Sources and Authorities that Inform Jurors that Negligence is Not Enough to Establish the Tort**.<br>To support the point that 'bad faith' cannot be established through negligence we recommend that the 'Sources and Authorities' keep citations that make clear that errors, negligence, and mistaken judgment are not enough to establish bad faith.<br><br>Based on the foregoing, CJAC and APCIA respectfully request that the jury instruction be revised as recommended above to align with the *Pinto* decision and other established case law." | *CACI*'s Sources and Authority are a reference for users, not jurors. The committee has deleted out-of-format content.<br><br>The committee believes that the instruction correctly states the applicable legal standards and is consistent with the case law, including *Pinto*. |
| | Bruce Greenlee<br>Attorney<br>Richmond | 1. I agree that the *Pinto* case compels adding the new element 4 and the excision in the Directions for Use. Too bad that the Supreme Court didn't grant review and put the issue to bed forever, but I think it's safe to conclude that the denial of review means that the war is over. | No response required. |
| | | 2. I would not add the additional sentence at the end of the instruction. While it's a correct statement of law, it's just a general principle disassociated from any facts, and as such would not be helpful to a jury. What is or is not reasonable insurer conduct will involve analysis of the facts of the case. | The committee agrees that the sentence is a correct statement of the law. (See *Pinto, supra,* p. 692.) The committee, however, has revised the sentence in response to other comments, as noted above. |

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| | | 3. The DforU needs a sentence about element 4 to replace the current discussion. Something like: "The jury must find that the settlement demand was reasonable (Element 3), and also that the insurer's rejection of the demand was unreasonable (Element 4). (full cite *Pinto*.)." This will fix the problem of the first citation to *Pinto* in the S&A being a *supra* cite. | Because the new element does not need explanation, the committee has not included *Pinto* in the Directions for Use. As noted by the Orange County Bar Association (see comment below), the committee has corrected the first citation to *Pinto* in the Sources and Authority. |
| | Peter Klee<br>Attorney<br>Sheppard, Mullin, Richter & Hampton LLP<br>San Diego, on behalf of:<br>Allstate Insurance Company<br>Alliance United Insurance Company<br>Anchor General Insurance<br>Crusader Insurance Company<br>Fred Loya Insurance | "We write to provide our comments on the recent amendments to CACI 2334 that have been proposed as a result of the California Court of Appeal's recent decision in *Pinto v. Farmers Insurance* (2021) 61 Cal.App.5th 676. Our principal suggestion is that, instead of trying to fix the broken instruction, the Judicial Council revert to the language used in BAJI 12.95, the approved instruction that was in use for decades before CACI was adopted. As explained below, BAJI 12.95 is a more accurate and complete instruction. In addition, we identify several separate and independent reasons for not adopting some of the proposed amendments to the instruction." | See the committee's responses to specific comments below. |
| | | "These comments are submitted by the following auto insurance companies: [list of companies omitted; see commenter information]<br><br>Collectively, we issue a significant number of policies in the State of California and command a substantial share of the automobile insurance market in the state. | No response required.<br><br>No response required. |

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| | Company Government Employees Insurance Company (GEICO)<br>Infinity Insurance Company<br>Interinsurance Exchange of the Automobile Club (Auto Club)<br>Mercury Insurance<br>Travelers Insurance<br>Wawanesa General Insurance Company | We process tens of thousands of third-party auto liability claims in California every year. A small percentage of those claims are not settled and result in 'bad faith failure to settle' lawsuits. In a large number of those cases, there is significant confusion concerning CACI 2334 and whether it is accurate and complete.<br><br>In our experience, trial judges (applying both the use notes and case law) have been receptive to modifying CACI 2334. Some trial judges, however, will simply give the model instruction. This engenders both confusion and uncertainty, which is unnecessary. As interpreted by the courts, the tort has more or less remained the same for over half a century. There is no reason of which we can conceive why the instruction is constantly undergoing significant revisions when the law has basically not changed." | No response required.<br><br>A recent case, *Pinto, supra,* 61 Cal.App.5th 676, is the impetus for the committee's proposed changes. The content removed from the Directions for Use, including a link to the committee's supplemental report to the Judicial Council for its June 2016 meeting, explains some of the prior revisions. (A link is also at footnote 6 of this report.) |
| | | "**A. Requested Change: Revert to BAJI 12.95**<br>In 2003, the Judicial Council adopted CACI as California's official jury instructions. Before then, BAJI instructions were in common use throughout the state. BAJI 12.95 addressed the tort of bad faith failure to settle. The CACI instructions replaced BAJI 12.95 with CACI 2334 in 2003. The idea was not to change the law, but to write the instructions in a more user-friendly way. (See https://www.courts.ca.gov/ partners/315.htm ['Does CACI change the law in California? No. In drafting the new instructions, the Task Force was charged with accurately stating the law in a way that is understandable to the average juror. The articulation and | The committee disagrees. Under California Rules of Court, rule 2.1050, the *CACI* instructions are designated as the "official instructions for use in the state of California." CACI No. 2334 replaced the BAJI instruction in 2003. As with the revisions proposed in this |

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| | | interpretation of California law remains in the purview of the Legislature and court of review.'].)<br>If CACI is intended to make jury instructions 'more understandable to the average juror,' the recently proposed changes to CACI 2334 do not advance the mission. A simple juxtaposition of BAJI 12.95 and the proposed CACI 2334 demonstrates the point.<br>[Language of BAJI 12.95 and proposed CACI No. 2334 omitted]<br>There are a number of problems with CACI 2334, both as it currently exists and as it is proposed to be amended, that would be remedied by a return to BAJI 12.95." | report, new case law or efforts to clarify prior language in CACI No. 2334 led to revisions at various points over the last two decades. Each of the prior iterations of this instruction was approved by the council after public comment. |
| | | "***1. CACI 2334 Eliminates 'Proximate Causation' As An Element of the Tort***<br>BAJI 12.95, which had been used in California for decades, contains the requisite causation element (element 6), and for that reason is preferable to proposed CACI 2334.<br>*Pinto*, like BAJI, confirms that 'proximate causation' is an element of a third-party bad faith claim. To recover in any bad faith case, the insured must show that the insurance company's breach of the implied covenant is the proximate cause of the damages they seek to recover:<br>> If the insurer breaches the implied covenant by unreasonably refusing to settle the third party suit, the insured may sue the insurer in tort to recover damages *proximately caused* by the insurer's breach.' (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 312, 84 Cal.Rptr.2d 455, 975 P.2d 652.)<br>*Pinto*, 61 Cal.App.5th at 687 [Emphasis added]. See also *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 725 ['An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits']; *PPG Indus., Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315 ['Because breach of the implied covenant is actionable as a tort, the measure of damages for tort actions applies | No elements were eliminated from the instruction in the committee's proposed revisions. To the extent that the commenter is advocating for the addition of a discrete causation element, the comment is beyond the scope of the invitation to comment. The committee will consider the issue in a future release. |

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| | | and the insurance company generally is liable for any damages which are the proximate result of that breach.']; *Graciano v. Mercury Gen. Corp.* (2014) 231 Cal.App.4th 414, 425 ['If the insurer breaches the implied covenant by unreasonably refusing to settle the third party suit, the insured may sue the insurer in tort to recover damages *proximately* caused by the insurer's breach.'] | |
| | | The current proposed version of CACI 2334 is missing the element of causation. This omission is compounded by the fact that CACI does not provide trial courts with a special verdict form in third-party bad faith cases, so the trial court may be inclined to use the model jury instruction as the basis for the special verdict form (which is missing the element of causation)." | The committee will consider the issue in a future release cycle and will also consider developing a related verdict form. |
| | | "***2. The Proposed Version of CACI 2334 Muddles and Buries the Pinto Requirement***<br>BAJI 12.95 provides a clearer description of the separate elements of the tort. For example, it separately states two elements that should not be comingled: (i) that the third-party claimant made a 'reasonable offer' and (ii) that the insurer 'unreasonably refused to accept.' The proposed revision to CACI 2334, however, confusingly commingles these distinct elements. In particular, element #2 of the proposed revision reads: 'That [name of defendant] failed to accept a reasonable settlement demand for an amount within policy limits.' | With respect to the commenter's suggestion to rephrase the reasonable-offer element (element 3 in this report), the comment is beyond the scope of the invitation to comment. The committee will consider it in a future release. |
| | | As phrased, element # [3] is prejudicially confusing. It does not plainly state that the claimant's demand must be reasonable. Instead, it buries the 'reasonable settlement demand' requirement in the middle of the sentence, and the sentence begins with -- *and is principally focused on* -- the insurer's conduct (i.e., 'That [name of defendant] failed to accept'). Many jurors reading this instruction will be misled into focusing on the insurer's failure to accept, rather | No further response required. |

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| | | than on the analytically separate and distinct requirement that the claimant's demand was reasonable.<br><br>As made clear by *Pinto*, proof of the tort requires the jury to consider two analytically separate issues involving reasonableness: (i) whether the demand made by the claimant was reasonable, and (ii) if so, whether the insurance company unreasonably refused or failed to accept it. Very different considerations go into these two reasonableness elements. The first element focuses on matters within the claimant's control, including: whether the claimant's demand offers to release all persons insured under the policy, not just some; whether the demand offers releases on behalf of all possible claimants, not just some; whether the demand allows the insurer an adequate time to respond; and whether the demand is clear enough to assure that the insurer's acceptance will consummate a binding settlement agreement. *See, e.g., Graciano*, 231 Cal.App.4th at p. 425. The second element, in contrast, focuses on the insurance company's response to the demand, specifically, whether the insurer's response was reasonable given the facts known at the time. *Pinto*, 5 Cal.App.5th at p. 688. Proposed element #3 as drafted reads: "That [name of defendant]'s failure to accept, whether by action or failure to act, was the result of unreasonable conduct by [name of defendant]." The phrasing in BAJI 12.95 is preferable for several reasons.<br><br>First, it is language that has already passed muster with the disinterested drafters of the BAJI instructions.<br><br>Second, it avoids the circumlocution "was the result of unreasonable conduct" with the simple adjective "unreasonable."<br>Third, the simple adjective phrase "unreasonably refused" properly focuses the jury on the basis for the insurer's response to the | For the reasons stated above in the committee's response to the comment of Karen M. Bray, the committee does not see improved clarity with the proposed phrasing "unreasonably refused."<br><br>The committee is not persuaded that the language of the BAJI instruction is preferable.<br><br>As noted above in the committee's response to the comment of Karen M. Bray, the new language is |

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| | | demand: "'[T]he crucial issue is . . . the basis for the insurer's decision to reject an offer of settlement.'" (Pinto, 61 Cal.App.5th at p. 688, quoting *Walbrook Ins. Co. v. Liberty Mut. Ins. Co.* (1992) 5 Cal. App. 4th 1445, 1460.) In contrast, the "was the result of unreasonable conduct" phraseology invites the jury to hold the insurer liable based on conduct that occurred long before a settlement demand was made and that bears only a tenuous (if any) relationship to the "basis for the insurer's decision to reject." BAJI tracks the language repeatedly used by the California Supreme Court; the proposed CACI instruction does not. *E.g., Hamilton v. Maryland Cas. Co* (2002) 27 Cal.4th 718, 725 ["An unreasonable refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits"]; *Kransco v. American Empire Surplus Ins. Co.* (2002) 23 Cal.4th 390, 401 ["An insurer that breaches its implied duty of good faith and fair dealing by unreasonably refusing to accept a settlement offer within policy limits may be held liable for the full amount of the judgment against the insured in excess of its policy limits"]; *PPG Industries, Inc. v. Transamerica Ins. Co.*, 20 Cal.4th 310, 312 (1999) [same]; *Commercial Union Assur. Co. v. Safeway Stores, Inc.*, (1980) 26 Cal.3d 912, 916-917 ["[A]n insurer may be held liable for a judgment against the insured in excess of its policy limits where it has breached its implied covenant of good faith and fair dealing by unreasonably refusing to accept a settlement offer within the policy limits"]; *Comunale v. Traders & Gen. Ins. Co.* (1958) 50 Cal. 2d 654, 663 [third-party bad faith is based on "wrongful refusal to settle"] | taken from *Pinto*, which the court said was correct. |
| | | Indeed, our research has failed to locate <u>any</u> California case employing language that tracks or resembles proposed element #3 ("That [the insurer's] failure to accept the settlement, whether by action or inaction, was the result of unreasonable conduct by [the insurer]"). Proposed element #3 does not, for example, track the | As noted above, element 4 (as renumbered in this report) tracks language in *Pinto*. *See id.* at p. 694. |

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| | | *Pinto* decision. *Pinto*, 61 Cal.App.5th at 687 ["If the insurer breaches the implied covenant by unreasonably refusing to settle the third party suit, the insured may sue the insurer in tort to recover damages proximately caused by the insurer's breach."]; id. at 688 ["An *unreasonable* refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits.] [italics original]." | |
| | | **"B. The Proposed Sentence 'An insurer's conduct is unreasonable when, for example, it places its own interests above those of the insured' Should not be Added; It Is Neither Even-Handed nor Consistent with the Totality of Circumstances Rule.**<br>The proposed revisions add a sentence to the end of the CACI 2334, purporting to give an example of what *is* bad faith. The proposed addition is problematic for two reasons: it is formulaic language that violates the 'totality of circumstances' rule, and it is not even-handed. It therefore should not be added. If, however, the Judicial Council is inclined to include the sentence, we suggest the following language be used instead:<br>**In deciding whether the insurer responded unreasonably to the settlement demand, you should consider the totality of the circumstances. An insurer's conduct may be unreasonable when, for example, it places its own interests above those of the insured. Mere errors, negligence, and honest mistakes are not enough to constitute unreasonable behavior.**<br>We explain the reasoning for our suggestion below." | See the committee's response to the comment of Karen M. Bray. |
| | | "*1. It Violates the Totality of Circumstances Rule and Constitutes an Improper Formula Instruction*<br>It is well-established that the reasonableness of an insurer's conduct must be judged in light of the totality of the circumstances. As explained by the California Supreme Court: 'An insurer's good or | See the committee's response to the comment of Karen M. Bray. |

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| | | bad faith must be evaluated in light of the totality of the circumstances surrounding its actions.' *Wilson*, 42 Cal.4th at p. 723. The draft proposed language violates this rule by focusing the jury on only a single factor. Further, it directs the jury to find unreasonableness if it finds this single factor to be true – thus directing the jury to disregard the totality of the circumstances. And for that reason it borders on an improper formula instruction. See *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 65; *Dodge v. San Diego Electric Ry. Co.* (1949) 92 Cal.App.2d 759, 763-764; see also *Hubbard v. Calvin* (1978) 83 Cal.App.3d 529, 533-534.<br>This is important because cases may arise where there is some evidence of the insurance company putting its own interests first, but also other evidence that it was reasonable to reject the settlement demand. For example, an insurer may have two reasons for rejecting a demand: its belief that the demand may be too high, and the fact that the demand was made early in a claim when few facts were available to assess liability or damages. As drafted, the proposed addition would direct the jury to find unreasonableness if it finds that the insurance company was concerned about overpaying – without allowing the jury to consider whether that concern was reasonable given the limited facts available at the time of the demand." | |
| | | "*2. The Proposed Sentence Is Not Even-Handed*<br>The proposed addition is not even-handed. It provides an example of unreasonable conduct, but it provides no guidance on what conduct is not sufficient to be unreasonable. In particular, it fails to instruct the jury that mere negligence is not enough to constitute unreasonable conduct. *Pinto* reaffirms that mere errors by an insurer do not supply the degree of unreasonableness necessary to establish the tort of bad faith refusal to settle:<br>"[M]ere errors by an insurer in discharging its obligations to its insured '"does not necessarily make the insurer liable in | See the committee's response to the comment of Karen M. Bray. |

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| | | tort for violating the covenant of good faith and fair dealing; to be liable in tort, the insurer's conduct must also have been unreasonable."'" (*Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425, 179 Cal.Rptr.3d 717.) "[S]o long as insurers are not subject to a strict liability standard, there is still room for an honest, innocent mistake." (*Walbrook*, at p. 1460, 7 Cal.Rptr.2d 513; accord *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1280, 31 Cal.Rptr.2d 433 ["erroneous denial of a claim does not alone support tort liability; instead, tort liability requires that the insurer be found to have withheld benefits unreasonably"].)<br>*Pinto*, 61 Cal. App. 5th at p. 688. The tort of bad faith requires something more than negligence. Merritt v. Reserve Ins. Co. (1973) 34 Cal. App. 3d 858, 880. The standard of culpability for the tort is, in fact, much higher, Bad faith is 'prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement.' *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 726; *Chateau Chamberay Homeowners Ass'n v. Associated Int'l Ins. Co.* (2001) 90 Cal.App.4th 335, 346 [Croskey, J.].<br>Unfortunately, 'reasonable' and 'unreasonable' are vague concepts to lay jurors. Most jurors (and even attorneys) equate 'unreasonableness' with 'negligence.' Indeed, in tort cases with which jurors are more familiar – such as auto accident cases – 'mere errors' and bad judgment are enough to impose liability under the 'reasonable person' standard. Even judges equate unreasonable conduct with negligence. E.g., *Metcalf v. Cty. of San Joaquin* (2008) 42 Cal.4th 1121, 1132 ['The plaintiff is not required to prove that the employee's conduct was unreasonable (i.e., negligent or wrongful) in any other respect'] *Law v. Shoate* (1960) 178 Cal. App. 2d 739, 742 ['[T]the jury must determine the issue of negligence on | |

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| | | the basis of the standard of reasonable conduct, or the degree of care which a reasonable person under similar circumstances would exercise to protect another from harm']; see, e.g., *Kentucky Fried Chicken of Cal., Inc. v. Superior Ct.*, (1997) 14 Cal. 4th 814, 832 ['By framing the issue as a question of duty, the majority usurps the jury's historic function in a negligence case to determine the reasonableness of defendant's conduct under the surrounding circumstances'] [Kennard, J., dissenting]. Indeed, the California's model jury instructions have long defined "negligence" in terms of unreasonable conduct. See CACI 401 and BAJI 3.10.<br>It is therefore critically important that jurors be instructed that "unreasonableness" in the context of a bad faith tort means more than "unreasonable" in the context of negligence-based torts.<br>The need to clarify this important distinction – that mere negligence should not be equated with "unreasonable" conduct in the context of a bad faith claim – has been recognized by both the Court of Appeal and the Ninth Circuit. *E.g., National Life & Accident Ins. Co. v. Edwards* (1981) 119 Cal.App.3d 326, 339 ["mere negligence is not enough to constitute unreasonable behavior for the purpose of establishing a breach of the implied covenant of good faith and fair dealing in an insurance case"]; see *Guebara v. Allstate Ins. Co.*, (9th Cir. 2001) 237 F.3d 987, 995 [quoting *Edwards*].<br>Therefore, if the proposed new sentence is added, we request that the instruction also state: **'In deciding whether the insurer responded unreasonably to the settlement demand, you should consider the totality of the circumstances' and 'Mere errors, negligence, and honest mistakes are not enough to constitute unreasonable behavior.'** " | |
| | | "**3. Do Not Eliminate From 'Sources and Authorities' Cases Holding That More Than Mere Errors or Negligence is Required to Establish Unreasonableness** | See the committee's response to the comments of Karen M. Bray. |

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| | | Apparently because *Pinto* resolved any uncertainty on the issue, the proposed draft completely eliminates the 'Sources and Authority' note that, quoting the Rutter Group, acknowledges a dispute about what degree of culpability is required to support a finding of unreasonableness. It makes sense to delete the Rutter Group note because there can no longer be dispute on that point. But it makes no sense to delete the references to cases that, like *Pinto*, make clear that mere negligence is not enough to establish the tort. Deleting reference to those cases is likely to result in judges and jurors mistakenly believing that mere negligence is enough to establish the tort.<br>Instead, the Judicial Council should include 'Sources and Authorities' citations for the proposition that mere errors, negligence, and mistaken judgment is not enough. These citations should include the passage in *Pinto* quoted above, the cases *Pinto* cites for the proposition (i.e., *Graciano* and *Walbrook*), and the cases the Rutter Group cited for the same proposition (i.e., *Brown, Howard, Walbrook*). | With respect to the suggestion to add additional content from the *Pinto* case, the committee now recommends adding a direct quote on the issue, as suggested. The committee also notes that the Sources and Authority for CACI No. 2334 already includes direct quotes from *Graciano* and *Howard* on this issue. To the extent other cases on this subject exist, *CACI*'s Sources and Authority cannot include every case relevant to an issue. |
| | | As currently drafted, there is nothing in either the body of the proposed instruction, or the accompanying use notes, explaining that negligence is not bad faith. <u>Read literally, the proposed instruction appears to turn third-party bad faith into a negligence-based tort</u>. Indeed, CACI 401 essentially equates negligence with unreasonable conduct:<br>> Negligence is the failure to use reasonable care to prevent harm to oneself or to others. [¶] A person can be negligent by acting or by failing to act. A person is negligent if that person does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation. [¶] You must decide how a reasonably careful | The committee believes that the proposed instruction correctly states the applicable legal standard. To the extent the commenter is advocating for the addition of new content on the meaning of bad faith, the comment is beyond the scope of the invitation to comment. The committee will |

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| | | person would have acted in [name of plaintiff/defendant]'s situation.<br>This is why CACI 2334 should be clear that negligence is not bad faith in California." | consider the suggestion in a future release. |
| | Orange County Bar Association (OCBA) by Larisa M. Dinsmoor, President | Changes are consistent with *Pinto v. Farmers Insurance Exchange* (2021) 61 Cal.App.5th 676. | No response required. |
| | | We recommend changing the following sentence in the instruction as follows, to better reflect that this is an example of unreasonableness: An insurer's conduct ~~is~~ may be unreasonable when, for example, it places its own interests above those of the insured. | The committee has rephrased the sentence as noted above, but the committee does not see improved clarity by changing the verb from "is" to "may be." |
| | | The first cite of *Pinto* is incomplete and needs to be a full cite to allow for shorthand citations later, and various typographical errors need to be corrected. Accordingly, the ninth bulleted paragraph under "Sources and Authority" should actually read as follows: [excerpt from *Pinto* contained in ninth bullet omitted] | As suggested, the committee has changed the first citation to *Pinto* in the Sources and Authority to a full cite. The committee has confirmed that the excerpts from the case in the Sources and Authority accurately reflect the case language as published by the court's official publisher. |

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| | | We also think the twenty-fourth bulleted paragraph under "Sources and Authorities" should be removed as unnecessary and confusing in light of *Pinto v. Farmers Insurance Exchange* (2021) 61 Cal.App.5th 676: ~~"(4) [12:245] Insurer culpability required? A number of cases suggest that some degree of insurer 'culpability' is required before an insurer's refusal to settle a third party claim can be found to constitute 'bad faith.' " [(Howard v. American Nat'l Fire Ins. Co. (2010) 187 Cal.App.4th 498, 529 [, 115 Cal.Rptr.3d 42].), 69 (quoting text)]~~ | The committee agrees, and has deleted the quotation, which is out-of-format material from a practice guide. |
| 2521A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Revise) | Bruce Greenlee<br>Attorney<br>Richmond | 1. I agree that adding applicants to element 1 is appropriate. | No response required. |
| | | 2. But I think that the structure of the material added to the DforU is a bit clunky. Subdivision (j)(1) extends FEHA harassment protection to applicants. I think that my first added sentence would be the one used in 2522C, noting that applicants are covered, to support the addition to the instruction. Then my next sentence would note the extension of coverage to the other nonemployer entities (unions, etc.); both of these sentences would be cited to (j)(1). Then I would make the point about harassment that does not occur at the workplace, with the cite to *Doe*. I would not include "If the plaintiff is an external applicant for a position or." As applicants are now covered in Element 1; modification of the instruction is not necessary. | The committee has refined the first paragraph of the Directions for Use by adding a sentence and citation regarding the scope of statute. The committee does not see improved clarity by moving the first new sentence concerning "other covered entities," which naturally follows the instruction's introductory sentence. As suggested by the commenter, the committee has deleted the reference to external applicants. |

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| 2521B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant (Revise) | Bruce Greenlee<br>Attorney<br>Richmond | 1. I agree that adding applicants to element 1 is appropriate. | No response required. |
| | | 2. But I think that the structure of the material added to the DforU is a bit clunky. Subdivision (j)(1) extends FEHA harassment protection to applicants. I think that my first added sentence would be the one used in 2522C, noting that applicants are covered, to support the addition to the instruction. Then my next sentence would note the extension of coverage to the other nonemployer entities (unions, etc.); both of these sentences would be cited to (j)(1). Then I would make the point about harassment that does not occur at the workplace, with the cite to *Doe*. I would not include "If the plaintiff is an external applicant for a position or." As applicants are now covered in Element 1; modification of the instruction is not necessary. | See response to CACI No. 2521A. |
| 2521C. Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant (Revise) | Bruce Greenlee<br>Attorney<br>Richmond | For the C instructions and verdict forms, I question whether an applicant can be the victim of widespread sexual favoritism since it involves the workplace culture, which an applicant has not experienced. This claim is case-created, not statutory, so the inclusion of applicants in the statute would not necessarily extend this claim to applicants. | The committee is not aware of a legal or factual bar to an applicant stating a claim of sexual favoritism harassment. As the Directions for Use state, "If the facts of the case support it, the instruction should be modified as appropriate to the applicant's circumstances." |
| 2522A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual | Bruce Greenlee<br>Attorney<br>Richmond | For the 2522 group (Individual Defendant), for which the nonemployer entities sentence is not applicable: I would make the same additions and revisions to the added material in the DforU that I proposed above for the 2521 group. | The committee did not include content in the Directions for Use concerning "nonemployer entities." The committee, however, has refined the |

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| Elements—Individual Defendant (Revise) | | | first paragraph of the Directions for Use by adding a sentence and citation regarding the scope of the statute. |
| 2522B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant (Revise) | Bruce Greenlee Attorney Richmond | For the 2522 group (Individual Defendant), for which the nonemployer entities sentence is not applicable: I would make the same additions and revisions to the added material in the DforU that I proposed above for the 2521 group. | See response to CACI No. 2522A. |
| 2522C. Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant (Revise) | Bruce Greenlee Attorney Richmond | For the 2522 group (Individual Defendant), for which the nonemployer entities sentence is not applicable: I would make the same additions and revisions to the added material in the DforU that I proposed above for the 2521 group. | See response to CACI No. 2522A. |
| | | If my suggestion for 2521C is rejected, I would not include "If the facts of the case support it, the instruction should be modified as appropriate to the applicant's circumstances." This language is just too vague to be of help to anyone. What would be helpful would be any theories about what facts might make widespread sexual favoritism applicable to job applicants. | See response to CACI No. 2521C. To the extent the commenter seeks a modification, the committee disagrees. The Directions for Use state, "If the facts of the case support it, the instruction should be modified as appropriate to the applicant's circumstances." |
| 2704. Waiting-Time Penalty for | California Lawyers Association, | a. We believe a waiting time penalty is a separate claim, and this instruction states the essential factual elements, so we would add "Essential Factual Elements" to the title. | The committee disagrees. The instruction concerns a statutory penalty, which |

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| Nonpayment of Wages (Revise) | Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento | | is derivative of a claim for unpaid wages. |
| | | b. We would reorder the first two sentences of the instruction so it begins, "[*Name of plaintiff*] claims . . . ." Other instructions stating the essential factual elements begin this way, and this makes it clear that this is a separate claim. We would delete the language "I have determined that" as unnecessary and unhelpful. | For consistency and improved clarity, the committee has made the suggested changes. |
| | | c. Labor Code section 203 states that an employee who avoids or refuses payment of wages is not entitled to a waiting time penalty. We would add a reference to this provision to the Directions for Use. | The provision is included in the Sources and Authority. |
| | Bruce Greenlee Attorney Richmond | 1. No authority is provided to explain why these changes are proposed. I am left to speculate that it is for the court to decide whether there has been a failure to timely pay final wages, and that the jury decides only whether the failure was "willful." Then the court computes the amount of the penalty. The entitlement to the penalty stands or falls on willfulness. Some authority should be provided to explain why the current first paragraph has been replaced by the new first paragraph. | The committee has proposed revisions (and further refinements based on public comments) to improve the instruction's clarity. The Directions for Use already address what the jury needs to determine and what the court must determine. |
| | | 2. I don't really understand the intent of the proposed changes to the last part of the instruction. These three findings are to help the jury compute the amount of the penalty. If the court is going to compute the amount, then this entire part of the instruction should be removed, along with the sentence in the DforU. | As the Directions for Use have stated since at least 2005, "The second part [of the instruction] is intended to instruct the jury on the facts required to assist the court in calculating the amount of waiting time penalties." |

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| | Orange County Bar Association by Larisa M. Dinsmoor, President | Strike "I have determined that" to avoid ambiguity about a judge making a factual determination. Also, by striking this language it simply restates the law in a neutral way that Defendant is obligated to pay all wages owed at the end of an employee's employment, then proceeds to instruct the jury on the issue of penalties. | As also suggested by the California Lawyers Association, the committee has removed the phrasing. |
| 2705. Independent Contractor—Affirmative Defense—Worker Was Not Hiring Entity's Employee (Revise) | California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento | a. We suggest adding the words "*hiring entity*" after "*Name of defendant*" and "*worker*" after "*name of plaintiff*" within the brackets in the first sentence for greater clarity. | The committee does not see improved clarity in adding the suggested language in the brackets. |
| | | b. As stated in the User Guide, elements of causes of action and affirmative defenses are listed by numbers, and factors to be considered by the jury are listed by letters. We believe the elements of this instruction should be listed as 1, 2, 3, rather than a, b, c. | The committee agrees that the three factors of the ABC test are being used as elements in this *CACI* instruction, and has made the change. |
| | | c. The citation to *Dynamex* for the rule that the court decides as a matter of law whether an employment relationship exists seems inapt. Instead, we would cite *Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 342-342, which states this rule more clearly. | Because the jury's role in determining whether the carriers were employees or independent contractors was waived by the appellant, the committee declines to add a citation to the *Espejo* case for this proposition. |
| | Bruce Greenlee Attorney Richmond | "[N]o authority is provided for the proposed changes. The instruction is still labelled as an affirmative defense, but Plaintiff and Defendant have been changed to Worker and Hiring Entity. If this instruction can now be used by a plaintiff, it is no longer an | The committee does not share the commenter's concern. The committee has not changed the parties' identities in the |

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| | | affirmative defense. And the DforU should give an example of when it can be used by a plaintiff." | instruction; the revisions to the Directions for Use are intended to provide more clarity to users. |
| 2750. Failure to Reimburse Employee for Necessary Expenditures or Losses—Essential Factual Elements (New) | California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento | a. We would substitute "Reimburse" for "Compensate" in the title because we believe reimbursement for expenses is different from compensation for wages. (See Labor Code, § 200, subd. (a).) | The committee agrees, and has changed the name of the new instruction. |
| | | b. We would modify the instruction for greater clarity, to consistently refer to reimbursement rather than compensation, and to avoid overemphasis by repetition of the requirement that the expenses be "necessary," as shown below. | To improve clarity and for consistency, the committee agrees and has refined the language of the instruction, but has not replaced the statutory term "expenditures" with the suggested term "expenses." |
| | | c. We would revise the final paragraph for greater clarity and make it optional because in many cases the issue may not arise. | The committee agrees in part, and has bracketed the final paragraph, and has added a sentence to the Direction for Use about omitting it if not at issue. The committee, however, does not see improved clarity in revising the language of the definition. |

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| | | d. Accordingly, we suggest the following:<br>"[*Name of plaintiff*] claims that [*name of defendant*] ~~owes~~ failed to reimburse [him/her/*nonbinary pronoun*] ~~compensation~~ for necessary [expen~~ditures~~ses] [and] [losses] made as a direct consequence of [his/her/*nonbinary pronoun*] employment with [*name of defendant*]. To establish this claim, [*name of plaintiff*] must prove all of the following:<br><br>"1. That [*name of plaintiff*] incurred necessary [expen~~ditures~~ses] [and] [losses] ~~in~~ as a direct consequence of [~~the~~ discharg~~e~~ing ~~of~~ [his/her/*nonbinary pronoun*] ~~employment~~ job duties/obe~~dience~~ying ~~to~~ the directions of [*name of defendant*]];<br><br>"2. That the ~~necessary~~ [expen~~ditures~~ses] [and] [losses] were reasonable in amount;<br><br>"3. That [*name of defendant*] failed to reimburse [*name of plaintiff*] for the full amount of the ~~necessary~~ [expen~~ditures~~ses] [and] [losses]; and<br><br>"4. The amount of the [expen~~ditures~~ses] [and] [losses] that [*name of defendant*] failed to ~~compensate~~ reimburse.<br><br>~~" 'Necessary [expenditures] [and] [losses]' may include [expenditures] [and] [losses] [*name of plaintiff*] would have incurred even if [he/she/*nonbinary pronoun*] did not also incur them in direct consequence of the discharge of [his/her/*nonbinary pronoun*] employment duties or obedience to the direction of [*name of defendant*].~~"<br><br>"[The fact that [*name of plaintiff*] would have incurred the [expenses] [and] [losses] anyway cannot prevent you from finding that [*name of plaintiff*] incurred the [expenses] [and] [losses] as a direct consequence of [discharging [his/her/*nonbinary pronoun*] job duties/obeying the directions of [*name of defendant*]].]" | See responses to comments above. No further response required. |

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| | Bruce Greenlee<br>Attorney<br>Richmond | 1. Format this way: [expenditures/ [and] losses] | For consistency, the committee has made the formatting change. |
| | | 2. Element 1 is a mouthful. There should be a better way to say "in direct consequence of," but I can't come up with one at the moment. | For lack of a better alternative, the committee has hewed to the statutory language (with the modest change suggested by California Lawyers Association, discussed above). |
| | | 3. Change "obedience to" to "following." | The committee has changed the language based on the suggestion from California Lawyers Association, discussed above. |
| | Kenneth Yoon<br>Attorney<br>Yoon Law, APC<br>Los Angeles | "Change the following in proposed CACI 2750: Delete 'failed' and replace with 'did not'. The term failed suggests there was a prior request or attempt for the employer to reimburse, but 2802 does not require a prior request for reimbursement. There is no legal requirement, per established case law, for prior notice or attempt to get reimbursed." | The committee does not see improved clarity in the suggested language. Although "did not" may be simpler, "failed" is used throughout *CACI* in this way. |
| 2752. Tip Pool Conversion—Essential Factual Elements (New) | California Lawyers Association, Litigation Section, Civil Jury Instructions | a. We believe "Tip Pool Conversion" more accurately describes this claim and would modify the title accordingly. | The committee agrees, and has changed the name of the instruction. |
| | | b. The instruction refers repeatedly to "gratuities." We believe the jury understands the nature of tips, and there is no need to use the | The committee agrees, and has changed |

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| | Committee by Reuben A. Ginsburg, Chair Sacramento | word "gratuities," which may be unfamiliar to some jurors. We would use the term "money" or "tips" in place of "gratuities" as shown below. | "gratuities" to "money" where appropriate. |
| | | c. Element 2 makes element 1 unnecessary because if plaintiff was defendant's employee, defendant was an employer. We would delete element 1 as unnecessary. | The committee disagrees. A defendant's status as an employer may be disputed. The committee has added a sentence to the Directions for Use, however, that element 1 may be omitted if there is no factual dispute. |
| | | d. We believe that much of the information in element 3 is unnecessary and duplicative of element 4, which explains a tip pool. | To simplify the instruction and eliminate some overlap, the committee has merged the components of the two elements into a single element 3. |
| | | e. Element 5 includes two option sentences, each of which should be bracketed. | The committee has made the suggested formatting change. |
| | | f. We believe elements 6 and 7 are superfluous because plaintiff necessarily was harmed if defendant took or allowed someone to take money from a tip pool that plaintiff was entitled to receive (element 5), and defendant's conduct necessarily was a substantial factor in causing plaintiff's harm if that happened. We would delete elements 6 and 7 as unnecessary. | The committee agrees and has deleted elements 6 and 7. |

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| | | g. We would modify the paragraph following the elements in light of the above, as shown below. | The committee has refined the paragraph following the elements in the manner shown in comment i. below. |
| | | h. We would move the final sentence of the instruction to the Directions for Use and change "gratuities" to "tips." | The committee has added "tips" to the final paragraph for improved clarity, but the committee believes that the jury should be instructed on the defendant's duty to keep records. |
| | | i. Accordingly, we would modify the instruction as follows: "[*Name of plaintiff*] claims that [*name of defendant*] [took ~~gratuities~~ money/allowed [*specify ineligible individual(s) or class(es) of individuals*] to take ~~gratuities~~ money] from a tip pool that [*name of plaintiff*] was entitled to receive. [The court has determined that [*specify ineligible individual(s) or class(es) of individuals*] [was/were] not eligible to receive ~~gratuities~~ money from a tip pool.]<br><br>"To establish this claim, [*name of plaintiff*] must prove all of the following:<br><br>"~~1. That [*name of defendant*] was a[n] [employer/[*other covered entity*]];~~<br><br>"~~2~~1. That [*name of plaintiff*] was an employee of [*name of defendant*];<br><br>"~~3~~2. That [*name of plaintiff*] was entitled to a portion of tips ~~gratuities left for [him/her/*nonbinary pronoun*] as an amount over~~ | No further response required. |

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| | | ~~and above the actual amount due to [*name of defendant*] for [specify services rendered or goods, food, drink, or articles sold to the patron(s)]~~;<br><br>"~~4~~3. That [*name of defendant*] maintained a tip pool for [his/her/*nonbinary pronoun*/its] employees in which ~~gratuities~~ tips left by patrons were pooled to be distributed among employees including [*name of plaintiff*]; and<br><br>"~~5~~4. [That [*name of defendant*] took money from the tip pool that [*name of plaintiff*] was entitled to receive;]<br><br>[or]<br><br>[That [*name of defendant*] allowed [specify ineligible individual(s) or class(es) of individuals] to take money from the tip pool that [*name of plaintiff*] was entitled to receive;]<br><br>"~~6. That [*name of plaintiff*] was harmed; and~~<br><br>"~~7. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.~~<br><br>"~~To establish harm,~~ [*N~~n~~ame of plaintiff*] does not have to prove the exact amount of money that was taken. ~~[*Name of plaintiff*] can establish harm by proving the taking of any amount of gratuity that [*name of plaintiff*] was entitled to receive.~~"<br><br>~~"[Name of defendant] is required to keep accurate records of all gratuities received by [him/her/nonbinary pronoun/it] for [his/her/nonbinary pronoun/its] employees."~~ | |

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| | Bruce Greenlee<br>Attorney<br>Richmond | 1. Element 1: Format this way: [a/an]. | For consistency, the committee has made the formatting change. |
| | | 2. Element 4 and last paragraph: pronoun choices: I would move "its" to follow "his/her." It's easy to overlook it hanging out at the end after "nonbinary." It is probably the most common choice as most employers are entities rather than individuals. | The bracketed personal pronoun options are uniform throughout *CACI* without regard to how likely or unlikely a particular option may be in the context of an instruction. The committee, therefore, declines to make the suggested change. |
| 2753. Failure to Pay All Vested Vacation Time—Essential Factual Elements (New) | California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair<br>Sacramento | a. We believe that an employment relationship is essential to this claim, so we would add a new element 1 stating: "1. [*Name of plaintiff*] was an employee of [*name of defendant*]." | The committee agrees, and has added two elements: element 1 (defendant is an employer) and element 2 (plaintiff is defendant's employee). A sentence has also been added to the Direction for Use about omitting element 1 if it is not disputed. |
| | | b. The word "vested" may be unfamiliar to some jurors. Moreover, vacation time vests as it is earned (i.e., as the labor is rendered), so there is no need to speak of vesting if what is meant is earned. The vacation time also must be unused for plaintiff to recover. We would modify the instruction as follows: "[*Name of plaintiff*] claims that | The committee agrees, and has used "earned" in the instruction instead of "vested," and has added "unused" as a modifier. |

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| | | [*name of defendant*] owes [him/her/*nonbinary pronoun*] compensation for ~~unpaid, vested~~ earned, unused vacation time.<br><br>"To establish this claim, [*name of plaintiff*] must prove ~~both~~ all of the following:<br><br>"1. [*Name of plaintiff*] was an employee of [*name of defendant*].<br><br>"~~1~~2. That [*name of defendant*] did not pay [him/her/*nonbinary pronoun*] all ~~vested~~ earned, unused vacation time at [his/her/*nonbinary pronoun*] final rate of pay in accordance with the [contract of employment/employer policy]; and<br><br>"~~2~~3. The amount owed to [*name of plaintiff*] for ~~vested~~ earned, unused vacation time." | |
| | | c. We would modify the first bullet point in the Sources and Authority to more fully describe the statute: "Vested Vacation Wages; Payment Upon Termination. Labor Code section 227.3" | The committee has refined the description of the statute in the Sources and Authority. |
| | Kenneth Yoon<br>Attorney<br>Yoon Law, APC<br>Los Angeles | Add the following language to the end of the proposed CACI 2753: The term "vested vacation time" means vacation time that has been earned by the employee. A proportionate right to vacation time vests as the labor is provided, on a regular (for example daily) basis.<br><br>Without a definition, there is likely to be many unnecessary disputes as to the jury instruction. The law requires vacation to vest as it is earned, such that a person who quits at 6 months is entitled to half a year's worth of vacation (e.g., 2.5 days if vacation was given at the rate of 5 days a year). Many regular workers might assume vacation under such a circumstance would only vest on the one year anniversary. | As suggested by the California Lawyers Association, the committee has used "earned" instead of "vested." The committee notes that the Directions for Use already address the potential need to instruct the jury on how to determine a pro rata share of vacation time if there is a dispute as to |

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| | | | how much vacation time has vested. |
| 2754. Reporting Time Pay—Essential Factual Elements (New) | California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento | a. We would clarify the first paragraph of the instruction by summarizing the claim without stating so much detail, as shown below. | The committee believes that the language suggested for the introductory paragraph (see comment d. below) would sacrifice accuracy for simplicity. |
| | | b. Element 2 makes element 1 unnecessary because if plaintiff was defendant's employee, defendant was an employer. We would delete element 1 as unnecessary. | The committee believes both elements are required. The committee, however, has added a sentence to the Directions for Use that if the defendant's status as an employer is not disputed, element 1 may be omitted. |
| | | c. We believe that element 4 should be separated into two elements, as shown below: | For improved clarity, the committee has separated element 4 into two elements, as suggested. |
| | | d. Accordingly, we would modify the first paragraph and the elements as follows:<br><br>"[*Name of plaintiff*] claims that [*name of defendant*] ~~scheduled or otherwise required [him/her/*nonbinary pronoun*] to [report to work] [and] [report to work for a second shift] but when [*name of plaintiff*] reported to work, [*name of defendant*] [failed to put [*name of* | See responses above. No further response required. |

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| | | ~~*plaintiff*] to work] [and] [furnished a shortened [workday/shift]]~~ failed to pay [*name of plaintiff*] for reporting to work as required. To establish this claim, [*name of plaintiff*] must prove all of the following:<br><br>"~~1. That [*name of defendant*] was a[n] [employer/[specify other covered entity]]~~;<br><br>"~~2~~1. That [*name of plaintiff*] was an employee of [*name of defendant*];<br><br>"~~3~~2. That [*name of defendant*] required [*name of plaintiff*] to report to work for one or more [workdays] [and] [second shifts]; ~~and~~<br><br>"~~4~~3. That ~~after~~ [*name of plaintiff*] reported for work~~,~~; and<br><br>"4. That [*name of defendant*] [failed to put [*name of plaintiff*] to work] [and] [furnished less than [half of the usual day's work/ two hours of work on a second shift]]." | |
| | | e. We believe that selecting the appropriate bracketed language is not modifying the instruction. Accordingly, we would modify the second paragraph of the Directions for Use as follows:<br>"~~Modify~~ Select the appropriate bracketed language in the introductory paragraph and elements 3 and 4 if a second shift is at issue, and ~~modify~~ in the introductory paragraph and element 4 to indicate whether the plaintiff was not provided work at all or was provided a shortened shift, or both." | The committee has revised the language of the Directions for Use to reflect the options. |

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| | Bruce Greenlee<br>Attorney<br>Richmond | 1. Opening paragraph: Format this way: [report to work/ [and] report to work for a second shift]. Is this really an "and?" It seems unlikely that you would want both. | The committee has deleted the bracketed "and," and has revised the Directions for Use to address the need for modification if both options are at issue. |
| | | 2. Format this way: [failed to put [*name of plaintiff*] to work/ [and] furnished a shortened [workday/shift]]. Again, it doesn't seem that you would want to include both options. | The committee has deleted the bracketed "and," and has revised the Directions for Use to address the need for modification if both options are at issue. |
| | | 3. Element 1: format [a/an] | For consistency, the committee has made the formatting change. |
| | | 4. Element 3: format: [workdays/ [and] second shifts]. Same concern about "and." | The committee has deleted the bracketed "and," and has revised the Directions for Use to address the need for modification if both options are at issue. |
| | | 5. Element 4: format: [failed to put [*name of plaintiff*] to work/ [and] furnished less than [half of the usual day's work/ two hours of work on a second shift]]. Here particularly "and" seems wrong. I don't think you can both fail to put the person to work at all and also furnish inadequate hours. | The committee has deleted the bracketed "and," and has revised the Directions for Use to address the need for |

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| | | | modification if both options are at issue. |
| | | 6. Paragraph following elements: Note that here you have an "either/or." That makes a lot more sense. If you were to change this one to an "and," it wouldn't (make sense). | No response required. |
| | | 7. Next-to-last paragraph: I would make the first sentence on rate of pay a separate paragraph. | For improved clarity, the committee has made the sentence a separate paragraph. |
| | | 8. Next-to-last paragraph – optional sentence: delete the commas around "as required." | For improved clarity, the committee has rephrased the sentence. |
| | | 9. DforU second paragraph: These are not modifications; these are selections. A modification is when one has to deviate from or add more words to the provided text. Here, the user is selecting which options of the provided text to include. | The committee has revised the language of the Directions for Use to reflect the options. |
| 3046. Violation of Pretrial Detainee's Federal Civil Rights—Fourteenth Amendment—Medical Care and Conditions of Confinement (New) | Bruce Greenlee Attorney Richmond | 1. This new instruction is well done. | No response required. |
| | | 2. DforU: Cross refer to 3041 for prisoners with a cited sentence that says why prisoners and pretrial detainees are treated differently under 1983. | The committee does not believe a cross reference to CACI No. 3041 would be particularly helpful. The committee, however, has added a direct quote from *Castro* to the Sources and Authority that discusses the constitutional basis for |

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| | | | the different deliberate indifference standards. |
| | | 3. DforU: I would end the current first paragraph after the citation to *Castro*. Then I would say in a new paragraph: "The opening paragraph may be modified to specify the conditions of confinement or the needed but denied medical care at issue." Then continue with the "for example" sentence. Or I might actually revise the opening paragraph to include this information. | For improved clarity, the committee has revised the Directions for Use. |
| 3050. Retaliation—Essential Factual Elements (Revise) | Bruce Greenlee Attorney Richmond | Is there some authority for the proposition that a person of "ordinary firmness" is just a "reasonable" person? "Ordinary firmness" comes from the *Tichinin* case and other 9th Circuit cases excerpted in the SandA. No case is cited for "reasonable." I don't think that you can make this change unless a court has said that that's all that "ordinary firmness" means. | One of the committee's goals is to explain the law in plain English. Though jurists regularly use the phrase "a person of ordinary firmness" in First Amendment retaliation cases, the committee understands that phrase to mean a "reasonable person" and believes that jurors will better understand the updated terminology. |

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| 3709. Ostensible Agent (Revise) | Association of Southern California Defense Counsel by David P. Pruett Carroll, Kelly, Trotter & Franzen Sacramento | "In response to the Invitation to Comment, the Association of Southern California Defense Counsel ('ASCDC') submits the following comments regarding instructions on ostensible agency; the proposed revision of CACI 3709, 'Ostensible Agent,' and the newly proposed instruction of CACI 3714, 'Ostensible Agency—Physician-Hospital Relationship.'<br>Based upon guidance from statutes and the Courts of Appeal, the newly proposed CACI 3714 should not be approved as it is unnecessary and is not a complete and accurate instruction. Otherwise, any approved instruction on ostensible agency should include changes, to achieve accuracy and completeness, to the text of the instruction, 'Directions for Use,' and 'Sources and Authorities.' " | See the committee's responses to ASCDC's specific comments, below. |
| | | "ASCDC believes that the Sources and Authorities for an instruction on ostensible agency should include the case of *Wicks v. Antelope Valley Healthcare District* (2020) 49 Cal.App.5th 866, which the Advisory Committee has not, so far, included. Further, ASCDC believes that the Directions for Use and Sources and Authorities should reflect that the assessment of ostensible agency requires considering the 'totality of circumstances' of a patients' interactions with physician and hospital. ASCDC believes that approach is implicitly required by the Civil Code section 2300 and the pertinent cases discussing ostensible agency. Further, ASCDC directs attention to the discussion in the recent Second District decision of *Steger v. CSJ Providence St. Joseph Medical Center* (Cal. Ct. App., Aug. 16, 2021, No. B304043) 2021 WL 3615548, explicitly describing the totality of circumstances approach. Publication of the *Steger* decision has been requested; if it is published, it should also be noted in the Sources and Authorities." | The committee has added a quote from *Wicks* to the Sources and Authority of CACI No. 3714—the new instruction on hospital-physician ostensible agency. Because *Steger* is not certified for publication, the committee will not add it at this time. If the pending publication request is granted, the committee will consider the case in a future release cycle. |
| | California Lawyers Association, | a. The first sentence of the instruction names three individuals before using a personal pronoun to refer to one of those three individuals. We believe it would be clearer to refer to that person by | The committee agrees that using a specific name would be clearer than |

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| | Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento | name so as to remove any doubt: "[Name of plaintiff] claims that [name of defendant] is responsible for [name of agent]'s conduct because ~~[he/she/nonbinary pronoun]~~ [name of agent] was [name of defendant]'s apparent [employee/agent]." | using a personal pronoun; the committee has made the suggested change. |
| | | b. Although it is beyond the scope of the invitation to comment, we believe this instruction, which should be given with CACI No. 3701, Tort Liability Asserted Against Principal—Essential Factual Elements, should be replaced by a stand-alone instruction stating all the essential factual elements, for the reasons stated below. | This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release. |
| 3714. Ostensible Agency—Physician-Hospital Relationship (New) | Association of Southern California Defense Counsel by David P. Pruett Carroll, Kelly, Trotter & Franzen Sacramento | **"1. The Instructions Should Follow the Legislative Definition of Ostensible Agency, Codified by Civil Code § 2300; CACI 3714 Should Not Be Approved for Use**<br>The primary basis for any instruction on ostensible agency emanates from Civil Code section 2300, which states: 'An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.'<br><br>Giving effect to the Civil Code section 2300 statutory definition, CACI 3709 has included, as its first element: 'That [name of defendant] intentionally or carelessly created the impression that [name of agent] was [name of defendant]'s [employee/agent].'<br><br>But, the fundamental rule of section 2300 has disappeared from the newly proposed CACI 3714. The phrasing of CACI 3714 gravitates towards a general proposition that physicians are ostensible agents of hospitals, because every hospital holds 'itself out the public as a provider of care' and that a patient looks to a hospital 'for services, rather than selecting [a particular physician] for services.' Proposed CACI 3714 would incorrectly suggest to jurors that physicians are ostensible agents because a hospital is itself is a provider of care. | The committee disagrees. The proposed instruction is consistent with the authority cited, including the *Wicks* case raised by the commenter (see comment to CACI No. 3709, above): "It is well established in California that a hospital may be liable for the negligence of physicians on the staff, unless the hospital has clearly notified the patient that the treating physicians are not hospital employees and there is no reason to believe the patient was unable to understand or act on the information. This rule is founded on |

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| | | Candidly, that amounts to saying that because a hospital is a hospital that physicians are its ostensible agents.<br>It is well-established that hospitals are providers of care. The Medical Injury Compensation Reform Act (MICRA) pertains to 'actions against " '[h]ealth care provider[s],' " generally, which it defined to include any licensed "clinic, health dispensary, or health facility." ' (*Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, 81; quoting Code Civ. Proc. § 340.5(1)). A 'health facility' includes a hospital. (Health & Saf. Code § 1250(a).) ' " ' Provider' means any professional person, organization, health facility, or other person or institution licensed by the state to deliver or furnish health care services.'" (*PacifiCare of California v. Bright Medical Associates, Inc.* (2011) 198 Cal.App.4th 1451, 1457; quoting Health & Saf. Code, § 1345, subd. (i).)<br><br>The syllogism of hospital as provider as basis for vicarious liability for physicians as ostensible agents is inconsistent with Civil Code section 2300.<br><br>CACI 3714 should not be adopted because it is not a complete and accurate instruction. In *Olive v. General Nutrition Centers, Inc.* (2018) 30 Cal.App.5th 804, the Court instructed: 'A party in a civil case is, upon request, entitled to correct jury instructions on every theory of the case that is supported by substantial evidence.' (*Id.* at 813; citing *Eng v. Brown* (2018) 21 Cal.App.5th 675, 704.) ' "It is elementary that a court may refuse a party's request for a jury instruction that misstates the law.' (*Ibid.*)<br><br>Regarding statutory bases for instructions, *Olive* stated: "An instruction that clarifies the application of statutory language may not add to the words of a statute." (*Olive* at 813; citing *Torres v. Parkhouse Tire Service, Inc*. (2001) 26 Cal.4th 995, 1003-1004.) | the theory of ostensible agency." (*Wicks v. Antelope Valley Healthcare District* (2020) 49 Cal.App.5th 866, 882.) |

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| | | *Olive* is consistent with other decisions. Statutes are sources of law for jury instructions. (*In re Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 523.) Moreover, failure to conform the standards of applicable statutes generally leads to error; "the general rule is that in construing a statute, we are not permitted to 'insert qualifying provisions not included' in the statute, nor edit it 'to conform to an assumed intention which does not appear from its language.'" (*Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC* (2013) 221 Cal.App.4th 102, 130; *Cadlerock Joint Venture, L.P. v. Lobel* (2012) 206 Cal.App.4th 1531, 1549, 143.)<br><br>A Court of Appeal recently criticized a CACI instruction that did not include a required element for a theory of liability. In *Pinto v. Farmers Insurance Exchange* (2021) 61 Cal.App.5th 676, the Second District held that the CACI instruction for insurance bad faith did not correctly describe the applicable law, stating: "Although CACI No. 2334 describes three elements necessary for bad faith liability, it lacks a crucial element: Bad faith. To be liable for bad faith, an insurer must not only cause the insured's damages, it must act or fail to act without proper cause, for example by placing its own interests above those of its insured." (*Id.* at 692.) The Court observed: "Farmers proposed that a special verdict question mirroring CACI No. 2334 be modified to ask whether Farmers' failure to accept Pinto's settlement offer was 'the result of unreasonable conduct by Farmers,' which Farmers at all times argued was essential to Pinto's bad faith failure-to-settle theory. This would have been the correct question, but Pinto successfully objected to it." (*Id.* at 694.) In *Pinto*, the Court of Appeal concluded that the jury instruction was incorrect and led to a verdict that unfairly imposed bad faith liability without actually showing bad faith of the insurer. So, *Pinto* provides a recent example that efforts to shorten jury instructions should not give way to the ultimate obligation to correctly state the legal standards for determining whether a defendant is liable to a plaintiff. Further, *Pinto* illustrates | |

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| | | that truncating the statements of law in a jury instruction prejudices the parties to litigation who necessarily depend upon correct instructions in the determination of liability.<br><br>In *Pinto*, the Court of Appeal criticized CACI 2334 as leading to a conclusion that an insurer's "failure to accept a reasonable settlement offer is itself unreasonable per se." (*Pinto* at 687-688.) *Pinto* stated there was no "authority posits that failure to accept a reasonable settlement is unreasonable per se." (*Id.* at 690.) CACI 3714 should not be adopted because is posits that because a hospital is a provider that it is per se vicariously liable for physicians as ostensible agents.<br><br>Therefore, CACI 3714 should not be approved. The issue of ostensible agency can be adequately addressed by CACI 3709, subject to case-specific modifications that parties may propose and the courts adopt to assure the proper application of legal principles, including in cases in which a plaintiff contends a hospital is vicariously liable for the negligence of physicians as ostensible agents." | The committee believes that a new ostensible agent instruction for the hospital-physician context is preferable to the alternative of modifying CACI No. 3709, and that the proposed instruction correctly states the applicable legal standard. |
| | | "**2. The 'Directions for Use' and 'Sources and Authorities' Should Reflect the Need to Consider the Application of the Rule Based Upon the Circumstances Presented in the Case to Avoid an Instruction that Unduly Gravitates Towards Finding Ostensible Agency**<br>For any instruction relative to ostensible agency, the terms of Civil Code section 2300 should be set forth in the Sources and Authorities, as a foundational matter, as indicated above**.** | The committee agrees to the extent that the commenter believes the instruction should reflect the requirements set forth in the cases and the Civil Code. That ostensible agency may be more easily proven in the |

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| | | | hospital-physician context is well-established by the authorities referenced. The committee notes that Civil Code section 2300 has been included in the Sources and Authority for this new instruction. |
| | | The case of *Wicks v. Antelope Valley Healthcare District* (2020) 49 Cal.App.5th 866, should be included, as well as that Court's description of the significant published decisions on the topic.<br><br>As mentioned in *Wicks*, the decision in *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448 "explained the required elements of ostensible agency: '(1) conduct by the hospital that would cause a reasonable person to believe there was an agency relationship and (2) reliance on that apparent agency relationship by the plaintiff.'" (*Wicks* at 882; quoting *Mejia* at 1457.) Wicks acknowledged: ""*Mejia* observed that California law has 'inferred ostensible agency from the mere fact that the plaintiff sought treatment at the hospital without being informed that the doctors were independent contractors.'" (Ibid.) "'Thus, unless the patient had some reason to know of the true relationship between the hospital and the physician—i.e., because the hospital gave the patient actual notice or because the patient was treated by his or her personal physician—ostensible agency is readily inferred.'" (*Wicks* at 882; quoting *Mejia* at 1454-1455.)<br><br>The discussion in *Wicks* reflects that the assessment the issue of ostensible agency is affected by the circumstances of a particular patient's presentation to a particular physician at a particular hospital. Wicks' discussion in that regard included the Court's | The committee believes that the new instruction adequately sets forth the requirements of the cases referenced by the commenter, including the jury's need to assess "the circumstances of a particular patient's presentation to a particular physician at a particular hospital." As noted above in the response to ASCDC's comment to CACI No. 3709, the committee has added two direct quotations from *Wicks* to the Sources and Authority, and the *Mejia, Whitlow*, and *Markow* cases have already been included in the Sources |

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| | | rejection of the proposition that "that no matter what circumstances bring a patient to an emergency room, an admission form notifying the patient that the ER doctor is not an employee or agent of the hospital cannot establish lack of agency as a matter of law." (*Wicks* at 883.)<br><br>Explaining that circumstances must be assessed on a case-by-case basis, *Wicks* reviewed precedent and explained: "In *Mejia*, the hospital did not give the patient any notice that its staff physicians were independent contractors, and the patient had no reason to know they were not agents of the hospital." (*Wicks* at 883; citing *Mejia* at 1450.) "In contrast with *Mejia*, Mr. Wicks signed a straightforward notice, with no obtuse legalese, telling him the staff physicians were independent contractors and not employees or agents." (*Wicks* at 883.)<br><br>Going on, *Wicks* recounted that in *Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 63, "the patient was in no condition to understand the admission form she signed in the emergency room stating that all physicians furnishing services to her were independent contractors and not employees or agents of the hospital. Her son declared his mother was 'crying in horrible pain' when the hospital's registration processor told her to sign and initial the form, she was nauseous and unable to read it, and the processor did not explain the contents of the form or read it to her," pointing out that expert testimony showed that the "was suffering from a massive left temporal hemorrhage" at the time "and was incapable of understanding what was contained in the form." (*Wicks* at 883; citing *Whitlow* at 633-634.) Under the circumstances addressed in *Wicks*, however, that Court explained: "In contrast with *Whitlow*, there is nothing to suggest Mr. Wicks was incapable of understanding the admission form. He drove himself to the hospital." (*Wicks* at 883.) | and Authority for this new instruction. |

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| | | Continuing in the meaningful review of the circumstances presented in other cases, *Wicks* also explained: "At the factually opposite end of the spectrum from *Mejia* and *Whitlow* is *Markow v. Rosner* (2016) 3 Cal.App.5th 1027, where the court found no basis to hold a hospital liable for the negligence of a staff physician. The physician had been the patient's chosen personal doctor for four and a half years. [Citation.] The patient signed 25 conditions of admission forms and other consent forms notifying him that his physician was an independent contractor, not an agent or employee of the hospital. [Citation.] The patient did not seek emergency care from the hospital. Despite evidence that the physician was the hospital's director of its pain clinic, used the hospital's name and logo on his business cards, wore a hospital badge, and treated patients in a building displaying the hospital's name and logo, the court found these facts were 'negated' by the actual notice the hospital gave the patient that his doctor was an independent contractor, not the hospital's agent or employee." (*Wicks* at 883; quoting *Markow* at 1041-1042.)<br><br>Ultimately, again emphasizing that analysis of the totality of circumstances matters in the context of assessing whether a hospital is vicariously liable for a physician's negligence based on ostensible agency, *Wicks* summed up by saying: "Neither *Mejia*, *Whitlow*, nor *Markow* is factually on point with this case. Yet all three opinions inform our decision in this case. They rest on the same principle of California law, that although a hospital may not control, direct or supervise physicians on its staff, a hospital may be liable for their negligence on an ostensible agency theory, unless (1) the hospital gave the patient actual notice that the treating physicians are not hospital employees, and (2) there is no reason to believe the patient was unable to understand or act on the information, or (3) the patient was treated by his or her personal physician and knew or should have known the true relationship between the hospital and physician." (*Wicks* at 884.) | |

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| | | This foregoing summation should be included in the Directions for Use or Sources and Authorities. | |
| | | "Moreover, the Sources and Authorities should provide the additional legal underpinnings of the doctrine, by reference to the foundational general rule that 'a principal is not vicariously liable for the negligent acts of an independent contractor.' *(Hill Brothers Chemical Co. v. Superior Court* (2004) 123 Cal.App.4th 1001, 1008.)<br><br>Indeed, publication has been requested of a recent Second District decision that recounted the foregoing rule, the case of *Steger v. CSJ Providence St. Joseph Medical Center* (Cal. Ct. App., Aug. 16, 2021, No. B304043) 2021 WL 3615548, which stated: "In our view, based on *Wicks* and *Whitlow*, it appears that the application of the doctrine is determined by the totality of the circumstances in which the notice was provided to the patient, not solely on whether the patient sought 'emergency care.'" (*Id.* at *10.) Whether the *Steger* decision becomes published or not, its conclusion that 'the application of the doctrine is determined by the totality of the circumstances in which the notice was provided to the patient' is supported by the other published authorities that were otherwise discussed in *Wicks*. It will be known whether the Court of Appeal orders the *Steger* decision to be published at least by September 15, 2021, the date of finality of the decision. If it is published, its instruction to consider the 'totality of the circumstances' should be included in the Sources and Authorities." | The committee disagrees. The committee believes that the final sentence of the new instruction correctly instructs the jury to consider the facts of the particular case. The authorities cited in the Sources and Authority recognize that a different rule applies in the medical context. For purposes of responding to this comment, the committee notes that even the unpublished case referenced by the commenter recognizes that the general rule does not apply in this context: "In general, a principal is not vicariously liable for the negligent acts of an independent contractor. [citation to *Hill Brothers* omitted] **However, in the medical context**, vicarious liability has been extended to a hospital entity under a |

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| | | | theory of ostensible agency for the acts of non-employee physicians who perform services on hospital premises." (*Steger v. Csj Providence St. Joseph Med. Ctr.* (Aug. 16, 2021, No. B304043) _Cal.App.5th_, emphasis added.) |
| | California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento | a. The Directions for Use say to give this instruction with CACI No. 3701, Tort Liability Asserted Against Principal—Essential Factual Elements. No. 3701 states two essential elements: (1) another person was defendant's agent, and (2) the agent was acting within the scope of agency. We believe No. 3714 relates to only element 1, the existence of an agency relationship. But No. 3714 does not make this clear. Instead, No. 3714 reads like an essential factual element instruction and appears to state a separate claim, which is incomplete because it does not include the element that the ostensible agent was acting within the scope of the ostensible agency. We believe CACI No. 3714 should be revised to make it a separate claim (essential factual elements), including the element that the ostensible agent was acting within the scope of the ostensible agency. | This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release. |
| | | b. The language "held itself out to the public as a provider of care" may be unfamiliar to some jurors. We suggest "gave the public the appearance of offering health care services." | The committee does not see improved clarity in the language suggested. |
| | | c. The language "looked to [name of hospital] for services" is not plain English. We suggest "sought health care services from [name of hospital] rather than from [name of physician]." | The committee does not see improved clarity in the language suggested. |

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| | | d. Similarly, we suggest changing the language "a hospital holds itself out to the public as a provider of care unless . . ." in the final, optional paragraph to "a hospital gives the public the appearance of offering health care services . . . ." | The committee does not see improved clarity in the language suggested. |
| | | e. We believe the Sources and Authority should cite Civil Code section 2330 relating to the scope of actual or ostensible agency. ("An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal.") | The committee does not believe inclusion of section 2330 in the Sources and Authority would be helpful to users. |
| | Bruce Greenlee<br>Attorney<br>Richmond | 1. Good instruction and good idea to add it to CACI. | No response required. |
| | | 2. I would delete "Generally speaking" from the last paragraph. The paragraph goes on to specify the circumstances when notice might not be adequate, so "generally speaking" is not really needed. | The committee has made the suggested deletion. |
| | | 3. Maybe add a cross reference to 3709 to the DforU. | The committee does not believe the suggested cross reference would be helpful to users. |
| | Orange County Bar Association by Larisa M. Dinsmoor, President | "At 'Sources and Authority,' the sixth item: The proposed modification would correct the case citation based on the quote cited. As such, the amendment should be modified to reflect the proper case citation as *Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 641 [188 Cal.Rptr.3d 246]." | The committee has corrected the pinpoint citation for *Whitlow*. |
| 4304. Termination for Violation of Terms of Lease/Agreement— | California Apartment Association by Heidi Palutke, | "The California Apartment Association (CAA) is the largest statewide rental housing trade association in the country, representing more than 50,000 single family and apartment owners and operators who are responsible for nearly two million affordable | As suggested, the committee has refined the Directions for Use to cite Civil Code section |

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| Essential Factual Elements (Revise) | Education, Policy and Compliance Counsel Sacramento | and market rate rental housing units throughout California. CAA's mission is to promote fairness and equality in the rental of residential housing and to promote and aid in the availability of high-quality rental housing in California. CAA represents its members in legislative, regulatory, judicial, and other state and local forums.<br>CAA offers the following comments on the proposed revised and new jury instructions:<br><br>**4304 Termination for Violation of Terms of Lease/agreement – Essential Factual Elements**<br><br>The 'Directions for Use' state that the instruction should be modified if the Tenant Protection Action of 2019 applies. The example provided specifies that element 5 should be modified for a just cause eviction 'involving a residential rental property tenancy of 12 months or more.' This description of the precondition to the application of the TPA's just cause protection based on the duration of tenancy is not accurate. The TPA provides that a tenancy is not protected until *after* a tenant has resided in the unit for 12 months:<br><br>["]Notwithstanding any other law, *after* a tenant has continuously and lawfully occupied a residential real property for 12 months, the owner of the residential real property shall not terminate the tenancy without just cause, which shall be stated in the written notice to terminate tenancy.' Civ. Code §1946.2(a) (emphasis added).<br><br>Moreover, if additional roommates are added, the clock resets, until at least one tenant has lived in the unit for two years.<br><br>If any additional adult tenants are added to the lease before an existing tenant has continuously and lawfully occupied the residential real property for 24 months, then this subdivision shall only apply if either of the following are satisfied: | 1946(a), and to describe more fully the various lengths of tenancies referenced in that subdivision, rather than giving a single example. |

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| | | (1) All of the tenants have continuously and lawfully occupied the residential real property for 12 months or more.<br><br>(2) One or more tenants have continuously and lawfully occupied the residential real property for 24 months or more. Civ. Code §1946.2(a)<br><br>For example, if the first tenant has lived alone in the unit for 13 months, they are protected. However, if a new roommate moves in, the tenancy is no longer protected – until at least one tenant has lived there for two years. This distinction is important, given the purpose of the 'reset' when a new roommate moves in. The purpose of this provision is to make it easier for the landlord to address a new problem tenant, while also protecting the tenancies of long-term tenants. Given the likelihood of the final three-day notice to quit without opportunity to cure required by Civ. Code §1946(c) being invoked to address un-remedied conduct of a new problem tenant, this example should precisely track the language of the statute." | |
| | California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento | We believe the sixth paragraph of the Directions for Use should simply refer to Tenant Protection Act of 2019, rather than refer to the use note below:<br>"If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 5~~. See use note, below, concerning the Tenant Protection Act of 2019.~~, unless the Tenant Protection Act of 2019, noted below, requires otherwise. (See Civ. Code, § 1946.2, subd. (c).)" | As a result of refinements made to the instruction as suggested by Centro Legal de la Raza (discussed below), the committee has removed the sentence referring to the Tenant Protection Act of 2019 in the sixth paragraph of the Directions for Use. |
| | Centro Legal de la Raza | "Centro Legal de la Raza is a legal services agency protecting and advancing the rights of low-income, immigrant, Black, and Latinx | The committee has added a bracketed element 7, as |

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| | Mihaela Gough<br>Managing<br>Attorney | communities through bilingual legal representation, education, and advocacy. As part of our mission, Centro represents clients in unlawful detainer jury trials. As such, accurate jury instructions are an integral part in assuring that defendants' rights are protected. Housing law can be very confusing and if the jury instructions are not clear a jury may choose to vote on a different outcome than they would have otherwise. AB1482, Tenant Protection Act of 2019, was passed to protect housing rights and to prevent homelessness. All jury instructions should clearly and accurately state the law.<br><br>Along those lines, we have drafted clearer instructions which demonstrate the necessity of a separate three day notice in situations where AB 1482 applies. Where AB 1482 applies, it is the plaintiff's obligation to demonstrate that an additional notice to quit was also served after the initial three day notice to cure. See below our suggested edits in green to Jury Instruction number 4304.<br><br>4304. Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements<br>Where AB 1482 Applies<br>[Name of plaintiff] claims that [name of defendant] [and [name of subtenant], a subtenant of [name of defendant],] no longer [has/have] the right to occupy the property because [name of defendant] has failed to perform [a] requirement(s) under [his/her/nonbinary pronoun/its] [lease/rental agreement/sublease]. To establish this claim, [name of plaintiff] must prove all of the following:<br>1. That [name of plaintiff] [owns/leases] the property;<br><br>2. That [name of plaintiff] [rented/subleased] the property to [name of defendant]; | suggested, and has added content to the Directions for Use concerning a second notice required under the Tenant Protection Act of 2019. |

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| | | 3. That under the [lease/rental agreement/sublease], [name of defendant] agreed [insert required condition(s) that were not performed];<br><br>4. That [name of defendant] failed to perform [that/those] requirement(s) by [insert description of alleged failure to perform];<br><br>5. That [name of plaintiff] properly gave [name of defendant] [and [name of subtenant]] three days' written notice to [either [describe action to correct failure to perform] or] vacate the property; [and]<br><br>[6. That [name of defendant] did not [describe action to correct failure to perform]; and]<br><br>[X. That [name of plaintiff] did properly serve a 3 day notice to quit]<br><br>7. That [name of defendant] [or subtenant [name of subtenant]] is still occupying the property.<br><br>[[Name of defendant]'s failure to perform the requirement(s) of the [lease/rental agreement/sublease] must not be trivial, but must be a substantial violation of [an] important obligation(s).]" | |
| | Bruce Greenlee<br>Attorney<br>Richmond | DforU fourth paragraph: I don't think that CACI has ever cross referred from one paragraph in the DforU to another. I don't really see that this is necessary. If it is, I wouldn't say "use note." While people do use this term, I believe it goes back to BAJI. "Directions for Use" I believe was selected to avoid copying BAJI. If you must, just say: "See the last paragraph below …" | As a result of refinements made to the instruction as suggested by CAA and Centro Legal de la Raza (discussed above), the committee has removed the sentence. |
| 4330. Denial of Requested | Bruce Greenlee<br>Attorney<br>Richmond | 1. This instruction is not an affirmative defense; it is the plaintiff-landlord's instruction. You can't say "to succeed on this defense, plaintiff must prove …" | The committee has changed the instruction's introductory language. |

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| Accommodation (New) | | | |
| | | 2. Change title to: *Denial of Tenant's Requested Accommodation Was Proper* | The committee has changed the instruction's title. |
| | | 3. Rewrite this thing thus: [*Name of Plaintiff*] claims that [*name of defendant*]'s requested accommodation for [[*name of defendant*]'s/a member of [*name of defendant*]'s household's] disability was properly denied because of an exception to [*name of plaintiff*]'s duty to reasonably accommodate a tenant's disability. To succeed on this claim, [*name of plaintiff*] must prove: | The committee has refined the content of the introductory paragraph. |
| | | 4. Or better yet, pull it from the release and put it back on the drawing board. | The committee believes that the bench and bar would benefit from this instruction's inclusion in *CACI*, and that the refinements made in response to public comment have resolved the commenter's concerns. |
| | Orange County Bar Association by Larisa M. Dinsmoor, President | This new proposed instruction is designed for use with CACI 4329 "Affirmative Defense-Failure to Provide Reasonable Accommodation" in unlawful detainer cases. The plaintiff is the landlord, and the tenant defendant is claiming as a defense the landlord's failure to accommodate the disability of defendant under CACI 4329. This new proposed CACI 4330 attempts to provide a defense to the plaintiff landlord based on a regulatory exceptions found at 2 Cal.Code Reqs §12179. No other legal authority is cited. The only authority cited for 2 C.C.R. §12179 are general authorities | The committee believes the proposed new instruction serves the bench and bar by recognizing that there are exceptions in the regulation that may be jury issues. As the law concerning the defense |

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| | | for the DFEH to implement regulations, prevent general discriminatory practices, and prosecute claims to prevent discrimination. The only specific statutory authority known for the duty of a landlord to provide "reasonable accommodations" to a disabled person are at Government Code §12927(c)(1) and 42 U.S.C. 3604(f)(3)(B). No statutory exceptions exist to this duty of reasonable accommodation, and the relevant cases all cite the proposition that "reasonable accommodation" can only be determined on a factual case-by-case basis. See, Auburn Woods I Homeowners Association vs Fair Employment & Housing Comm. (2004) 121 Cal. App 4th 1578; U.S. vs California Mobile Home Park Management Co. (9th Cir. 1997) 107 F.3d 1374, 1380-1381. The "exceptions" set forth at 2 C.C.R. §12179 may be proper interpretations, but support for the listed "exceptions" should be properly listed or explained. Currently, 2 C.C.R. §12179 lists six (6) regulatory exceptions, but none of the authorities listed relate to "exceptions" and the Government Code citations likewise have nothing to do with any exceptions. A better explanation of these regulatory exceptions is necessary together with proper cites to the disabled housing statutes rather than the employment discrimination statutes. See, e.g. Civil Code §51, Civil Code §54-55-32. | (see CACI No. 4329) and its exceptions develops, the committee will consider revisions to these unlawful detainer instructions. |
| All except as noted above | California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento | Agree (2334, 2521A, 2521B, 2521C, 2522A, 2522B & 2522C, VF-2506A, VF-2506B, VF-2506C, VF-2507A, VF-2507B, VF-2507C, 2702, 3041, 3046, 3050, and 4330) | No response required. |

**ITC CACI 21-02**
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

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| All except as noted above | Orange County Bar Association by Larisa M. Dinsmoor, President | Agree (2521A, 2521B, 2521C, 2522A, 2522B, 2522C, VF-2506A, VF-2506B, VF-2506C, VF-2507A, VF-2507B, VF2507C, 2702, 2705, 2750, 2752, 2753, 2754, 3041, 3046, 3050, 3709, and 4304) | No response required. |