Judicial Council *of* California

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 24-073
For business meeting on May 17, 2024

Title
Jury Instructions: Civil Jury Instructions (Release 45)

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

Recommended by
Advisory Committee on Civil Jury Instructions
Hon. Adrienne M. Grover, Chair

Agenda Item Type
Action Required

Effective Date
May 17, 2024

Date of Report
April 19, 2024

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Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approval of revised civil jury instructions and verdict forms prepared by the committee. Among other things, 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 midyear supplement to the 2024 edition of the *Judicial Council of California Civil Jury Instructions* (*CACI*).

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective May 17, 2024, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court:

1. Revisions to 27 instructions and verdict forms: CACI Nos. 372, VF-300, VF-400, 1009A, 2500, 2501, 2502, 2513, 2521A, 2521B, 2521C, 2540, 2541, 2547, 2743, 3066, 4000, 4002, 4004, 4005, 4006, 4007, 4008, VF-4000, 4328, 5009, and 5012; and

2. Revocation of CACI No. 4001.

A table of contents and the revised civil jury instructions and verdict forms are attached at pages 6–108.

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 *CACI* 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 45 of *CACI*. The council approved release 44 at its November 2023 meeting.

Analysis/Rationale

A total of 28 instructions and verdict forms are presented in this release.[2] In addition, at its meeting on April 4, 2024, the Judicial Council's Rules Committee approved changes to 9 other instructions under a delegation of authority from the council to the Rules Committee.[3]

The recommended revisions to the instructions are 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.

Revised instructions

CACI No. 2501, *Affirmative Defense—Bona fide Occupational Qualification*. A comment received for last year's release 44 urged the committee to develop an instruction addressing an employer's bona fide occupational qualification (BFOQ) defense for employees who are pregnant, recovering from childbirth, or having related medical conditions under Government

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

[2] The committee also proposes two global changes to be made to all verdict forms, discussed below. These proposed changes are demonstrated in CACI No. VF-300 and CACI No. VF-400, which are attached at pages 104–108. CACI No. VF-4000 has a substantive change as well as demonstrating the global change shown in VF-300.

[3] 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.

Code section 12945(a). In the current release, the committee proposed adding "not to offer an accommodation" to the existing BFOQ instruction as a bracketed option; the committee's proposal inadvertently did not include adding a citation to the source of the proposed change (section 12945) in the Directions for Use or the Sources and Authority, which caused some confusion. The committee thus recommends adding (1) a citation in the Sources and Authority to section 12945 and (2) a sentence to the Directions for Use about the need for modification if the BFOQ defense relates to allegations of failure to accommodate an employee who is pregnant, recovering from childbirth, or having related medical conditions. But based on input from commenters, the committee no longer proposes changes to the text of the instruction. Because the existing elements of CACI No. 2501 are not formulated to cover a failure to accommodate claim without modification, the committee will consider in a future release additional changes to the instruction or a new BFOQ instruction for use in the context of an employer's failure to accommodate.

Fair Employment and Housing Act (FEHA). Several CACI instructions in the FEHA series include as an essential element to be proved that the defendant is an employer (or other covered entity). Others are drafted for use in cases in which the defendant's status as an employer (or other covered entity) is assumed. The Supreme Court in *Raines v. U.S. Healthworks Medical Group* recently held that a business entity acting as an agent of an employer may be held directly liable as an "employer" for alleged violations of FEHA.[4] The committee recommends citing the new case in the Sources and Authority of several instructions and noting in the Directions for Use the potential need for modification if the defendant's status as an employer is disputed. One commenter did not view the recommended changes as necessary, especially those relating to work environment harassment. Two commenters supported the additions. A fourth commenter proposed language limiting the court's holding, which the committee has excerpted in the Sources and Authority.

Lanterman-Petris-Short Act (LPS). Senate Bill 43 (Stats. 2023, ch. 637) updated LPS conservatorship law. Before SB 43, people were eligible for LPS conservatorship if a serious mental illness or chronic alcoholism left them unable to secure food, clothing, or shelter. SB 43 expanded eligibility for LPS conservatorship to include people who are unable to provide for their personal safety or necessary medical care, in addition to food, clothing, or shelter. In addition, severe substance use disorder and a co-occurring mental health disorder with severe substance use disorder were added to the conditions which may support conservatorship based on the inability to secure basic personal needs. These changes were largely implemented by expanding the definition of "gravely disabled." The committee recommends revisions to several instructions in the LPS series to conform them to this recent legislation.

CACI No. 4328, *Affirmative Defense—Tenant Was Victim of Domestic Violence, Sexual Assault, Stalking, Elder/Dependent Adult Abuse, or Human Trafficking*. Recent legislation expanded the affirmative defense to eviction available to tenants when an eviction is based on

[4] (2023) 15 Cal.5th 268 [312 Cal.Rptr.3d 301, 534 P.3d 40].

acts of violence or abuse.[5] Senate Bill 1017 made the defense available when the abuse or violence is committed against a tenant, as well as against a tenant's immediate family member, or a tenant's household member. (Code Civ. Proc., § 1161.3(b).) The eviction protections under section 1161.3 also include a broader range of violent acts. In addition to domestic violence, sexual assault, stalking, human trafficking, and elder and dependent adult abuse, SB 1017 added three categories of crimes of violence. (§ 1161.3(a)(1).) Another change concerns what constitutes documentation of the abuse or violence for notifying the landlord of the abuse or violence. (§ 1161.3(a)(2)(D).)

The committee recommends retitling the instruction as *Affirmative Defense—Victim of Abuse or Violence* and refining the instruction based on the amendments to section 1161.3. Three commenters observed that the proposal retained language from a previous version of section 1161.3 about a plaintiff giving "at least three days' notice" before terminating a tenancy based on an act of abuse or violence. Current law requires the expiration of a three-day notice requiring the tenant not to voluntarily permit or consent to the presence of the perpetrator of abuse or violence on the premises. (§ 1161.3(b)(2)(B)(ii).) The committee has refined the instruction to correct the phrasing in elements 2 and 3 of the second half of the instruction. These three commenters also advocated for the instruction to address new partial eviction procedures under section 1174.27 if the perpetrator of abuse or violence is also a tenant in residence of the same dwelling unit as the tenant, the tenant's immediate family member, or the tenant's household member. The committee will consider the suggestion in the next cycle.

Global Changes to Verdict Forms. Each verdict form in *CACI* has a final sentence to instruct the presiding juror what to do after a verdict has been reached. The sentence currently states, "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." A trial judge (now retired) suggested that the committee consider deleting the final clause about presenting the verdict in the courtroom. In that trial judge's experience, the existing language caused jurors to believe that they would have to present orally in open court and that belief had the effect of discouraging jurors from agreeing to serve as the presiding juror. Because verdict forms not referring to courtroom presentation would be equally effective in advising the jury what to do once a verdict has been reached, the committee recommends deleting the final clause from the final sentence of all verdict forms. An example of this deletion as recommended is shown in CACI Nos. VF-300, VF-400, and VF-4000.

The committee also recommends deleting the word "being" from the introductory clause of a stock sentence in the Directions for Use of a number of verdict forms. The current phrasing is, "If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest … ." An example of this deletion (and the one discussed above) is shown in CACI No. VF-400.

[5] Sen. Bill 1017 (Stats. 2022, ch. 558); Assem. Bill 1756 (Stats. 2023, ch. 478).

Policy implications

The committee endeavors to express the law in plain English. Except for language choices, there are generally no policy implications.

Comments

The proposed additions and revisions in *CACI* circulated for comment from January 30 through March 5, 2024. Comments were received from eight commenters: a lawyer, two bar associations (California Lawyers Association and Orange County Bar Association), and five professional organizations (Association of Southern California Defense Counsel, Civil Justice Association of California, Family Violence Appellate Project, Public Law Center, and Western Center on Law & Poverty). Most commenters submitted comments on multiple instructions and verdict forms. No particular instruction garnered unusual attention or opposition.[6]

The committee evaluated all comments and, as a result, refined some of the instructions and verdict forms in this release. A chart of the comments received and the committee's responses is attached at pages 109–158.

Alternatives considered

Rules 2.1050(e) 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 from members of the legal community that did not result in recommendations for this release. Some suggestions were deferred for further consideration; others were declined for lack of support.

Fiscal and Operational Impacts

No implementation costs are associated with this proposal.

Attachments and Links

1. CACI Nos. 372, 1009A, 2500, 2501, 2502, 2513, 2521A, 2521B, 2521C, 2540, 2541, 2547, 2743, 3066, 4000, 4001, 4002, 4004, 4005, 4006, 4007, 4008, VF-4000, 4328, 5009, 5012, VF-300, VF-400, at pages 6–108
2. Chart of comments, at pages 109–158

[6] Two commenters identified a recent Court of Appeal case, *Acosta v. MAS Realty, LLC* (2023) 96 Cal.App.5th 635 [314 Cal.Rptr.3d 507], that flagged potential issues related to CACI No. 1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions*. That case was not yet final when the invitation to comment (CACI 24-01) circulated. The committee will consider the commenters' suggestions and the *Acosta* decision at its next meeting.

TABLE OF CONTENTS
CIVIL JURY INSTRUCTIONS
Release 45; May 2024

LANTERMAN-PETRIS-SHORT ACT

UNLAWFUL DETAINER

CONCLUDING INSTRUCTIONS

VERDICT FORMS*

*These verdict forms changes will be applied globally across all the verdict forms in the Judicial Council of California Civil Jury Instructions.

372. Common Count: Open Book Account

A book account is a written record of the credits and debts between parties [to a contract/in a fiduciary relationship]. [The contract may be oral, in writing, or implied by the parties' words and conduct.] A book account is "open" if entries can be added to it from time to time.

[*Name of plaintiff***] claims that there was an open book account in which financial transactions between the parties were recorded and that [***name of defendant***] owes [him/her/***nonbinary pronoun***/it] money on the account. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] had financial transactions with each other;**

2. **That [***name of plaintiff***], in the regular course of business, kept [a written/an electronic] account of the debits and credits involved in the transactions;**

3. **That [***name of defendant***] owes [***name of plaintiff***] money on the account; and**

4. **The amount of money that [***name of defendant***] owes [***name of plaintiff***].**

*New December 2005; Revised November 2019, May 2024**

Directions for Use

The instructions in this series are not intended to cover all available common counts. Users may need to draft their own instructions or modify the CACI instructions to fit the circumstances of the case.

Include the second sentence in the opening paragraph if the account is based on a contract rather than a fiduciary relationship. It is the contract that may be oral or implied; the book account must be in writing. (See Code Civ. Proc., § 337a [book account must be kept in a reasonably permanent form]; *Joslin v. Gertz* (1957) 155 Cal.App.2d 62, 65–66 [317 P.2d 155] [book account is a detailed statement kept in a *book*].)

Do not give this instruction for a claim involving "consumer debt" incurred on or after July 1, 2024. (See Code Civ. Proc., § 337a(a), (b) [defining and excluding "consumer debt" from the definition of "book account"]; see also Code Civ. Proc., § 425.30 [exempting "consumer debt" from "common counts"].)

Sources and Authority

- "Book Account" and "Consumer Debt" for Book Accounts Defined. Code of Civil Procedure section 337a(a), (b).

- " 'A book account may be deemed to furnish the foundation for a suit in assumpsit ... only when it contains a statement of the debits and credits of the transactions involved completely enough to

supply evidence from which it can be reasonably determined what amount is due to the claimant.' ... 'The term "account," ... clearly requires the recording of sufficient information regarding the transaction involved in the suit, from which the debits and credits of the respective parties may be determined, so as to permit the striking of a balance to ascertain what sum, if any, is due to the claimant.' " (*Robin v. Smith* (1955) 132 Cal.App.2d 288, 291 [282 P.2d 135], internal citations omitted.)

- "A book account is defined ... as 'a detailed statement, kept in a book, in the nature of debit and credit, arising out of contract or some fiduciary relation.' It is, of course, necessary for the book to show against whom the charges are made. It must also be made to appear in whose favor the charges run. This may be shown by the production of the book from the possession of the plaintiff and his identification of it as the book in which he kept the account between him and the debtor. An open book account may consist of a single entry reflecting the establishment of an account between the parties, and may contain charges alone if there are no credits to enter. Money loaned is the proper subject of an open book account. Of course a mere private memorandum does not constitute a book account." (*Joslin, supra,* 155 Cal.App.2d at pp. 65–66, internal citations omitted.)

- "A book account may furnish the basis for an action on a common count ' "... when it contains a statement of the debits and credits of the transactions involved completely enough to supply evidence from which it can be reasonably determined what amount is due to the claimant." ' A book account is described as 'open' when the debtor has made some payment on the account, leaving a balance due." (*Interstate Group Administrators, Inc. v. Cravens, Dargan & Co.* (1985) 174 Cal.App.3d 700, 708 [220 Cal.Rptr. 250], internal citations and footnote omitted.)

- "A *book account* is a detailed statement of debit/credit transactions kept by a creditor in the regular course of business, and in a reasonably permanent manner. In one sense, *an open-book account* is an account with one or more items unsettled. However, even if an account is technically settled, the parties may still have an open-book account, if they anticipate possible future transactions between them." (*Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 579, fn. 5 [53 Cal.Rptr.3d 887, 150 P.3d 764], original italics, internal citation omitted.)

- "[T]he most important characteristic of a suit brought to recover a sum owing on a book account is that the amount owed is determined by computing *all* of the credits and debits entered in the book account." (*Interstate Group Administrators, Inc., supra,* 174 Cal.App.3d at p. 708.)

- "It is apparent that the mere entry of dates and payments of certain sums in the credit column of a ledger or cash book under the name of a particular individual, without further explanation regarding the transaction to which they apply, may not be deemed to constitute a 'book account' upon which an action in *assumpsit* may be founded." (*Tillson v. Peters* (1940) 41 Cal.App.2d 671, 679 [107 P.2d 434].)

- "The law does not prescribe any standard of bookkeeping practice which all must follow, regardless of the nature of the business of which the record is kept. We think it makes no difference whether the account is kept in one book or several so long as they are permanent records, and constitute a system of bookkeeping as distinguished from mere private memoranda." (*Egan v. Bishop* (1935) 8 Cal.App.2d 119, 122 [47 P.2d 500].)

- " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim. Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)

- "Although such an action is one at law, it is governed by principles of equity. It may be brought 'wherever one person has received money which belongs to another, and which "in equity and good conscience," or in other words, in justice and right, should be returned. ... The plaintiff's right to recover is governed by principles of equity, although the action is one at law.' " (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873], internal citations omitted.)

- "[S]ince the basic premise for pleading a common count ... is that the person is thereby 'waiving the tort and suing in assumpsit,' any tort damages are out. Likewise excluded are damages for a breach of an express contract. The relief is something in the nature of a constructive trust and ... 'one cannot be held to be a constructive trustee of something he had not acquired.' One must have acquired some money which in equity and good conscience belongs to the plaintiff or the defendant must be under a contract obligation with nothing remaining to be performed except the payment of a sum certain in money." (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 14–15 [101 Cal.Rptr. 499], internal citations omitted.)

- " 'As Witkin states in his text, "[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract." ' A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)

- "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)

- "A common count is not a specific cause of action, ... rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (5th ed. 2008) Pleading, §§ 561, 565

1 California Forms of Pleading and Practice, Ch. 8, *Accounts Stated and Open Accounts*, §§ 8.20, 8.47 (Matthew Bender)

4 California Points and Authorities, Ch. 43, *Common Counts and Bills of Particulars*, § 43.2820 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 9, *Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions,* 9.02, 9.15, 9.32

1009A. Liability to Employees of Independent Contractors for Unsafe Concealed Conditions

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[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was harmed by an unsafe concealed condition while employed by [*name of plaintiff's employer*] and working on [*name of defendant*]'s property. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [owned/leased/occupied/controlled] the property;**
2. **That [*name of defendant*] knew, or reasonably should have known, of a preexisting unsafe concealed condition on the property;**
3. **That [*name of plaintiff's employer*] neither knew nor could be reasonably expected to know of the unsafe concealed condition;**
4. **That the condition was not part of the work that [*name of plaintiff's employer*] was hired to perform;**
5. **That [*name of defendant*] failed to warn [*name of plaintiff's employer*] of the condition;**
6. **That [*name of plaintiff*] was harmed; and**
7. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

An unsafe condition is concealed if either it is not visible or its dangerous nature is not apparent to a reasonable person.

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*Derived from former CACI No. 1009 April 2007; Revised April 2009, December 2011, May 2024**

Directions for Use

This instruction is for use if a concealed dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property.

Elements 3 and 4 express the independent contractor's limited duty to inspect the premises for potential safety hazards. (*Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 53–54 [282 Cal.Rptr.3d 658, 493 P.3d 212].)

For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries based on the hirer's retained control over the contractor's performance of work, see CACI No. 1009B, *Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control*. For an instruction for injuries based on the property owner~~'s~~ providing defective equipment, see CACI No. 1009D, *Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment*.

See also the Vicarious Responsibility Series, CACI No. 3700 et seq., for instructions on the liability of a hirer for the acts of an independent contractor.

Sources and Authority

- "[T]he hirer as landowner may be independently liable to the contractor's employee, even if it does not retain control over the work, if: (1) it knows or reasonably should know of a concealed, preexisting hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 675 [36 Cal.Rptr.3d 495, 123 P.3d 931].)

- "[T]here is no reason to distinguish conceptually between premises liability based on a hazardous substance that is concealed because it is invisible to the contractor and known only to the landowner and premises liability based on a hazardous substance that is visible but is known to be hazardous only to the landowner. If the hazard is not reasonably apparent, and is known only to the landowner, it is a concealed hazard, whether or not the substance creating the hazard is visible." (*Kinsman, supra*, 37 Cal.4th at p. 678.)

- "A landowner's duty generally includes a duty to inspect for concealed hazards. But the responsibility for job safety delegated to independent contractors may and generally does include explicitly or implicitly a limited duty to inspect the premises as well. Therefore, … the landowner would not be liable when the contractor has failed to engage in inspections of the premises implicitly or explicitly delegated to it. Thus, for example, an employee of a roofing contractor sent to repair a defective roof would generally not be able to sue the hirer if injured when he fell through the same roof due to a structural defect, inasmuch as inspection for such defects could reasonably be implied to be within the scope of the contractor's employment. On the other hand, if the same employee fell from a ladder because the wall on which the ladder was propped collapsed, assuming that this defect was not related to the roof under repair, the employee may be able to sustain a suit against the hirer. Put in other terms, the contractor was not being paid to inspect the premises generally, and therefore the duty of general inspection could not be said to have been delegated to it. Under those circumstances, the landowner's failure to reasonably inspect the premises, when a hidden hazard leads directly to the employee's injury, may well result in liability." (*Kinsman, supra,* 37 Cal.4th at pp. 677–678, internal citations omitted.)

- "We emphasize that our holding applies only to hazards on the premises of which the independent contractor is aware or should reasonably detect. Although we recognized in *Kinsman* that the delegation of responsibility for workplace safety to independent contractors may include a limited duty to inspect the premises, it would not be reasonable to expect [an independent contractor] to identify every conceivable dangerous condition on the roof given that he is not a licensed roofer and was not hired to repair the roof." (*Gonzalez, supra,* 12 Cal.5th at p. 54, internal citations omitted.)

- "[T]he initial formulation of the *Kinsman* test asks whether the independent contractor could reasonably have discovered the latent hazardous condition; the gloss on the test for obvious hazards asks whether knowledge of the hazard is inadequate to prevent injury. Both of these tests are defeated where, as here, there is undisputed evidence that the hazard could reasonably have been discovered (by inspecting the ladder) and, once discovered, avoided (by getting another ladder)." (*Johnson v.*

Raytheon Co. (2019) 33 Cal.App.5th 617, 632 [245 Cal.Rptr.3d 282].)

- "The court also told the jury that [defendant] was liable if its negligent use or maintenance of the property was a substantial factor in harming [plaintiff] (see CACI Nos. 1000, 1001, 1003 & 1011). These instructions were erroneous because they did not say that these principles would only apply to [defendant] if the hazard was concealed." (*Alaniz v. Sun Pacific Shippers, L.P.* (2020) 48 Cal.App.5th 332, 338–339 [261 Cal.Rptr.3d 702].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1259 et seq.

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-A, *Liability For Defective Conditions On Premises*, ¶¶ 6:4, 6:9.12 (The Rutter Group)

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, §§ 15.04[4], 15.08 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.~~23~~20 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability,* §§ 421.11–421.12 (Matthew Bender)

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

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

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

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

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

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

   [or]

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

   [or]

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

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

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

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

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*New September 2003; Revised April 2009, June 2011, June 2012, June 2013, May 2020, May 2024**

Directions for Use

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

~~If element 1 is given~~If the defendant's status as employer is in dispute, the court may need to instruct the

jury on the statutory definition of "employer" under the FEHA, which can include business entities acting as agents of employers. (Gov. Code, § 12926(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940~~(a)–(d)~~(b)–(h), (j), (k).)

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

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

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

For damages instructions, see applicable instructions on tort damages.

Sources and Authority

- Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Perception and Association. Government Code section 12926(o).
- "Race~~,~~." ~~"Protective Hairstyles," and "Reproductive Health Decisionmaking."~~ Government Code section 12926(w)~~, (x), (y)~~.
- "Protective Hairstyles." Government Code section 12926(x).
- "Reproductive Health Decisionmaking." Government Code section 12926(y).
- "The California Fair Employment and Housing Act, which defines 'employer' to 'include[]' 'any person acting as an agent of an employer,' permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of

employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA's definition of employer; we express no view of the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision." (*Raines, supra,* 15 Cal.5th at p. 291, internal citations omitted.)

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

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

- "The *McDonnell Douglas* framework was designed as 'an analytical tool for use by the trial judge in applying the law, not a concept to be understood and applied by the jury in the factfinding process.' " (*Abed v. Western Dental Services, Inc.* (2018) 23 Cal.App.5th 726, 737 [233 Cal.Rptr.3d 242].)

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

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

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

- "We conclude that where a plaintiff establishes a prima facie case of discrimination based on a failure to interview her for open positions, the employer must do more than produce evidence that the hiring authorities did not know why she was not interviewed. Nor is it enough for the employer, in a writ petition or on appeal, to cobble together after-the-fact *possible* nondiscriminatory reasons. While the stage-two burden of production is not onerous, the employer must clearly state the *actual* nondiscriminatory reason for the challenged conduct." (*Dept. of Corrections & Rehabilitation v. State Personnel Bd.* (2022) 74 Cal.App.5th 908, 930 [290 Cal.Rptr.3d 70], original italics.)

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

- "Although '[t]he specific elements of a prima facie case may vary depending on the particular facts,' the plaintiff in a failure-to-hire case '[g]enerally … must provide evidence that (1) he [or she] was a member of a protected class, (2) he [or she] was qualified for the position he [or she] sought … , (3) he [or she] suffered an adverse employment action, such as … denial of an available job, and (4) some other circumstance suggests discriminatory motive,' such as that the position remained open and the employer continued to solicit applications for it." (*Abed, supra,* 23 Cal.App.5th at p. 736.)

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

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

- "[Defendant] still could shift the burden to [plaintiff] by presenting admissible evidence showing a legitimate, nondiscriminatory reason for terminating her. 'It is the employer's honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that

is at issue in a discrimination case.' … '[I]f nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct. … While the objective soundness of an employer's proffered reasons supports their credibility … , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, "legitimate" reasons … in this context are reasons that are *facially unrelated to prohibited bias,* and which, if true, would thus preclude a finding *of discrimination*. …' " (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 170–171 [125 Cal.Rptr.3d 1], original italics, internal citations omitted.)

- "[W]e hold that a residency program's claim that it terminated a resident for academic reasons is not entitled to deference. … [T]he jury should be instructed to evaluate, without deference, whether the program terminated the resident for a genuine academic reason or because of an impermissible reason such as retaliation or the resident's gender." (*Khoiny v. Dignity Health* (2022) 76 Cal.App.5th 390, 404 [291 Cal.Rptr.3d 496].)

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

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

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

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

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

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

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

- "In no way did the Court of Appeal in *Reeves* overturn the long-standing rule that comparator evidence is relevant and admissible where the plaintiff and the comparator are similarly situated in all relevant respects and the comparator is treated more favorably. Rather, it held that in a job hiring case, and in the context of a summary judgment motion, a plaintiff's weak comparator evidence 'alone' is insufficient to show pretext." (*Gupta v. Trustees of California State University* (2019) 40 Cal.App.5th 510, 521 [253 Cal.Rptr.3d 277].)

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

- "[D]iscriminatory remarks can be relevant in determining whether intentional discrimination occurred: 'Although stray remarks may not have strong probative value when viewed in isolation, they may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence. Certainly, who made the comments, when they were made in relation to the adverse employment decision, and in what context they were made are all factors that should be considered … .' " (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1190–1191

[220 Cal.Rptr.3d 42].)

- "Discrimination on the basis of an employee's foreign accent is a sufficient basis for finding national origin discrimination." (*Galvan v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 549, 562 [250 Cal.Rptr.3d 16].)

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

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

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

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1025 et seq.

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

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

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, §§ 43.01, 43.10 (Matthew Bender)

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

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

2501. Affirmative Defense—Bona fide Occupational Qualification

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[*Name of defendant***] claims that [his/her/***nonbinary pronoun***/its] decision [to ~~discharge~~/[***other adverse employment action***]] [***name of plaintiff***] was lawful because [he/she/***nonbinary pronoun***/it] was entitled to consider [***protected status—for example, race, gender, or age***] as a job requirement. To succeed, [***name of defendant***] must prove all of the following:**

1. **That the job requirement was reasonably necessary for the operation of [*name of defendant*]'s business;**

2. **That [*name of defendant*] had a reasonable basis for believing that substantially all [*members of protected group*] are unable to safely and efficiently perform that job;**

3. **That it was impossible or highly impractical to consider whether each [applicant/employee] was able to safely and efficiently perform the job; and**

4. **That it was impossible or highly impractical for [*name of defendant*] to rearrange job responsibilities to avoid using [*protected status*] as a job requirement.**

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*New September 2003; Revised May 2024**

Directions for Use

An employer may assert the bona fide occupational qualification (BFOQ) defense where the employer has a practice that on its face excludes an entire group of individuals because of their protected status. Modifications will be necessary if the BFOQ defense is raised in a case involving allegations of failure to accommodate an employee who is pregnant, recovering from childbirth, or having related medical conditions. (Gov. Code, § 12945(a).)

Sources and Authority

- Bona fide Occupational Qualification. Government Code section 12940(a)(1).
- Bona fide Occupational Qualification for Pregnancy, Childbirth and Related Conditions. Government Code section 12945(a).
- Bona fide Occupational Qualification. Cal. Code Regs., tit. 2, § ~~7286.7(a)~~ 11010(a).
- Bona fide Occupational Qualification Under Federal Law. 42 U.S.C. § 2000e-2(e)(1).
- The BFOQ defense is a narrow exception to the general prohibition on discrimination. (*Bohemian Club v. Fair Employment & Housing Com.* (1986) 187 Cal.App.3d 1, 19 [231 Cal.Rptr. 769]; *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.* (1991) 499 U.S. 187, 201 [111 S.Ct. 1196, 113 L.Ed.2d 158].)

- " '[I]n order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.' " (*Bohemian Club*, *supra*, 187 Cal.App.3d at p. 19, quoting *Weeks v. Southern Bell Telephone & Telegraph Co.* (5th Cir. 1969) 408 F.2d 228, 235.)

- "First, the employer must demonstrate that the occupational qualification is 'reasonably necessary to the normal operation of [the] particular business.' Secondly, the employer must show that the categorical exclusion based on [the] protected class characteristic is justified, i.e., that 'all or substantially all' of the persons with the subject class characteristic fail to satisfy the occupational qualification." (*Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal.App.3d 517, 540 [267 Cal.Rptr. 158], quoting *Weeks*, *supra*, 408 F.2d at p. 235.)

- "Even if an employer can demonstrate that certain jobs require members of one sex, the employer must also 'bear the burden of proving that because of the nature of the operation of the business they could not rearrange job responsibilities ...' in order to reduce the BFOQ necessity." (*Johnson Controls, Inc.*, *supra*, 218 Cal.App.3d at p. 541; see *Hardin v. Stynchcomb* (11th Cir. 1982) 691 F.2d 1364, 1370–1371.)

- "Alternatively, the employer could establish that age was a legitimate proxy for the safety-related job qualifications by proving that it is 'impossible or highly impractical' to deal with the older employees on an individualized basis." (*Western Airlines, Inc. v. Criswell* (1985) 472 U.S. 400, 414–415 [105 S.Ct. 2743, 86 L.Ed.2d 321], internal citation and footnote omitted.)

- "The Fair Employment and Housing Commission has interpreted the BFOQ defense in a manner incorporating all of the federal requirements necessary for its establishment. ... [¶] The standards of the Commission are ... in harmony with federal law regarding the availability of a BFOQ defense." (*Bohemian Club*, *supra*, 187 Cal.App.3d at p. 19.)

- "By modifying 'qualification' with 'occupational,' Congress narrowed the term to qualifications that affect an employee's ability to do the job." (*International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW*, *supra*, 499 U.S. at p. 201.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1032, ~~1033~~ 1034

Chin et al., California Practice Guide: Employment Litigation, Ch.9-C, *California Fair Employment and Housing Act (FEHA)*, ¶¶ 9:2380, 9:2382, 9:2400, 9:2430 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual Harassment, §§ 2.91–2.94

2 Wilcox, California Employment Law, Ch. 41, *Civil Actions Under Equal Employment Opportunity Laws*, §§ 41.94[3], 41.108 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.54[4], 115.101 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:84 (Thomson Reuters)

2502. Disparate Impact—Essential Factual Elements (Gov. Code, § 12940(a))

[*Name of plaintiff***] claims that [***name of defendant***] had [an employment practice/a selection policy] that wrongfully discriminated against [him/her/***nonbinary pronoun***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That [***name of defendant***] had [an employment practice of [***describe practice***]/a selection policy of [***describe policy***]] that had a disproportionate adverse effect on [***describe protected group-for example, persons over the age of 40***];**

4. **That [***name of plaintiff***] is [***protected status***];**

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

6. **That [***name of defendant***]'s [employment practice/selection policy] was a substantial factor in causing [***name of plaintiff***]'s harm.**

*New September 2003; Revised June 2011, May 2024**

Directions for Use

This instruction is intended for disparate impact employment discrimination claims. Disparate impact occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group and cannot be justified by business necessity. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1405 [194 Cal.Rptr.3d 689].)

~~If element 1 is given~~If the defendant's status as employer is in dispute, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA, which can include business entities acting as agents of employers. (Gov. Code, § 12926(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940~~(a)–(d)~~(b)–(h), (j), (k).)

The court should consider instructing the jury on the meaning of "adverse impact," tailored to the facts of the case and the applicable law.

Sources and Authority

- Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section

12940(a).

- Disparate Impact May Prove Age Discrimination. Government Code section 12941.1.

- Justification for Disparate Impact. Cal. Code Regs., tit. 2, §§ 11010(b), 11017(a), (e).

- "The California Fair Employment and Housing Act, which defines 'employer' to 'include[]' 'any person acting as an agent of an employer,' permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA's definition of employer; we express no view of the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision." (*Raines, supra,* 15 Cal.5th at p. 291, internal citations omitted.)

- "Prohibited discrimination may ... be found on a theory of disparate impact, i.e., that regardless of motive, a *facially neutral* employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, fn. 20 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- "A 'disparate impact' plaintiff ... may prevail without proving intentional discrimination ... [However,] a disparate impact plaintiff 'must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue.' " (*Ibarbia v. Regents of the University of California* (1987) 191 Cal.App.3d 1318, 1329–1330 [237 Cal.Rptr. 92], quoting *Lowe v. City of Monrovia* (9th Cir. 1985) 775 F.2d 998, 1004.)

- " 'To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of discrimination ... Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination.' " (*City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 985 [236 Cal.Rptr. 716], quoting *Connecticut v. Teal* (1982) 457 U.S. 440, 446-447 [102 S.Ct. 2525, 73 L.Ed.2d 130], internal citation omitted.)

- "It is well settled that valid statistical evidence is required to prove disparate impact discrimination, that is, that a facially neutral policy has caused a protected group to suffer adverse effects. ' "Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. … [S]tatistical disparities must be sufficiently substantial that they raise such an inference of causation." ' " (*Jumaane, supra,* 241 Cal.App.4th at p. 1405.)

- Under federal title VII, a plaintiff may establish an unlawful employment practice based on disparate impact in one of two ways: (1) the plaintiff demonstrates that a defendant uses a particular employment practice that causes a disparate impact on the basis of a protected status, and the defendant "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"; or (2) the plaintiff demonstrates that there is an alternative employment practice with less adverse impact, and the defendant "refuses to adopt such alternative employment practice." (42 U.S.C. § 2000e-2(k)(1)(A).)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-A, *Employment Presumed At Will*, ¶ 4:25 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:530, 7:531, 7:535 (The Rutter Group)
1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.65

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.21 (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[4] (Matthew Bender)

California Civil Practice: Employment Litigation, § 2:23 (Thomson Reuters)

2513. Business Judgment for "At-Will" Employment

In California, employment is presumed to be "at will." ~~That~~ This means that an employer may [discharge/[*other adverse action*]] an employee for no reason, or for a good, bad, mistaken, unwise, or even unfair reason, as long as its action is not for a [discriminatory/retaliatory] reason.

New December 2013; Revised May 2024

Directions for Use

Give this instruction to advise the jury that the employer's adverse action is not illegal just because it is ill-advised. It has been held to be error not to give this instruction. (See *Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, 20−24 [151 Cal.Rptr.3d 41].)

Sources and Authority

- At-Will Employment. Labor Code section 2922.
- "[A] plaintiff in a discrimination case must show discrimination, not just that the employer's decision was wrong, mistaken, or unwise. … ' "The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason. … 'While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is … whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason … does not have to be a reason that the judge or jurors would act on or approve.' " ' " (*Veronese, supra,* 212 Cal.App.4th at p. 21, internal citation omitted.)
- "[I]f nondiscriminatory, [defendant]'s true reasons need not necessarily have been wise or correct. While the objective soundness of an employer's proffered reasons supports their credibility … , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, 'legitimate' reasons in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding of *discrimination*." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 358 [100 Cal.Rptr.2d 352, 8 P.3d 1089], original italics, internal citations omitted.)
- "[U]nder the law [defendant] was entitled to exercise her business judgment, without second guessing. But [the court] refused to tell the jury that. That was error." (*Veronese, supra,* 212 Cal.App.4th at p. 24.)
- "An employment decision based on political concerns, even if otherwise unfair, is not actionable under section 12940 so long as the employee's race or other protected status is not a substantial factor in the decision." (*Diego v. City of Los Angeles* (2017) 15 Cal.App.5th 338, 355 [223 Cal.Rptr.3d 173].)
- "What constitutes satisfactory performance is of course a question ordinarily vested in the

employer's sole discretion. An employer is free to set standards that might appear unreasonable to outside observers, and to discipline employees who fail to meet those standards, so long as the standards are applied evenhandedly. But that does not mean that an employer conclusively establishes the governing standard of competence in an employment discrimination action merely by asserting that the plaintiff's performance was less than satisfactory. Evidence of the employer's policies and practices, including its treatment of other employees, may support a contention, and an eventual finding, that the plaintiff's job performance did in fact satisfy the employer's own norms." (*Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736, 742−743 [167 Cal.Rptr.3d 485].)

- "The central issue is and should remain whether the evidence as a whole supports a reasoned inference that the challenged action was the product of discriminatory or retaliatory animus. The employer's mere articulation of a legitimate reason for the action cannot answer this question; it can only dispel the presumption of improper motive that would otherwise entitle the employee to a judgment in his favor." (*Cheal, supra,* 223 Cal.App.4th at p. 755.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 244 et seq.

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

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-A, *Employment Presumed At Will*, ¶ 4:25 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:194, 7:200–7:201, 7:356, 7:391–7:392, 7:530, 7:531, 7:535 (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline,* § 60.01 et seq. (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.11 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.23 (Matthew Bender)

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

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

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

1. **That [***name of plaintiff***] was [an employee of/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.**

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018, July 2019, May 2020, November 2021, November 2023, May 2024**

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).) Further modification may be necessary if the defendant is a business-entity agent of an employer. (*Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) 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].) 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].)

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).

- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).

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

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

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

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

- "The California Fair Employment and Housing Act, which defines 'employer' to 'include[]' 'any person acting as an agent of an employer,' permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA's definition of employer; we express no view of the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision." (*Raines, supra,* 15 Cal.5th at p. 291, internal citations omitted.)

- "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.)

- "Under FEHA, an employer is strictly liable for harassment by a supervisor. However, an employer is only strictly liable under FEHA for harassment by a supervisor 'if the supervisor is acting in the capacity of supervisor when the harassment occurs.' 'The employer is *not* strictly liable for a supervisor's acts of harassment resulting from a completely private relationship unconnected with the employment and not occurring at the workplace or during normal working hours.' " (*Atalla v. Rite Aid Corp.* (2023) 89 Cal.App.5th 294, 309 [306 Cal.Rptr.3d 1], internal citations omitted, original italics.)

- "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))

[*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, May 2024**

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).) Further modification may be necessary if the defendant is a business-entity agent of an employer. (*Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) 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 California Fair Employment and Housing Act, which defines 'employer' to 'include[]' 'any person acting as an agent of an employer,' permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA's definition of employer; we express no view of the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision." (*Raines, supra,* 15 Cal.5th at p. 291, internal citations omitted.)
- "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))

[*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, May 2024**

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).) Further modification may be necessary if the defendant is a business-entity agent of an employer. (*Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) 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 California Fair Employment and Housing Act, which defines 'employer' to 'include[]' 'any person acting as an agent of an employer,' permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA's definition of employer; we express no view of the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision." (*Raines, supra,* 15 Cal.5th at p. 291, internal citations omitted.)
- "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)

2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

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

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

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

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

4. **That [***name of plaintiff***] was able to perform the essential job duties of [his/her/***nonbinary pronoun***] [current position/the position for which [he/she/***nonbinary pronoun***] applied], either with or without reasonable accommodation for [his/her/***nonbinary pronoun***] [***e.g., condition***];**

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

   [or]

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

   [or]

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

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

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

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

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

plaintiff]/**conduct].]**

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*New September 2003; Revised June 2006, December 2007, April 2009, December 2009, June 2010, June 2012, June 2013, December 2014, December 2016, May 2019, May 2020, May 2024**

Directions for Use

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

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

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA, which can include business entities acting as agents of employers. (Gov. Code, § 12926(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940~~(a)–(d)~~(b)–(h), (j), (k).)

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

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

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

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

Regarding element 4, it is now settled that the ability to perform the essential duties of the job, with or without reasonable accommodation, is an element of the plaintiff's burden of proof. (See *Green v. State of California* (2007) 42 Cal.4th 254, 257–258 [64 Cal.Rptr.3d 390, 165 P.3d 118].)

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

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

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

If the existence of a qualifying disability is disputed, ~~additional~~ consider giving special instructions defining ~~"physical disability," "mental disability," and~~ "medical condition," "mental disability," and "physical disability." ~~may be required.~~ (See Gov. Code, § 12926(i), (j), (m) [defining "medical condition," "mental disability," and "physical disability"]; see also Cal. Code Regs., tit. 2, § 11065.)

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Inability to Perform Essential Job Duties. Government Code section 12940(a)(1).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Perception of Disability and Association With Person Who Has or Is Perceived to Have Disability Protected. Government Code section 12926(o).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "The California Fair Employment and Housing Act, which defines 'employer' to 'include[]' 'any person acting as an agent of an employer,' permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA's definition of employer; we express no

view of the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision." (*Raines, supra,* 15 Cal.5th at p. 291, internal citations omitted.)

- "[T]he plaintiff initially has the burden to establish a prima facie case of discrimination. The plaintiff can meet this burden by presenting evidence that demonstrates, even circumstantially or by inference, that he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability. To establish a prima facie case, a plaintiff must show ' " ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a [prohibited] discriminatory criterion … ." ' " …' The prima facie burden is light; the evidence necessary to sustain the burden is minimal. As noted above, while the elements of a plaintiff's prima facie case can vary considerably, generally an employee need only offer sufficient circumstantial evidence to give rise to a reasonable *inference* of discrimination." (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310 [115 Cal.Rptr.3d 453], original italics, internal citations omitted.)

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

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

- "If the employee meets this [prima facie] burden, it is then incumbent on the employer to show that it

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

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

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

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

- "To establish a prima facie case of mental disability discrimination under FEHA, a plaintiff must show the following elements: (1) She suffers from a mental disability; (2) she is otherwise qualified

to do the job with or without reasonable accommodation; and (3) she was subjected to an adverse employment action because of the disability." (*Higgins-Williams v. Sutter Medical Foundation* (2015) 237 Cal.App.4th 78, 84 [187 Cal.Rptr.3d 745].)

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

- "[Defendant] asserts the statute's 'regarded as' protection is limited to persons who are denied or who lose jobs based on an employer's reliance on the 'myths, fears or stereotypes' frequently associated with disabilities. … However, the statutory language does not expressly restrict FEHA's protections to the narrow class to whom [defendant] would limit its coverage. To impose such a restriction would exclude from protection a large group of individuals, like [plaintiff], with more mundane long-term medical conditions, the significance of which is exacerbated by an employer's failure to reasonably accommodate. Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute's plain language leads to the conclusion that the 'regarded as' definition casts a broader net and protects *any* individual 'regarded' or 'treated' by an employer 'as having, or having had, any physical condition that makes achievement of a major life activity difficult' or may do so in the future. We agree most individuals who sue exclusively under this definitional prong likely are and will continue to be victims of an employer's 'mistaken' perception, based on an unfounded fear or stereotypical assumption. Nevertheless, FEHA's protection is nowhere expressly premised on such a factual showing, and we decline the invitation to import such a requirement." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 [43 Cal.Rptr.3d 874], original italics, internal citations omitted.)

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

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

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

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

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

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

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

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

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

- "We conclude that where, as here, an employee is found to be able to safely perform the essential duties of the job, a plaintiff alleging disability discrimination can establish the requisite employer intent to discriminate by proving (1) the employer knew that plaintiff had a physical condition that

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

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

- " '[W]eight may qualify as a protected "handicap" or "disability" within the meaning of the FEHA if medical evidence demonstrates that it results from a physiological condition affecting one or more of the basic bodily systems and limits a major life activity.'… '[A]n individual who asserts a violation of the FEHA on the basis of his or her weight must adduce evidence of a physiological, systemic basis for the condition.' " (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 928 [227 Cal.Rptr.3d 286].)

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

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ ~~1049~~ 1045–1051

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

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

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

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

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

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

[*Name of plaintiff***] claims that [***name of defendant***] failed to reasonably accommodate [his/her/***nonbinary pronoun***] [***select term to describe basis of limitations, e.g., physical condition***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That [[***name of plaintiff***] had/[***name of defendant***] treated [***name of plaintiff***] as if [he/she/***nonbinary pronoun***] had] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];**

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

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

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

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

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

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

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*New September 2003; Revised April 2007, December 2007, April 2009, December 2009, June 2010, December 2011, June 2012, June 2013, May 2019, May 2023, May 2024**

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, §

12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA, which can include business entities acting as agents of employers. (Gov. Code, § 12926(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940~~(a)–(d)~~(b)–(h), (j), (k).)

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

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

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

If the existence of a qualifying disability is disputed, ~~additional~~ consider giving special instructions defining ~~"physical disability," "mental disability," and~~ "medical condition," "mental disability," and "physical disability." ~~may be required.~~ (See Gov. Code, § 12926(i), (j), (m) [defining "medical condition," "mental disability," and "physical disability"]; see also Cal. Code Regs., tit. 2, § 11065.)

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

There may still be an unresolved issue if the employee claims that the employer failed to provide the employee with other suitable job positions that the employee might be able to perform with reasonable accommodation. The rule has been that the employer has an affirmative duty to make known to the employee other suitable job opportunities and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to any other employees or has a policy of offering such assistance or benefit to any other employees. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951 [62 Cal.Rptr.2d 142]; see also *Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 745 [151

Cal.Rptr.3d 292]; *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837]; *Hanson v. Lucky Stores* (1999) 74 Cal.App.4th 215, 226 [87 Cal.Rptr.2d 487].) In contrast, other courts have said that it is the employee's burden to prove that a reasonable accommodation could have been made, i.e., that the employee was qualified for a position in light of the potential accommodation. (See *Nadaf-Rahrov, supra,* 166 Cal.App.4th at p. 978; see also *Cuiellette, supra,* 194 Cal.App.4th at p. 767 [plaintiff proves he or she is a qualified individual by establishing that he or she can perform the essential functions of the position to which reassignment is sought].) The question of whether the employee has to present evidence of other suitable job descriptions and prove that a vacancy existed for a position that the employee could do with reasonable accommodation may not be fully resolved.

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

Sources and Authority

- Reasonable Accommodation Required. Government Code section 12940(m).
- "Reasonable Accommodation" Explained. Government Code section 12926(p).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "Under FEHA, an employer is required 'to make reasonable accommodation for the known physical or mental disability of an applicant or employee.' Relatedly, the employer is required 'to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability … .' " (*Lin v. Kaiser Foundation Hospitals* (2023) 88 Cal.App.5th 712, 728 [304 Cal.Rptr.3d 820], internal citations omitted.)
- "There are three elements to a failure to accommodate action: '(1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff's disability. [Citation.]' " (*Hernandez v. Rancho Santiago Cmty. College Dist.* (2018) 22 Cal.App.5th 1187, 1193–1194 [232 Cal.Rptr.3d 349].)
- "Under the FEHA, 'reasonable accommodation' means 'a modification or adjustment to the

workplace that enables the employee to perform the essential functions of the job held or desired.' " (*Cuiellette, supra,* 194 Cal.App.4th at p. 766.)

- "Reasonable accommodations include '[j]ob restructuring, part-time or modified work schedules, *reassignment to a vacant position,* … and other similar accommodations for individuals with disabilities.' " (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 968 [181 Cal.Rptr.3d 553], original italics.)

- "The examples of reasonable accommodations in the relevant statutes and regulations include reallocating nonessential functions or modifying how or when an employee performs an essential function, but not eliminating essential functions altogether. FEHA does not obligate the employer to accommodate the employee by excusing him or her from the performance of essential functions." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 375 [184 Cal.Rptr.3d 9].)

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

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

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

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

vacant position at the same level exists.' [Citations.]" [Citations.]' " (*Furtado, supra,* 212 Cal.App.4th at p. 745.)

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

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

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

- " '[A]n employer "knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation." ' … [¶] 'While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the *only* reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations under the [FEHA]." ' " (*Featherstone, supra,* 10 Cal.App.5th at p. 1167, internal citations omitted.)

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

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

- "Employers must make reasonable accommodations to the disability of an individual unless the

employer can demonstrate that doing so would impose an 'undue hardship.' " (*Prilliman*, *supra,* 53 Cal.App.4th at p. 947.)

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

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

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

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

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

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

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

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

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

- "While 'a finite leave can be a reasonable accommodation under FEHA, provided it is likely that at

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

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 977, 1048

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

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

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ ~~115.22~~ 115.20, 115.35, 115.92 (Matthew Bender)

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

2547. Disability-Based Associational Discrimination—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her/***nonbinary pronoun***] based on [his/her/***nonbinary pronoun***] association with a person with a disability. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That [***name of plaintiff***] was [***specify basis of association or relationship, e.g., the brother of [name of associate]***], who had [a] [***e.g., physical condition***];**

4. [**That [***name of associate***]'s [***e.g., physical condition***] was costly to [***name of defendant***] because [***specify reason, e.g., [name of associate] was covered under [plaintiff]'s employer-provided health care plan***];]**

   [or]

   [That [*name of defendant***] feared [***name of plaintiff***]'s association with [***name of associate***] because [***specify, e.g., [name of associate] has a disability with a genetic component and [name of plaintiff] may develop the disability as well***];]**

   [or]

   [That [*name of plaintiff***] was somewhat inattentive at work because [***name of associate***]'s [***e.g., physical condition***] requires [***name of plaintiff***]'s attention, but not so inattentive that to perform to [***name of defendant***]'s satisfaction [***name of plaintiff***] would need an accommodation;]**

   [or]

   [[*Specify other basis for associational discrimination***];]**

5. **That [***name of plaintiff***] was able to perform the essential job duties;**

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

   [*or***]**

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

   [*or***]**

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

7. **That [*name of plaintiff*]'s association with [*name of associate*] was a substantial motivating reason for [*name of defendant*]'s [decision to [discharge/refuse to hire/[*other adverse employment action*]] [*name of plaintiff*]/conduct];**

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

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

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*New December 2014; Revised May 2017, May 2020, November 2023, May 2024**

Directions for Use

Give this instruction if plaintiff claims that the plaintiff was subjected to an adverse employment action because of the plaintiff's association with a person with a disability or perceived to have a disability. Discrimination based on an employee's association with a person who is (or is perceived to be) disabled is an unlawful employment practice under the FEHA. (See Gov. Code, § 12926(o).)

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA, which can include business entities acting as agents of employers. (Gov. Code, § 12926(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(b)–(h), (j), (k).)

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

Three versions of disability-based associational discrimination have been recognized, called "expense," "disability by association," and "distraction." (See *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655–660 [163 Cal.Rptr.3d 392] [claim for "disability-based associational discrimination" adequately pled].) Element 4 sets forth options for the three versions, which are illustrative rather than exhaustive; therefore, an "other" option is provided. (See *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1042 [207 Cal.Rptr.3d 120].)

An element of a disability discrimination case is that the plaintiff must be otherwise qualified to do the job, with or without reasonable accommodation. (*Green v. State of California* (2007) 42 Cal.4th 254, 262 [64 Cal.Rptr.3d 390, 165 P.3d 118] (see element 5).) However, the FEHA does not expressly require reasonable accommodation for association with a person with a disability. (Gov. Code, § 12940(m) [employer must reasonably accommodate applicant or employee].) Nevertheless, one court has suggested that such a requirement may exist, without expressly deciding the issue. (See *Castro-Ramirez, supra,* 2 Cal.App.5th at pp. 1038−1039.) A reference to reasonable accommodation may be added to element 5 if

the court decides to impose this requirement.

Read the first option for element 6 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained*, if the existence of an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 6 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 7 if either the second or third option is included for element 4.

Element 7 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; *Castro-Ramirez, supra,* 2 Cal.App.5th at p. 1037; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

If the question of whether the associate has a disability is disputed, ~~additional~~ consider giving special instructions defining "medical condition," "mental disability," and "physical disability." ~~may be required.~~ (See Gov. Code, § 12926(i), (j), (m) [defining "medical condition," "mental disability," and "physical disability"]; see also Cal. Code Regs., tit. 2, § 11065.)

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Association With Person Who Has or Is Perceived to Have a Disability Protected. Government Code section 12926(o).
- " 'Three types of situation are, we believe, within the intended scope of the rarely litigated … association section. We'll call them "expense," "disability by association," and "distraction." They can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) ("expense") his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) ("disability by association") the employee's homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ("distraction") the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours.' " (*Rope, supra,* 220 Cal.App.4th at p. 657.)

- "We agree with *Rope* [*supra*] that *Larimer* [*Larimer v. International Business Machines Corp.* (7th Cir. 2004) 370 F.3d 698] provides an illustrative, rather than an exhaustive, list of the kinds of circumstances in which we might find associational disability discrimination. The common thread among the *Larimer* categories is simply that they are instances in which the 'employer has a motive to discriminate against a nondisabled employee who is merely associated with a disabled person.' As we discuss above, this is an element of a plaintiff's prima facie case—that the plaintiff's association with a disabled person was a substantial motivating factor for the employer's adverse employment action. *Rope* held the alleged facts in that case could give rise to an inference of such discriminatory motive. Our facts do not fit neatly within one of the *Larimer* categories either, but a jury could reasonably infer the requisite discriminatory motive." (*Castro-Ramirez, supra,* 2 Cal.App.5th at p. 1042, internal citation omitted.)

- " '[A]n employer who discriminates against an employee because of the latter's association with a disabled person is liable even if the motivation is purely monetary. But if the disability plays no role in the employer's decision … then there is no *disability* discrimination.' " (*Rope, supra,* 220 Cal.App.4th at p. 658, original italics.)

- "A prima facie case of disability discrimination under FEHA requires a showing that (1) the plaintiff suffered from a disability, (2) the plaintiff was otherwise qualified to do his or her job, with or without reasonable accommodation, and (3) the plaintiff was subjected to adverse employment action because of the disability. Adapting this [disability discrimination] framework to the associational discrimination context, the 'disability' from which the plaintiff suffers is his or her association with a disabled person. … [T]he disability must be a substantial factor motivating the employer's adverse employment action." (*Castro-Ramirez, supra,* 2 Cal.App.5th at p. 1037.)

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

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

- "[W]hen section 12940, subdivision (m) requires employers to reasonably accommodate 'the known physical … disability of an applicant or employee,' read in conjunction with other relevant provisions, subdivision (m) may reasonably be interpreted to require accommodation based on the employee's association with a physically disabled person." (*Castro-Ramirez, supra,* 2 Cal.App.5th at pp. 1038–1039.)

Secondary Sources

~~8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1045–1051~~

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, California Fair Employment And Housing Act (FEHA), ¶¶ 9:2213–9:2215 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.32[2], [4] (Matthew Bender)

~~11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.10, 115.23, 115.34 (Matthew Bender)~~

2743. Equal Pay Act—Retaliation—Essential Factual Elements (Lab. Code, § 1197.5(k))

[*Name of plaintiff*] claims that [*name of defendant*] retaliated against [him/her/*nonbinary pronoun*] for [pursuing/assisting another in the enforcement of] [his/her/*nonbinary pronoun*] right to equal pay regardless of [sex/race/ethnicity]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] [*specify acts taken by plaintiff to invoke, enforce, or assist in the enforcement of the right to equal pay*];**

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

3. **That [*name of plaintiff*]'s [pursuit of/assisting in the enforcement of another's right to] equal pay was a substantial motivating reason for [*name of defendant*]'s [discharging/[*other adverse employment action*]] [*name of plaintiff*];**

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

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

New May 2018; Revised May 2020, May 2024

Directions for Use

Use this instruction in cases of alleged retaliation against an employee under the Equal Pay Act. The ~~a~~Act prohibits adverse employment actions against an employee who has invoked the protections of or taken steps to enforce ~~the equal pay requirements of the act~~ it. ~~Also, the employer cannot prohibit an employee from disclosing that employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise that employee's rights.~~ (Lab. Code, § 1197.5(k)(1) [protecting the right of employees to invoke the protections of the Act, assist in enforcement of the Act, disclose their wages, discuss the wages of others, inquire about another employee's wages, or encourage other employees to exercise their rights under the Act].) Modify the instruction as necessary to describe the employee's protected activity in the first sentence. An employee who has been retaliated against may bring a civil action for reinstatement, reimbursement for lost wages and work benefits, interest, and equitable relief. (Lab. Code, § 1197.5(k)(2).)

Note that there are two causation elements. First, there must be a causal connection between the employee's ~~pursuit of equal pay~~ protected activity and the adverse employment action (element 3). Second, the employee must have suffered harm because of the employer's retaliatory acts (element 5).

Element 3 uses the term "substantial motivating reason" to express both intent and causation between the

employee's ~~pursuit of equal pay~~ protected activity and the adverse employment action. "Substantial motivating reason" has been held to be the appropriate standard under the discrimination prohibitions of the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether this standard applies to the Equal Pay Act retaliation cases has not been addressed by the courts.

If an employer takes adverse action within 90 days of an employee's exercise of rights protected by the Equal Pay Act, there is a rebuttable presumption in favor of the employee's claim. (Lab. Code, § 1197.5(k)(1).) Consider modifying this instruction and/or giving additional instructions regarding the rebuttable presumption.

Sources and Authority

- Retaliation Prohibited Under Equal Pay Act. Labor Code section 1197.5(k).
- Rebuttable Presumption in Favor of Employee's Claim. Labor Code section 1197.5(k)(1).

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 430, 431

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination*, ¶ 11:1077.20 (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.14 (Matthew Bender)

3066. Bane Act—Essential Factual Elements (Civ. Code, § 52.1)

[*Name of plaintiff*] claims that [*name of defendant*] intentionally interfered with [or attempted to interfere with] [his/her/*nonbinary pronoun*] civil rights by threats, intimidation, or coercion. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. [**That by threats, intimidation or coercion, [*name of defendant*] caused [*name of plaintiff*] to reasonably believe that if [he/she/*nonbinary pronoun*] exercised [his/her/*nonbinary pronoun*] right [*insert right, e.g., "to vote"*], [*name of defendant*] would commit violence against [[him/her/*nonbinary pronoun*]/ [or] [his/her/*nonbinary pronoun*] property] and that [*name of defendant*] had the apparent ability to carry out the threats;]**

   [*or*]

   [That [*name of defendant*] acted violently against [[*name of plaintiff*]/ [and] [*name of plaintiff*]'s property] [to prevent [him/her/*nonbinary pronoun*] from exercising [his/her/*nonbinary pronoun*] right [*e.g., to vote*]/to retaliate against [*name of plaintiff*] for having exercised [his/her/*nonbinary pronoun*] right [*e.g., to vote*]];]

[2. **That [*name of defendant*] intended to deprive [*name of plaintiff*] of [his/her/*nonbinary pronoun*] enjoyment of the interests protected by the right [*e.g., to vote*];]**

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

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

*New September 2003; Renumbered from CACI No. 3025 and Revised December 2012, November 2018, May 2024**

Directions for Use

Select the first option for element 1 if the defendant's conduct involved threats of violence. (See Civ. Code, § 52.1(k).) Select the second option if the conduct involved actual violence.

The Bane Act provides that speech alone is not sufficient to constitute a violation unless it involves a credible threat of violence. (Civ. Code, § 52.1(k).) This limitation would appear to foreclose a claim based on threats, intimidation, or coercion involving a nonviolent consequence. (See *Cabesuela v. Browning-Ferris Industries* (1998) 68 Cal.App.4th 101, 111 [80 Cal.Rptr.2d 60] [to state a cause of action under Bane Act there must first be violence or intimidation by threat of violence].) ~~For example, it would not be a violation to threaten to report someone to immigration if the person exercises a right granted under labor law.~~ No case has been found, however, that applies the speech limitation to foreclose ~~such~~ a claim based on coercion without violence or a threat of violence, and several courts have suggested that this point is not fully settled. (See *Shoyoye v. County of Los Angeles* (2012) 203

Cal.App.4th 947, 959 [137 Cal.Rptr.3d 839] [we "need not decide that every plaintiff must allege violence or threats of violence in order to maintain an action under section 52.1"]; *City and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 408 [39 Cal.Rptr.3d 1] [also noting issue but finding it unnecessary to address].) To assert such a claim, modify element 1, option 1 to allege coercion based on a nonviolent threat with severe consequences.

Civil Code section 52(a) provides for damages up to three times actual damages but a minimum of $4,000 for violations of Civil Code section 51 (Unruh Act), 51.5, and 51.6. Civil Code section 52(b) provides for punitive damages for violations of Civil Code sections 51.7 (Ralph Act) and 51.9. Neither subsection of Section 52 mentions the Bane Act or Civil Code section 52.1. Nevertheless, the reference to section 52 in subsection (b) of the Bane Act would seem to indicate that damages may be recovered under both subsections (a) and (b) of section 52.

Under the Unruh Act, if only the statutory minimum damages of $4,000 is sought, it is not necessary to prove harm and causation. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195] [Section 52 provides for minimum statutory damages for every violation of section 51, regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) ["actual damages" means special and general damages].) Presumably, the same rule applies under the Bane Act as the statutory minimum of section 52(a) should be recoverable Therefore, omit elements 2 and 3 unless actual damages are sought. If actual damages are sought, combine CACI No. 3067, *Unruh Civil Rights Act—Damages,* and CACI No. 3068, *Ralph Act—Damages and Penalty,* to recover damages under both subsections (a) and (b) of section 52.

It has been the rule that in a wrongful detention case, the coercion required to support a Bane Act claim must be coercion independent from that inherent in the wrongful detention itself. (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 981 [159 Cal.Rptr.3d 204].) One court, however, did not apply this rule in a wrongful arrest case. The court instead held that the "threat, intimidation or coercion" element requires a specific intent to violate protected rights. (*Cornell v. City & County of San Francisco* (2017) 17 Cal.App.5th 766, 790–804 [225 Cal.Rptr.3d 356].) Element 2 expresses this requirement.

Sources and Authority

- Bane Act. Civil Code section 52.1.
- Remedies Under Bane Act. Civil Code section 52.
- "The Bane Act permits an individual to pursue a civil action for damages where another person 'interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state.' 'The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., "threat[], intimidation or coercion"), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law.' " (*King v. State of California* (2015) 242 Cal.App.4th 265, 294 [195 Cal.Rptr.3d 286], internal citation omitted.)

- "[S]ection 52.1, was enacted a decade [after the Ralph Act] as part of Assembly Bill No. 63 (1987–1988 Reg. Sess.) (Assembly Bill No. 63) and is known as the Tom Bane Civil Rights Act. It was intended to supplement the Ralph Civil Rights Act as an additional legislative effort to deter violence. The stated purpose of the bill was 'to fill in the gaps left by the Ralph Act' by allowing an individual to seek relief to prevent the violence from occurring before it was committed and providing for the filing of criminal charges." (*Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, 1447 [39 Cal.Rptr.3d 706], internal citation omitted.)

- "The Legislature enacted section 52.1 to stem a tide of hate crimes." (*Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 338 [70 Cal.Rptr.2d 844, 949 P.2d 941], internal citation omitted.)

- "[T]o state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence. Second, the violence or threatened violence must be due to plaintiff's membership in one of the specified classifications set forth in Civil Code section 51.7 or a group similarly protected by constitution or statute from hate crimes." (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1290 [217 Cal.Rptr.3d 275].)

- "The plaintiff must show 'the defendant interfered with or attempted to interfere with the plaintiff's legal right by threatening or committing violent acts.' " (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 395 [218 Cal.Rptr.3d 38].)

- "However, the statutory language does not limit its application to hate crimes. Notably, the statute does not require a plaintiff to allege the defendant acted with discriminatory animus or intent based upon the plaintiff's membership in a protected class of persons." (*Shoyoye, supra,* 203 Cal.App.4th at p. 956.)

- "The phrase 'under color of law' indicates, without doubt, that the Legislature intended to include law enforcement officers within the scope of Section 52.1 if the requisites of the statute are otherwise met." (*Cornell, supra,* 17 Cal.App.5th at p. 800.)

- "Civil Code section 52.1, the Bane Act civil counterpart of [Penal Code] section 422.6, recognizes a private right of action for damages and injunctive relief for interference with civil rights." (*In re M.S.* (1995) 10 Cal.4th 698, 715 [42 Cal.Rptr.2d 355, 896 P.2d 1365].)

- "[T]he Bane Act requires that the challenged conduct be intentional." (*Simmons v. Superior Court* (2016) 7 Cal.App.5th 1113, 1125 [212 Cal.Rptr.3d 884].)

- "[S]ection 52.1 does require an attempted or completed act of interference with a legal right, accompanied by a form of coercion." (*Jones, supra,* 17 Cal.4th at p. 334.)

- "The statutory framework of section 52.1 indicates that the Legislature meant the statute to address interference with constitutional rights involving more egregious conduct than mere negligence." (*Shoyoye, supra,* 203 Cal.App.4th at p. 958.)

- ~~Section 52.1 is not a remedy to be used against private citizens for violations of rights that apply only to the state or its agents. (*Jones, supra*, 17 Cal.4th at p. 337 [right to be free from unreasonable search~~

~~and seizure].)~~

- " '[W]here coercion is inherent in the constitutional violation alleged, … the statutory requirement of "threats, intimidation, or coercion" is not met. The statute requires a showing of coercion independent from the coercion inherent in the wrongful detention itself.' " (*Simmons, supra,* 7 Cal.App.5th at p. 1126.)

- "The Legislature's purpose suggests to us that the coercive nature of a tax—however exorbitant or unfair that tax may be—was not what the Legislature had in mind when it forbade interference with legal rights by 'threat, intimidation, or coercion.' Plaintiffs have cited no case where economic or monetary pressures alone have been found to constitute coercion under the Bane Act." (*County Inmate Telephone Service Cases* (2020) 48 Cal.App.5th 354, 371 [262 Cal.Rptr.3d 1].)

- ~~Assembly Bill 2719 (Stats. 2000, ch. 98) abrogated the holding of *Boccato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797 [35 Cal.Rptr.2d 282], which held that a plaintiff was required to be a member of a specified protected class in order to bring an action under section 52.1:~~ "It is the intent of the Legislature in enacting this act to clarify that an action brought pursuant to Section 52.1 of the Civil Code does not require the individual whose rights are secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of California, to be a member of a protected class identified by its race, color, religion, or sex, among other things." (Assembly Bill 2719 (Stats. 2000, ch. 98) [abrogating the holding of *Boccato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797 [35 Cal.Rptr.2d 282]].)

- "Subdivision (j) of Civil Code section 52.1 provides that speech alone is insufficient to support such an action, except upon a showing that the speech itself threatens violence against a specific person or group of persons, the person or group of persons against whom the speech is directed 'reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence has the apparent ability to carry out the threat.' ... The presence of the express 'reasonable fear' element, in addition to the 'apparent ability' element, in Civil Code section 52.1, governing civil actions for damages, most likely reflects the Legislature's determination [that] a defendant's civil liability should depend on the harm actually suffered by the victim." (*In re M.S., supra,* 10 Cal.4th at p. 715, internal citation omitted.)

- "[Q]ualified immunity of the kind applied to actions brought under section 1983 does not apply to actions brought under Civil Code section 52.1." (*Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1246 [63 Cal.Rptr.3d 741].)

- "[A] wrongful detention that is 'accompanied by the requisite threats, intimidation, or coercion'—'coercion independent from the coercion inherent in the wrongful detention itself' that is 'deliberate or spiteful'—is a violation of the Bane Act." (*Bender, supra,* 217 Cal.App.4th at p. 981, internal citations omitted.)

- "Here, there clearly *was* a showing of coercion separate and apart from the coercion inherent in an unlawful arrest. [Defendant officer] wrongfully detained and arrested plaintiff, because he had no probable cause to believe plaintiff had committed any crime. But, in addition, [defendant officer] deliberately and unnecessarily beat and pepper sprayed the unresisting, already handcuffed plaintiff.

That conduct was not the coercion that is inherent in a wrongful arrest." (*Bender, supra,* 217 Cal.App.4th at p. 979, original italics.)

- "We acknowledge that some courts have read *Shoyoye* as having announced 'independen[ce] from [inherent coercion]' as a requisite element of all Section 52.1 claims alleging search-and-seizure violations, but we think those courts misread the statute as well as the import of *Venegas*. By its plain terms, Section 52.1 proscribes any 'interfere[nce] with' or attempted 'interfere[nce] with' protected rights carried out 'by threat, intimidation or coercion.' Nothing in the text of the statute requires that the offending 'threat, intimidation or coercion' be 'independent' from the constitutional violation alleged." (*Cornell, supra,* 17 Cal.App.5th at pp. 799–800.)

- "[W]here, as here, an unlawful arrest is properly pleaded and proved, the egregiousness required by Section 52.1 is tested by whether the circumstances indicate the arresting officer had a specific intent to violate the arrestee's right to freedom from unreasonable seizure, not by whether the evidence shows something beyond the coercion 'inherent' in the wrongful detention." (*Cornell, supra,* 17 Cal.App.5th at pp. 801–802.)

- "[T]his test ' "essentially sets forth two requirements for a finding of 'specific intent' … . The first is a purely legal determination. Is the … right at issue clearly delineated and plainly applicable under the circumstances of the case? If the trial judge concludes that it is, then the jury must make the second, factual, determination. Did the defendant commit the act in question with the particular purpose of depriving the citizen victim of his enjoyment of the interests protected by that … right? If both requirements are met, even if the defendant did not in fact recognize the [unlawfulness] of his act, he will be adjudged as a matter of law to have acted [with the requisite specific intent]—i.e., 'in reckless disregard of constitutional [or statutory] prohibitions or guarantees.' " ' " (*Cornell, supra,* 17 Cal.App.5th at p. 803.)

- "Civil Code section 52.1 does not address the immunity established by section 844.6 [public entity immunity for injury to prisoners]. Nothing in Civil Code section 52.1 indicates an intent to abrogate this specific immunity provision. The immunity that it creates therefore applies to [plaintiff]'s Bane Act claim." (*Towery v. State of California* (2017) 14 Cal.App.5th 226, 234 [221 Cal.Rptr.3d 692].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 989 et seq.

Cheng et al., Cal. Fair Housing and Public Accommodations § 14:5 (The Rutter Group)

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

2 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Employment Opportunity Laws*, § 40.12[2] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117A, *Civil Rights: Interference With Civil Rights by Threats, Intimidation, Coercion, or Violence*, § 117A.11 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, §§ 35.01, 35.20 et seq.

(Matthew Bender)

4000. Conservatorship—Essential Factual Elements

[*Name of petitioner***] claims that [***name of respondent***] is gravely disabled due to [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and a severe substance use disorder/impairment by chronic alcoholism] and therefore [should be placed in a conservatorship/the conservatorship should be renewed]. In a conservatorship, a conservator is appointed to oversee, under the direction of the court, the care of persons who are gravely disabled ~~due to a mental disorder or chronic alcoholism~~. To succeed on this claim, [***name of petitioner***] must prove beyond a reasonable doubt both of the following:**

1. **That [***name of respondent***] [has a [mental health disorder/severe substance use disorder/co-occurring mental health disorder and severe substance use disorder]/is impaired by chronic alcoholism]; and**

2. **That [***name of respondent***] is gravely disabled as a result of the [mental health disorder/severe substance use disorder/co-occurring mental health disorder and severe substance use disorder/chronic alcoholism].**

New June 2005; Revised June 2016, May 2022, May 2024

Directions for Use

Give CACI No. 4002, *"Gravely Disabled" Explained*, with this instruction.

Select the appropriate option in the first sentence depending on whether the case involves an initial petition to establish a conservatorship or a successive petition for reappointment. (Welf. & Inst. Code, §§ 5350, 5361(b).)

If a county's relevant governing body has adopted a resolution postponing the changes made to Welfare and Institutions Code section 5008 until January 1, 2026 (or an earlier date), do not include "severe substance use disorder" or "a co-occurring mental health disorder and severe substance use disorder." (Welf. & Inst. Code, § 5008(h)(4) [authorizing a county's deferral of changes made in Senate Bill 43 (Stats. 2023, ch. 637)].)

A different instruction will be required if the standard for mental incompetence under Penal Code section 1370 is alleged. (Welf. & Inst. Code, § 5008(h)(1)(B).)

Sources and Authority

- Right to Jury Trial. Welfare and Institutions Code section 5350(d).
- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).

- "The Lanterman-Petris-Short Act (the act) governs the involuntary treatment of the mentally ill in California. Enacted by the Legislature in 1967, the act includes among its goals ending the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious mental disorders, guaranteeing and protecting public safety, safeguarding the rights of the involuntarily committed through judicial review, and providing individualized treatment, supervision and placement services for the gravely disabled by means of a conservatorship program." (*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1008–1009 [36 Cal.Rptr.2d 40, 884 P.2d 988].)

- "LPS Act commitment proceedings are subject to the due process clause because significant liberty interests are at stake. But an LPS Act proceeding is civil. '[T]he stated purposes of the LPS Act foreclose any argument that an LPS commitment is equivalent to criminal punishment in its design or purpose.' Thus, not all safeguards required in criminal proceedings are required in LPS Act proceedings." (*Conservatorship of P.D.* (2018) 21 Cal.App.5th 1163, 1167 [231 Cal.Rptr.3d 79], internal citations omitted.)

- "The clear import of the LPS Act is to use the involuntary commitment power of the state sparingly and only for those truly necessary cases where a 'gravely disabled' person is incapable of providing for his basic needs either alone or with help from others." (*Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1280 [221 Cal.Rptr.3d 622].)

- "The right to a jury trial upon the establishment of conservatorship is fundamental to the protections afforded by the LPS. As related, that right is expressly extended to the reestablishment of an LPS conservatorship." (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, 1037 [226 Cal.Rptr. 33], internal citations omitted.)

- "[T]he trial court erred in accepting counsel's waiver of [conservatee]'s right to a jury trial … . (*Estate of Kevin A.* (2015) 240 Cal.App.4th 1241, 1253 [193 Cal.Rptr.3d 237].)

- " 'The due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act.' An LPS commitment order involves a loss of liberty by the conservatee. Consequently, it follows that a trial court must obtain a waiver of the right to a jury trial from the person who is subject to an LPS commitment." (*Conservatorship of Heather W.* (2016) 245 Cal.App.4th 378, 382−383 [199 Cal.Rptr.3d 689].)

- "We … hold that capacity or willingness to accept treatment is a relevant factor to be considered on the issue of grave disability but is not a separate element that must be proven to establish a conservatorship." (*Conservatorship of K.P.* (2021) 11 Cal.5th 695, 703 [280 Cal.Rptr.3d 298, 489 P.3d 296].)

- "We ... hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons."

(*Conservatorship of Davis, supra,* 124 Cal.App.3d at p. 328, disapproved on other grounds in *Conservatorship of K.P., supra,* 11 Cal.5th at p. 717.)

- "The jury should determine if the person voluntarily accepts meaningful treatment, in which case no conservatorship is necessary. If the jury finds the person will not accept treatment, then it must determine if the person can meet his basic needs on his own or with help, in which case a conservatorship is not justified." (*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1092–1093 [242 Cal.Rptr. 289].)

- "Our research has failed to reveal any authority for the proposition [that] without a finding that the proposed conservatee is unable or unwilling to voluntarily accept treatment, the court must reject a conservatorship in the face of grave disability. ... Some persons with grave disabilities are beyond treatment. Taken to its logical conclusion, they would be beyond the LPS Act's reach, according to the argument presented in this appeal." (*Conservatorship of Symington, supra,* 209 Cal.App.3d at p. 1469.)

- "The party seeking imposition of the conservatorship must prove the proposed conservatee's grave disability beyond a reasonable doubt and the verdict must be issued by a unanimous jury." (*Conservatorship of Susan T., supra,* 8 Cal.4th at p. 1009, internal citation omitted.)

- "Although there is no private right of action for a violation of section 5152, 'aggrieved individuals can enforce the [LPS] Act's provisions through other common law and statutory causes of action, such as negligence, medical malpractice, false imprisonment, assault, battery, declaratory relief, United States Code section 1983 for constitutional violations, and Civil Code section 52.1. [Citations.]' " (*Swanson v. County of Riverside* (2019) 36 Cal.App.5th 361, 368 [248 Cal.Rptr.3d 476].)

Secondary Sources

15 Witkin, Summary of California Law (11th ed. 2017) Wills and Probate, § ~~1007~~ 994

3 Witkin, California Procedure (~~5th~~ 6th ed. ~~2008~~2019) Actions, § ~~97~~ 103 et seq.

2 California Conservatorship Practice (Cont.Ed.Bar) Ch. 23

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.~~30~~ 42 et seq. (Matthew Bender)

4001. "Mental Disorder" Explained

Revoked May 2024. Reserved for Future Use.

~~**The term "mental disorder" is limited to those disorders described in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association. This book is sometimes referred to as "the DSM [***current edition, e.g., "IV"***]."**~~

~~*New June 2005*~~

~~Directions for Use~~

~~This instruction is not intended for cases proceeding on a theory of impairment by chronic alcoholism only.~~

~~Sources and Authority~~

~~"The term 'mental disorder' is limited to those disorders listed by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders (Cal. Admin. Code, tit. 9, § 813)." (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 282, fn. 5 [139 Cal.Rptr. 357].) "Although this [administrative] regulation has since been repealed, the practice has been to continue using the same definition." (California Conservatorship Practice (Cont.Ed.Bar) § 23.11.)~~

~~Secondary Sources~~

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

~~2 California Conservatorship Practice (Cont.Ed.Bar) § 23.11~~

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

4002. "Gravely Disabled" Explained

The term "gravely disabled" means that a person is presently unable to provide for the person's basic needs for food, clothing, ~~or~~ shelter, personal safety, or necessary medical care because of [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and a severe substance use disorder/impairment by chronic alcoholism]. [The term "gravely disabled" does not include persons with intellectual disabilities by reason of the disability alone.]

[[*Insert one or more of the following*:**] [psychosis/bizarre or eccentric behavior/delusions/hallucinations/[***insert other***]] [is/are] not enough, by [itself/themselves], to find that [***name of respondent***] is gravely disabled. [He/She/***Nonbinary pronoun***] must be unable to provide for the basic needs of food, clothing, ~~or~~ shelter, personal safety, or necessary medical care because of [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and a severe substance use disorder/impairment by chronic alcoholism].]**

["Personal safety" means the ability of a person to survive safely in the community without involuntary detention or treatment.]

["Necessary medical care" means care that a licensed health care practitioner, while operating within the scope of their practice, determines to be necessary to prevent serious deterioration of an existing physical medical condition, which, if left untreated, is likely to result in serious bodily injury. "Serious bodily injury" means an injury involving extreme physical pain, substantial risk of death, or protracted loss or impairment of function of a bodily member, organ, or of mental faculty, or requiring medical intervention, including but not limited to hospitalization, surgery, or physical rehabilitation.]

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

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

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

In determining whether [*name of respondent***] is gravely disabled, you may consider whether [he/she/***nonbinary pronoun***] is unable or unwilling to voluntarily accept meaningful treatment.**

New June 2005; Revised January 2018, May 2019, May 2020, May 2022, May 2024

Directions for Use

This instruction provides the definition of "gravely disabled" from Welfare and Institutions Code section 5008(h)(1)(A) and (h)(2), which will be the applicable standard in most cases. The instruction applies to both adults and minors. (*Conservatorship of M.B.* (2018) 27 Cal.App.5th 98, 107 [237 Cal.Rptr.3d 775].)

If a county's relevant governing body has adopted a resolution postponing the changes made to Welfare and Institutions Code section 5008, omit from the definition of "gravely disabled" the terms "personal safety" and "necessary medical care," as well as "severe substance use disorder" and "a co-occurring mental health disorder and a severe substance use disorder." (Welf. & Inst. Code, § 5008(h)(4) [authorizing a county's deferral of changes made in Senate Bill 43 (Stats. 2023, ch. 637)].) These four terms should not be given in those counties until January 1, 2026, or an earlier date specified in the county's resolution.

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

The Welfare and Institutions Code defines "severe substance use disorder." (Welf. & Inst. Code, § 5008(o).) Give additional information about this term if appropriate. For example, severe substance use disorder requires a diagnosis, so it may be preferable to identify the individual's diagnosed severe substance use disorder.

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

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

Sources and Authority

- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).
- "Severe Substance Use Disorder" Defined. Welfare and Institutions Code section 5008(o).
- "Personal Safety" Defined. Welfare and Institutions Code section 5008(p).
- "Necessary Medical Care" Defined. Welfare and Institutions Code section 5008(q).
- "Serious Bodily Injury" Defined. Welfare and Institutions Code section 15610.67.
- "The enactment of the LPS and with it the substitution of 'gravely disabled' for 'in need of treatment' as the basis for commitment of individuals not dangerous to themselves or others reflects a legislative

determination to meet the constitutional requirements of precision. The term 'gravely disabled' is sufficiently precise to exclude unusual or nonconformist lifestyles. It connotes an inability or refusal on the part of the proposed conservatee to care for basic personal needs of food, clothing and shelter." (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 284 [139 Cal.Rptr. 357], footnotes omitted.)

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

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

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

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

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

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

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

- "[T]he pivotal issue is whether [respondent] was 'presently' gravely disabled and the evidence

demonstrates that he was not. Accordingly, the order granting the petition must be overturned." (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d. 1030, 1034 [226 Cal.Rptr. 33], fn. omitted, citing to *Conservatorship of Murphy* (1982) 134 Cal.App.3d 15, 18 [184 Cal.Rptr. 363].)

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

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

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

- "Theoretically, someone who is willing and able to accept voluntary treatment may not be gravely disabled if that treatment will allow the person to meet the needs for food, clothing, and shelter. Under the statutory scheme, however, this is an evidentiary conclusion to be drawn by the trier of fact. If credible evidence shows that a proposed conservatee is willing and able to accept treatment that would allow them to meet basic survival needs, the fact finder may conclude a reasonable doubt has been raised on the issue of grave disability, and the effort to impose a conservatorship may fail. It may be necessary in some cases for the fact finder to determine whether the treatment a proposed conservatee is prepared to accept will sufficiently empower them to meet basic survival needs. In some cases of severe dementia or mental illness, there may simply be no treatment that would enable the person to 'survive safely in freedom.' " (*Conservatorship of K.P.* (2021) 11 Cal.5th 695, 711 [280 Cal.Rptr.3d 298, 489 P.3d 296].)

Secondary Sources

3 Witkin, California Procedure (~~5th~~ 6th sed. ~~2008~~ 2019) Actions, §~~97~~ 103 et seq.

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

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

4004. Issues Not to Be Considered—Type of Treatment, Care, or Supervision

In determining whether [*name of respondent*] is gravely disabled, you must not consider or discuss the type of treatment, care, or supervision that may be ordered if a conservatorship is [established/renewed].

New June 2005; Revised May 2024

Sources and Authority

- "Petitioner's proposed jury instruction reads as follows: 'You are instructed that the matter of what kind or type of treatment, care or supervision shall be rendered is not a part of your deliberation, and shall not be considered in determining whether or not [proposed conservatee] is or is not gravely disabled. The problem of treatment, care and supervision of a gravely disabled person and whether or not he shall be detained in a sanitarium, private hospital, or state institution, is not within the province of the jury, but is a matter to be considered by the conservator in the event that the jury finds that [proposed conservatee] is gravely disabled.' [¶] [T]he instruction should be given." (*Conservatorship of Baber* (1984) 153 Cal.App.3d 542, 553 & fn. 7 [200 Cal.Rptr. 262].)

- "[I]nformation about the consequences of conservatorship for [proposed conservatee] was irrelevant to the only question before [the] jury: whether, as a result of a mental disorder, he is unable to provide for his basic personal needs for food, clothing, or shelter." (*Conservatorship of P.D.* (2018) 21 Cal.App.5th 1163, 1168 [231 Cal.Rptr.3d 79].)

Secondary Sources

3 Witkin, California Procedure (~~5th~~ 6th ed. ~~2008~~2019) Actions, § ~~97~~103 et seq.

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.89

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

4005. Obligation to Prove—Reasonable Doubt

[*Name of respondent*] is presumed not to be gravely disabled. [*Name of petitioner*] has the burden of proving beyond a reasonable doubt that [*name of respondent*] is gravely disabled. The fact that a petition has been filed claiming [*name of respondent*] is gravely disabled is not evidence that this claim is true.

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that [*name of respondent*] is gravely disabled as a result of [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and severe substance use disorder/impairment by chronic alcoholism]. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether [*name of respondent*] is gravely disabled, you must impartially compare and consider all the evidence that was received throughout the entire trial.

Unless the evidence proves that [*name of respondent*] is gravely disabled because of [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and severe substance use disorder/impairment by chronic alcoholism] beyond a reasonable doubt, you must find that [he/she/*nonbinary pronoun*] is not gravely disabled.

Although a conservatorship is a civil proceeding, the burden of proof is the same as in criminal trials.

New June 2005; Revised June 2016, May 2024

Directions for Use

The presumption in the first sentence of the instruction is perhaps open to question. Two older cases have held that there is such a presumption. (See *Conservatorship of Law* (1988) 202 Cal.App.3d 1336, 1340 [249 Cal.Rptr. 415]; *Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1099 [242 Cal.Rptr. 289].) However, these holdings may have been based on the assumption that the California Supreme Court had incorporated all protections for criminal defendants into LPS proceedings. (See *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [proof beyond reasonable doubt and unanimous jury verdict required].) Subsequent cases have made it clear that an LPS respondent is not entitled to all of the same protections as a criminal defendant. (See *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 538 [53 Cal.Rptr.3d 856, 150 P.3d 738] [exclusionary rule and *Wende* review do not apply in LPS].)

Sources and Authority

- "A proposed conservatee has a constitutional right to a finding based on proof beyond a reasonable doubt. Without deciding whether the court has a sua sponte duty to so instruct, we are satisfied that, on request, a court is required to instruct in language emphasizing a proposed conservatee is

presumed to not be gravely disabled until the state carries its burden of proof." (*Conservatorship of Walker, supra,* 196 Cal.App.3d at p. 1099, internal citation omitted.)

- "[I]f requested, a court is required to instruct that a proposed conservatee is presumed not to be gravely disabled until the state carries its burden of proof." (*Conservatorship of Law, supra,* 202 Cal.App.3d at p. 1340.)

- ~~But see *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1409 [122 Cal.Rptr.2d 384]:~~ "Even if we view the presumption in a more general sense as a warning against the consideration of extraneous factors, we cannot conclude that the federal and state Constitutions require a presumption-of-innocence-like instruction outside the context of a criminal case. Particularly, we conclude that, based on the civil and nonpunitive nature of involuntary commitment proceedings, a mentally ill or disordered person would not be deprived of a fair trial without such an instruction." ~~But see~~ (*People v. Beeson* (2002) 99 Cal.App.4th 1393, 1409 [122 Cal.Rptr.2d 384]~~:~~.)

- "Neither mental disorder nor grave disability is a crime." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 330 [177 Cal.Rptr. 369].)

- "More recently this court has recognized, however, that the analogy between criminal proceedings and proceedings under the LPS Act is imperfect at best and that not all of the safeguards required in the former are appropriate to the latter." (~~See~~ *Conservatorship of Ben C., supra,* 40 Cal.4th at p. 538.)

- "In [*Conservatorship of*] *Roulet*, the California Supreme Court held that due process requires proof beyond a reasonable doubt and jury unanimity in conservatorship proceedings. However, subsequent appellate court decisions have not extended the application of criminal law concepts in this area." (*Conservatorship of Maldonado* (1985) 173 Cal.App.3d 144, 147 [218 Cal.Rptr. 796].)

Secondary Sources

3 Witkin, California Procedure (~~5th~~ 6th ed. ~~2008~~ 2019) Actions, §§ ~~97, 104~~ 103, 116

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.81

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.~~33~~ 42[8][c] (Matthew Bender)

4006. Sufficiency of Indirect Circumstantial Evidence

You may not decide that [*name of respondent*] is gravely disabled based substantially on indirect evidence unless this evidence:

1. **Is consistent with the conclusion that [*name of respondent*] is gravely disabled due to [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and severe substance use disorder/impairment by chronic alcoholism]; and**

2. **Cannot be explained by any other reasonable conclusion.**

If the indirect evidence suggests two reasonable interpretations, one of which suggests the existence of a grave disability and the other its nonexistence, then you must accept the interpretation that suggests [*name of respondent*] is not gravely disabled.

If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable one.

If you base your verdict on indirect evidence, [*name of petitioner*] must prove beyond a reasonable doubt each fact essential to your conclusion that [*name of respondent*] is gravely disabled.

New June 2005; Revised May 2024

Directions for Use

Read this instruction immediately after CACI No. 202, *Direct and Indirect Evidence*.

Sources and Authority

- "[W]here proof to establish a conservatorship for a person alleged to be gravely disabled is based upon substantially circumstantial evidence, the proposed conservatee is entitled, on request in an appropriate case, to have the jurors instructed as to the principles relevant when applying circumstantial evidence to the beyond a reasonable doubt burden of proof." (*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1088 [242 Cal.Rptr. 289].)

- "A proposed conservatee is entitled to procedural due process protections similar to a criminal defendant since fundamental liberty rights are at stake. The trial court had a sua sponte duty to correctly instruct on the general principles of law necessary for the jury's understanding of the case." (*Conservatorship of Walker, supra,* 196 Cal.App.3d at p. 1092, fn. 5, internal citations omitted.)

- "The court has no duty to give the [circumstantial evidence jury instructions applicable to criminal cases] in a case where the circumstantial evidence necessary to prove a certain mental state is not

subject to any inference except that pointing to the existence of that mental state." (*Conservatorship of Walker, supra,* 196 Cal.App.3d at p. 1098; *Conservatorship of Law* (1988) 202 Cal.App.3d 1336, 1342 [249 Cal.Rptr. 415].)

- "Where a noncriminal case is to be evaluated by a reasonable doubt standard, it follows that a party on a proper state of the evidence is entitled on request to have jurors informed of the manner in which that standard must be established when the evidence consists substantially of circumstantial evidence." (*Conservatorship of Walker, supra,* 196 Cal.App.3d at p. 1098.)

Secondary Sources

3 Witkin, California Procedure (~~5th~~ 6th ed. ~~2008~~ 2019) Actions, §§ ~~100, 104~~ 106

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.90

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

4007. Third Party Assistance

A person is not "gravely disabled" if [he/she/*nonbinary pronoun*] can survive safely with the help of third party assistance. Third party assistance is the aid of family, friends, or others who are responsible, willing, and able to help provide for the person's basic needs ~~for food, clothing, or shelter~~ for food, clothing, shelter, personal safety, or necessary medical care.

You must not consider offers by family, friends, or others unless they [have testified to/stated specifically in writing] their willingness and ability to help provide [*name of respondent*] with food, clothing, ~~or shelter~~shelter, personal safety, or necessary medical care. Well-intended offers of assistance are not sufficient unless they will ensure the person can survive safely.

[Assistance provided by a correctional facility does not constitute third party assistance.]

New June 2005; Revised May 2024

Sources and Authority

- Help of Family or Friends. Welfare and Institutions Code section 5350(e).
- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).
- "[A] person is not 'gravely disabled' within the meaning of section 5008, subdivision (h)(1) if he or she is capable of surviving safely in freedom with the help of willing and responsible family members, friends or third parties." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 321 [177 Cal.Rptr. 369].)
- "As we view the broad purpose of the LPS Act, imposition of a conservatorship should be made only in situations where it is truly necessary. To accomplish this purpose evidence of the availability of third party assistance must be considered." (*Conservatorship of Early* (1983) 35 Cal.3d 244, 253 [197 Cal.Rptr. 539, 673 P.2d 209].)
- "The California Supreme Court in *Conservatorship of Early* ... concluded although a person might be gravely disabled if left to his or her own devices, he or she may be able to function successfully in freedom with the support and assistance of family and friends. The court recognized almost everyone depends to a greater or lesser extent upon others in order to survive in our complex society." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 299 [256 Cal.Rptr. 415].)
- "In *Conservatorship of Early* ... the Supreme Court held that it was error for the trial court to refuse to admit evidence of and to fail to instruct on the 'availability of assistance of others to meet the basic needs of a person afflicted with a mental disorder.' " (*Conservatorship of Baber* (1984) 153 Cal.App.3d 542, 552–553 [200 Cal.Rptr. 262], citation omitted.)
- "Corrections custody does not qualify as third party assistance under the LPS Act as interpreted by

case law." (*Conservatorship of Jones, supra,* 208 Cal.App.3d at p. 303.)

- "Under section 5350, subdivision (e)(1), a person is not gravely disabled only if he or she can *survive safely* with the assistance of a third party. There is substantial evidence that the assistance offered by [respondent's mother], while well-intended, would not meet this requirement." (*Conservatorship of Johnson* (1991) 235 Cal.App.3d 693, 699 [1 Cal.Rptr.2d 46], original italics, footnote omitted.)

- "The parties have raised the issue of whether section 5350, subdivision (e)(2), precluded the trial court from considering [petitioner's mother's] testimony on the issue of third party assistance. This section provides that third parties shall not be considered willing or able to provide assistance unless they so indicate in writing. This section has no application in this case. The purpose of section 5350, subdivision (e), 'is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others to publicly state, and requiring the court to publicly find, that no one is willing or able to assist the mentally disordered person in providing for the person's basic needs for food, clothing, or shelter.' This was not the case here; [petitioner's mother] took the stand at trial and testified as to her willingness to provide assistance to her daughter. No purpose of section 5350, subdivision (e), would be served by requiring her to also execute a writing to this effect." (*Conservatorship of Johnson, supra,* 235 Cal.App.3d at p. 699, fn. 5.)

Secondary Sources

3 Witkin, California Procedure (~~5th~~ 6th ed. ~~2008~~2019) Actions, §§ ~~98, 100~~ 104

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.4

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

4008. Third Party Assistance to Minor

A minor is not "gravely disabled" if [he/she/*nonbinary pronoun*] can survive safely with the help of third party assistance. Third party assistance is the aid of family, friends, or others who are responsible, willing, and able to help provide for the minor's health, safety, and development, including ~~food, shelter, and clothing~~ food, clothing, shelter, personal safety, and necessary medical care.

You must not consider offers by family, friends, or others unless they [have testified to/stated specifically in writing] their willingness and ability to help provide for [*name of respondent*]'s health, safety, and development. Well-intended offers of assistance are not sufficient unless they will ensure the person can survive safely.

[Assistance provided by a correctional facility does not constitute third party assistance.]

New June 2005; Revised May 2024

Sources and Authority

- Help of Family and Friends. Welfare and Institutions Code section 5350(e).
- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).
- "[A] person is not 'gravely disabled' within the meaning of section 5008, subdivision (h)(1) if he or she is capable of surviving safely in freedom with the help of willing and responsible family members, friends or third parties." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 321 [177 Cal.Rptr. 369].)
- "Although a minor may not be legally responsible to provide for his basic personal needs, or may suffer disabilities other than a mental disorder which preclude him from so providing, the [statutory] definition is nevertheless applicable. A minor is 'gravely disabled' within the meaning of section 5008, subdivision (h)(1), when the trier of fact, on expert and other testimony, finds that disregarding other disabilities, if any, the minor, because of the further disability of a mental disorder, would be unable to provide for his basic personal needs. Immaturity, either physical or mental when not brought about by a mental disorder, is not a disability which would render a minor 'gravely disabled' within the meaning of section 5008." (*In re Michael E.* (1975) 15 Cal.3d 183, 192, fn. 12 [123 Cal.Rptr. 103, 538 P.2d 231].)
- "As we view the broad purpose of the LPS Act, imposition of a conservatorship should be made only in situations where it is truly necessary. To accomplish this purpose evidence of the availability of third party assistance must be considered." (*Conservatorship of Early* (1983) 35 Cal.3d 244, 253 [673 P.2d 209, 197 Cal.Rptr. 539].)
- "The California Supreme Court in *Conservatorship of Early* ... concluded although a person might be

gravely disabled if left to his or her own devices, he or she may be able to function successfully in freedom with the support and assistance of family and friends. The court recognized almost everyone depends to a greater or lesser extent upon others in order to survive in our complex society." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 299 [256 Cal.Rptr. 415].)

- "Corrections custody does not qualify as third party assistance under the LPS Act as interpreted by case law." (*Conservatorship of Jones, supra,* 208 Cal.App.3d at p. 303.)

- "Under section 5350, subdivision (e)(1), a person is not gravely disabled only if he or she can *survive safely* with the assistance of a third party. There is substantial evidence that the assistance offered by [respondent's mother], while well-intended, would not meet this requirement." (*Conservatorship of Johnson* (1991) 235 Cal.App.3d 693, 699 [1 Cal.Rptr.2d 46], original italics, footnote omitted.)

- "The parties have raised the issue of whether section 5350, subdivision (e)(2), precluded the trial court from considering [petitioner's mother's] testimony on the issue of third party assistance. This section provides that third parties shall not be considered willing or able to provide assistance unless they so indicate in writing. This section has no application in this case. The purpose of section 5350, subdivision (e), 'is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others to publicly state, and requiring the court to publicly find, that no one is willing or able to assist the mentally disordered person in providing for the person's basic needs for food, clothing, or shelter.' This was not the case here; [petitioner's mother] took the stand at trial and testified as to her willingness to provide assistance to her daughter. No purpose of section 5350, subdivision (e), would be served by requiring her to also execute a writing to this effect." (*Conservatorship of Johnson, supra,* 235 Cal.App.3d at p. 699, fn. 5.)

Secondary Sources

3 Witkin, California Procedure (~~5th~~ 6th ed. ~~2008~~2019) Actions, §§ ~~90, 97, 100~~ 103, 105

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.4

~~28 California Forms of Pleading and Practice, Ch. 329, *Juvenile Courts: Delinquency Proceedings*, § 329.73 (Matthew Bender)~~

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, §§ 361A.42, 361A.45 (Matthew Bender)

VF-4000. Conservatorship—Verdict Form

Select one of the following two options:

____ **12 jurors find that [*name of respondent*] is presently gravely disabled due to [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and severe substance use disorder/impairment by chronic alcoholism].**

____ **9 or more jurors find that [*name of respondent*] is not presently gravely disabled due to [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and severe substance use disorder/impairment by chronic alcoholism].**

[If you have concluded that [*name of respondent*] is gravely disabled due to [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and severe substance use disorder/impairment by chronic alcoholism], then answer the following:

Do all 12 jurors find that [*name of respondent*] is disqualified from voting because [he/she/*nonbinary pronoun*] cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process?
____ Yes ____ No]

Signed: _____
Presiding Juror

Dated: _____

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

New June 2005; Revised December 2010, May 2017, May 2024

Directions for Use

The question regarding voter disqualification is bracketed. The judge must decide whether this question is appropriate in a given case. (See CACI No. 4013, *Disqualification From Voting.*)

4328. Affirmative Defense—~~Tenant Was~~ Victim of ~~Domestic Violence, Sexual Assault, Stalking, Elder/Dependent Adult Abuse, or Human Trafficking~~ Abuse or Violence (Code Civ. Proc., § 1161.3)

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/***nonbinary pronoun***] because [***name of plaintiff***] filed this lawsuit based on [an] act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]] against [[***name of defendant***]/ [or] a member of [***name of defendant***]'s immediate family/ [or] a member of [***name of defendant***]'s household]. To succeed on this defense, [***name of defendant***] must prove all of the following:**

1. **That [[***name of defendant***]/ [or] a member of [***name of defendant***]'s immediate family/ [or] a member of [***name of defendant***]'s household] was a victim of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]];**

2. **That the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]] [was/were] documented in a [court order/law enforcement report/statement of a qualified third party acting in a professional capacity/[***specify other evidence or documentation***]];**

3. **That the person who committed the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]] is not ~~also~~ a tenant of the same living unit as [[***name of defendant***]/ [or] a member of [***name of defendant***]'s immediate family/ [or] a member of [***name of defendant***]'s household]; and**

4. **That [***name of plaintiff***] filed this lawsuit because of the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]].**

Even if [*name of defendant***] proves all of the above, [***name of plaintiff***] may still evict [***name of defendant***] if [***name of plaintiff***] proves all of ~~both of~~ the following:**

1. **~~[Either] [*Name of defendant*] allowed the person who committed the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult] to visit the property after [the taking of a police report/issuance of a court order] against that person;~~**

   ~~[or]~~

   ~~[*Name of plaintiff*] reasonably believed that the presence of the person who committed the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult] posed a physical threat to [other persons with a right to be on the property/ [or] another tenant's right of quiet possession]~~ That the person who committed the abuse or violence threatened, by words or by actions, the physical safety of other

[tenants/ [or] guests/ [or] invitees/ [,/or] licensees];

~~**and**~~

2. ~~**[***Name of plaintiff***] previously gave at least three days' notice to [***name of defendant***] to correct this situation**~~ **That [***name of plaintiff***] gave [***name of defendant***] a three-day notice requiring [him/her/***nonbinary pronoun***] not to voluntarily permit or consent to the presence on the property of the person who committed the abuse or violence; and**

3. **That, after the three-day notice expired, [***name of defendant***] voluntarily permitted or consented to the presence on the property of the person who committed the abuse or violence.**

New December 2011; Revised June 2013, June 2014, January 2019, May 2020, May 2024

Directions for Use

This instruction is a tenant's affirmative defense alleging that the tenant is being evicted because the tenant, the tenant's immediate family member, or a tenant's household member was the victim of abuse or violence, including domestic violence, sexual assault, stalking, human trafficking, ~~or~~ elder or dependent adult abuse, and other crimes. (See Code Civ. Proc., § 1161.3.) If the tenant establishes the elements of the defense, the landlord may attempt to establish a statutory exception that would allow the eviction. The last part of the instruction sets forth the exception.

~~All protected statuses are~~ "Abuse and violence" is defined by statute to include several acts. (~~See~~ Code Civ. Proc., § 1161.3(a); see Code Civ. Proc., § 1219 [sexual assault]; Civ. Code, §§ 1708.7 [stalking], 1946.7(a)(6) [a crime that caused bodily injury or death], (a)(7) [a crime that included the exhibition, drawing, brandishing, or use of a firearm or other deadly weapon or instrument], (a)(8) [a crime that included the use of force against the victim or a threat of force against the victim]; Fam. Code, § 6211 [domestic violence]; Pen. Code, §§ 236.1 [human trafficking], Section 646.9 [stalking]; Welf. & Inst. Code, § 15610.07 [abuse of elder or dependent adult].) Consider giving an additional special instruction defining the ~~protected status~~ specific abuse or violence alleged to make the meaning clear to the jury.

~~The acts~~ Evidence of ~~domestic violence, sexual assault, stalking, human trafficking, or elder or dependent adult~~ abuse or violence must be documented in a court order, law enforcement report, ~~or tenant and~~ qualified third-party statement, or any other form of documentation or evidence that reasonably verifies that the abuse or violence occurred (element 2). (Code Civ. Proc., § 1161.3(a)~~(1)~~(2)(A)–(D).) Consider giving an additional special instruction defining the type of documentation if it is necessary to make the meaning clear to the jury. A "qualified third party" is a health practitioner, domestic violence counselor, a sexual assault counselor, ~~or~~ a human trafficking caseworker, or a victim of violent crime advocate. (Code Civ. Proc., § 1161.3~~(d)(3)~~(a)(6).) If the parties dispute whether a third party is qualified, consider giving an additional special instruction on the definition of "qualified third party."

~~Under the exception the tenant may be evicted if the landlord reasonably believes that the presence of the perpetrator poses a physical threat to other tenants, guests, invitees, or licensees, or to a tenant's right to~~

~~quiet possession pursuant to section 1927 of the Civil Code. (Code Civ. Proc., § 1161.3(b)(1)(B).) In the second option for element 1 of the landlord's response, this group has been expressed as "other persons with a right to be on the property." If more specificity is required, use the appropriate words from the statute.~~

The tenant has a complete defense to the unlawful detainer cause of action if the tenant ~~must~~ proves that the perpetrator is not a tenant of the same "dwelling unit" as the tenant, the tenant's immediate family member, or household member unless the statutory exception is established. (~~see~~ Code Civ. Proc., § -1161.3~~(a)(2)~~(d)(1); see Code Civ. Proc., § 1161.3(b)(2)(B).) ~~, which~~ "Dwelling unit" is expressed in element 3 as "living unit." ~~Presumably, the legislative intent is to permit the perpetrator to be evicted notwithstanding that the victim will be evicted also. The term "dwelling unit" is not defined. In a multi-unit building, the policies underlying the statute would support defining "dwelling unit" to include a single unit or apartment, but not the entire building. Otherwise, the victim could be evicted if the perpetrator lives in the same building but not the same apartment.~~ If the person who committed the abuse or violence is a tenant in residence of the same residential dwelling unit, then the statute provides for a partial eviction process under Code of Civil Procedure section 1174.27.

Sources and Authority

- Defense to Termination of Tenancy: Tenant Was Victim of ~~Domestic Violence, Sexual Assault, Stalking, Elder/Dependent Adult Abuse, or Human Trafficking~~Abuse or Violence. Code of Civil Procedure section 1161.3.

- Unlawful Detainer Remedies for Abuse or Violence Against Tenant. Code of Civil Procedure section 1174.27.

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 714, 752

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 11(I)-C, *Particular Defenses*, ¶¶ 11:230–231 (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 4-D, *Other Issues*, ¶ 4:240 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶ 5:288 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 8-D, *Answer To Unlawful Detainer Complaint*, ¶ 8:297 et seq., 8:381.10 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.41 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64[15] (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 330, *Landlord and Tenant: Eviction Actions*, § 330.28[8] (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.76 (Matthew Bender)

1 Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.20B

1 Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21[12]

5009. Predeliberation Instructions

When you go to the jury room, the first thing you should do is choose a presiding juror. The presiding juror should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently.

Please do not state your opinions too strongly at the beginning of your deliberations or immediately announce how you plan to vote as it may interfere with an open discussion. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

You should use your common sense and experience in deciding whether testimony is true and accurate. However, during your deliberations, do not make any statements or provide any information to other jurors based on any special training or unique personal experiences that you may have had related to matters involved in this case. What you may know or have learned through your training or experience is not a part of the evidence received in this case.

[Sometimes jurors disagree or have questions about the evidence or about what the witnesses said in their testimony. If that happens, you may [ask to have testimony read back to you] [or] [ask to see any exhibits admitted into evidence that have not already been provided to you].] [Also, jurors/Jurors] may need further explanation about the laws that apply to the case. If this happens during your discussions, write down your questions and give them to the [clerk/bailiff/court attendant]. I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will do my best to answer them. When you write me a note, do not tell me how you voted on an issue until I ask for this information in open court.

Your decision must be based on your personal evaluation of the evidence presented in the case. Each of you may be asked in open court how you voted on each question.

While I know you would not do this, I am required to advise you that you must not base your decision on chance, such as a flip of a coin. If you decide to award damages, you may not agree in advance to simply add up the amounts each juror thinks is right and then, without further deliberations, make the average your verdict.

You may take breaks, but do not discuss this case with anyone, including each other, until all of you are back in the jury room.

New September 2003; Revised April 2004, October 2004, February 2007, December 2009, June

2011, June 2013, May 2019, May 2024

Directions for Use

The advisory committee recommends that this instruction be read to the jury after closing arguments and after reading instructions on the substantive law.

If a special verdict will be used, give CACI No. 5012, *Introduction to Special Verdict Form*. If a general verdict is to be used, give CACI No. 5022, *Introduction to General Verdict Form*.

Judges may want to provide each juror with a copy of the verdict form so that the jurors can use it to keep track of how they vote. Jurors can be instructed that this copy is for their personal use only and that the presiding juror will be given the official verdict form to record the jury's decision. Judges may also want to advise jurors that they may be polled in open court regarding their individual verdicts.

~~Delete the reference to reading back testimony if the proceedings are not being recorded.~~ Do not read the bracketed portion of the fifth paragraph that refers to reading back testimony if a court reporter is not being used to record the trial proceedings. Consider deleting the reference to providing exhibits if the court sends all admitted exhibits into the jury room.

Sources and Authority

- Conduct of Jury Deliberations. Code of Civil Procedure section 613.
- Further Instructions After Deliberation Begins. Code of Civil Procedure section 614.
- Verdict Requires Three Fourths. Code of Civil Procedure section 618, article I, section 16, of the California Constitution.
- Juror Misconduct as Grounds for New Trial. Code of Civil Procedure section 657.
- "Chance is the 'hazard, risk, or the result or issue of uncertain and unknown conditions or forces.' Verdicts reached by tossing a coin, drawing lots, or any other form of gambling are examples of improper chance verdicts. 'The more sophisticated device of the *quotient verdict* is equally improper: The jurors agree to be bound by an *average* of their views; each writes the amount he favors on a slip of paper; the sums are added and divided by 12, and the resulting "quotient" pursuant to the prior agreement, is accepted as the verdict without further deliberation or consideration of its fairness.' " (*Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1064 [18 Cal.Rptr.2d 106], original italics.)
- " '[T]here is no impropriety in the jurors making an average of their individual estimates as to the amount of damages for the purpose of arriving at a basis for discussion and consideration, nor in adopting such average if it is subsequently agreed to by the jurors; but to agree beforehand to adopt such average and abide by the agreement, without further discussion or deliberation, is fatal to the verdict.' " (*Chronakis, supra,* 14 Cal.App.4th at p.

1066.)

- Jurors should be encouraged to deliberate on the case. (*Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 911 [64 Cal.Rptr.2d 492].)

- The jurors may properly be advised of the duty to hear and consider each other's arguments with open minds, rather than preventing agreement by stubbornly sticking to their first impressions. (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118].)

- "The trial court properly denied the motion for new trial on the ground that [the plaintiff] did not demonstrate the jury reached a chance or quotient verdict. The jury agreed on a high and a low figure and, before calculating an average, they further agreed to adjust downward the high figure and to adjust upward the low figure. There is no evidence that this average was adopted without further consideration or that the jury agreed at any time to adopt an average and abide by the agreement without further discussion or deliberation." (*Lara v. Nevitt* (2004) 123 Cal.App.4th 454, 462–463 [19 Cal.Rptr.3d 865].)

- "It is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct." (*In re Malone* (1996) 12 Cal.4th 935, 963 [50 Cal.Rptr.2d 281, 911 P.2d 468].)

- "[The juror]'s comments to the jury, in the nature of an expert opinion concerning the placement of crossing gate 'sensors,' their operation, and the consequent reason why gates had not been or could not be installed at the J-crossing, constituted misconduct … . Speaking with the authority of a professional transportation consultant, [the juror] interjected the subject of 'sensors,' on which there had been no evidence at trial." (*McDonald v. S. Pac. Transp. Co.* (1999) 71 Cal.App.4th 256, 263–264 [83 Cal.Rptr.2d 734].)

- "Jurors cannot, without violation of their oath, receive or communicate to fellow jurors information from sources outside the evidence in the case. '[It] is misconduct for a juror during the trial to discuss the matter under investigation outside the court or to receive any information on the subject of the litigation except in open court and in the manner provided by law. Such misconduct *unless shown by the prevailing party to have been harmless will invalidate the verdict*.' " (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 952–953 [161 Cal.Rptr. 377], original italics, internal citations omitted.)

- " 'All the jurors, including those with relevant personal backgrounds, were entitled to consider this evidence and express opinions regarding it. "[I]t is an impossible standard to require … [the jury] to be a laboratory, completely sterilized and freed from any external factors." [Citation.] "It is 'virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' " [Citation.] A juror may not express

> opinions based on asserted personal expertise that is different from or contrary to the law as the trial court stated it or to the evidence, but if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in *evaluating and interpreting* that evidence. Moreover, during the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's *analysis* of the evidence. We cannot demand that jurors, especially lay jurors not versed in the subtle distinctions that attorneys draw, never refer to their background during deliberations. "Jurors are not automatons. They are imbued with human frailties as well as virtues." [Citation.]' " (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 77 [133 Cal.Rptr.3d 548, 264 P.3d 336], original italics.)

Secondary Sources

7 Witkin, California Procedure (~~5th~~ 6th ed. ~~2008~~2019) Trial, §~~§ 318, 321, 380~~ 275 et seq.

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 15-A, *General Considerations*, ¶ 15:15 et seq. (The Rutter Group)

~~4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.01 (Matthew Bender)~~

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.~~32[3]~~30 (Matthew Bender)

~~28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.14 (Matthew Bender)~~

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.~~33~~30

California Judges Benchbook: Civil Proceedings—Trial §§ 13.8, 13.32, 13.50, 13.53, 13.59, 14.6, 14.21 (Cal CJER 2019)

5012. Introduction to Special Verdict Form

I will give you [a] verdict form[s] with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form[s] carefully. You must consider each question separately. Although you may discuss the evidence and the issues to be decided in any order, you must answer the questions on the verdict form[s] in the order they appear. After you answer a question, the form tells you what to do next.

At least 9 of you must agree on an answer before you can move on to the next question. However, the same 9 or more people do not have to agree on each answer.

All 12 of you must deliberate on and answer each question regardless of how you voted on any earlier question. Unless the verdict form tells all 12 jurors to stop and answer no further questions, every juror must deliberate and vote on all of the remaining questions.

When you have finished filling out the form[s], your presiding juror must write the date and sign ~~it~~ at the bottom [of the last page] and then notify the [bailiff/clerk/court attendant]~~ that you are ready to present your verdict in the courtroom~~.

New September 2003; Revised April 2004, October 2008, December 2009, December 2014, May 2019, May 2024

Directions for Use

This instruction should be given if a special verdict form is used. The second and third paragraphs will have to be modified in a case under the Lanterman-Petris-Short Act. (See CACI No. 4012, *Concluding Instruction* (for LPS Act).)

Sources and Authority

- General and Special Verdict Forms. Code of Civil Procedure section 624.
- Special Verdicts; Requirements for Award of Punitive Damages. Code of Civil Procedure section 625.
- " 'The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law.' (Code Civ. Proc., § 624.)" (*J.P. v. Carlsbad Unified School Dist.* (2014) 232 Cal.App.4th 323, 338 [181 Cal.Rptr.3d 286].)
- "A special verdict is 'fatally defective' if it does not allow the jury to resolve every controverted

issue." (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 136 [220 Cal.Rptr.3d 127].)

- "It is true that, in at least some respects, a special verdict—if carefully drawn and astutely employed—may improve the quality of the factfinding process. It can focus the jury's attention on the relevant questions, incorporating the pertinent legal principles, and guiding the jury away from irrelevant or improper considerations. It can also expose defects in the jury's deliberations when they occur, providing an opportunity for the court to seek correction through further deliberations." (*Ryan v. Crown Castle NG Networks, Inc.* (2016) 6 Cal.App.5th 775, 795 [211 Cal.Rptr.3d 743].)

- " 'This procedure presents certain problems: " 'The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. "[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings … ." [Citation.]' [Citation.]" ' 'A special verdict is "fatally defective" if it does not allow the jury to resolve every controverted issue.' " (*J.P., supra,* 232 Cal.App.4th at p. 338, internal citations omitted.)

- "All litigation is ultimately a matter of striking a reasonable compromise among competing interests, particularly the interest in resolving cases fairly and that of utilizing public and private resources economically. A special verdict is unlikely to serve either of these objectives unless it is drawn with considerable care." (*Ryan, supra,* 6 Cal.App.5th at p. 796.)

- "[T]hat the jury instruction … defined [the element] did not obviate the necessity of including that required element in the special verdict. 'A jury instruction alone does not constitute a finding. Nor does the fact that the evidence might support such a finding constitute a finding.' " (*Trejo, supra,* 13 Cal.App.5th at p. 138.)

- "When a jury is composed of 12 persons, it is sufficient if *any* nine jurors arrive at each special verdict, regardless of the jurors' votes on other special verdict questions." (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 255 [92 Cal.Rptr.3d 862, 206 P.3d 403], original italics.)

- "Appellate courts differ concerning the use of special verdicts. In one case the court said, 'we should utilize opportunities to force counsel into requesting special verdicts.' In contrast, a more recent decision included the negative view: 'Toward this end we advise that special findings be requested of juries only when there is a compelling need to do so. Absent strong reason to the contrary their use should be discouraged.' Obviously, it is easier to tell after the fact, rather than before, whether the special verdict is helpful in disclosing the jury conclusions leading to the end result." (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1221 [228 Cal.Rptr. 736], internal citations omitted.)

- "[W]e begin with the requirement that at least nine of twelve jurors agree that each element of a cause of action has been proved by a preponderance of the evidence. The elements of a cause of action constitute the essential or ultimate facts in a civil case comparable to the elements of a single, discrete criminal offense in a criminal case. Analogizing a civil 'cause of action' to a single, discrete criminal offense, and applying the criminal law jury agreement principles to civil law, we conclude that jurors need not agree from among a number of alternative acts which act is proved, so long as the jurors agree that each element of the cause of action is proved." (*Stoner v. Williams* (1996) 46 Cal.App.4th

986, 1002 [54 Cal.Rptr.2d 243, footnote omitted.)

- "In civil cases in which there exist multiple causes of action for which multiple or alternative acts could support elements of more than one cause of action, possible jury confusion could result as to whether a specific cause of action is proved. In those cases, … we presume that jury instructions may be appropriate to inform the jury that it must agree on specific elements of each specific cause of action. Yet, this still does not require that the jurors agree on exactly how each particular element of a particular cause of action is proved." (*Stoner, supra,* 46 Cal.App.4th at p. 1002.)

- "[A] juror who dissented from a special verdict finding negligence should not be disqualified from fully participating in the jury's further deliberations, including the determination of proximate cause. The jury is to determine all questions submitted to it, and when the jury is composed of twelve persons, each should participate as to each verdict submitted to it. To hold that a juror may be disqualified by a special verdict on negligence from participation in the next special verdict would deny the parties of 'the right to a jury of 12 persons deliberating on all issues.' Permitting any nine jurors to arrive at each special verdict best serves the purpose of less-than-unanimous verdicts, overcoming minor disagreements and avoiding costly mistrials. Once nine jurors have found a party negligent, dissenting jurors can accept the finding and participate in determining proximate cause just as they may participate in apportioning liability, and we may not assume that the dissenting jurors will violate their oaths to deliberate honestly and conscientiously on the proximate cause issue." (*Resch v. Volkswagen of America, Inc.* (1984) 36 Cal.3d 676, 682 [205 Cal.Rptr. 827, 685 P.2d 1178], internal citations omitted.)

Secondary Sources

7 Witkin, California Procedure (~~5th~~ 6th ed. ~~2008~~ 2019) Trial, §§ ~~342~~ 346

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict,* § 91.21 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 318, *Judgments*, § 318.49 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.11[3] ~~et seq.~~ (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, *Jury Verdicts*, 18.11 et seq.

California Judges Benchbook: Civil Proceedings—Trial § 14.14 (Cal CJER 2019)

VF-300. Breach of Contract

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff***] and [***name of defendant***] enter into a contract?**
____ Yes ____ No

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

[2. Did [*name of plaintiff***] do all, or substantially all, of the significant things that the contract required [him/her/***nonbinary pronoun***/it] to do?**
____ Yes ____ No

If your answer to question 2 is yes, [skip question 3 and] answer question 4. If you answered no, [answer question 3 *if excuse is at issue*/**stop here, answer no further questions, and have the presiding juror sign and date this form].]**

[3.
Was [*name of plaintiff***] excused from having to do all, or substantially all, of the significant things that the contract required [him/her/***nonbinary pronoun***/it] to do?**
____ Yes ____ No

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

[4. Did all the conditions that were required for [*name of defendant***]'s performance occur?**
____ Yes ____ No

If your answer to question 4 is yes, [skip question 5 and] answer question 6. If you answered no, [answer question 5 *if waiver or excuse is at issue*/**stop here, answer no further questions, and have the presiding juror sign and date this form].]**

[5. Were the required conditions that did not occur [excused/waived]?
____ Yes ____ No

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

6. [Did [*name of defendant***] fail to do something that the contract required [him/her/***nonbinary pronoun***/it] to do?**

____ Yes ____ No]

[or]

[Did [*name of defendant*] do something that the contract prohibited [him/her/*nonbinary pronoun*/it] from doing?
____ Yes ____ No]

If your answer to [either option for] question 6 is yes, then answer question 7. If you answered no [to both options], stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of plaintiff*] harmed by [*name of defendant*]'s breach of contract?
____ Yes ____ No

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

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

[a. Past [economic] loss [including [*insert descriptions of claimed damages*]]:

$ _____]

[b. Future [economic] loss [including [*insert descriptions of claimed damages*]]:

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New April 2004; Revised December 2010, June 2011, June 2013, June 2015, May 2020, May 2024

Directions for Use

This verdict form is based on CACI No. 303, *Breach of Contract—Essential Factual Elements*. This form is intended for use in most contract disputes. If more specificity is desired, see verdict forms that follow.

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

Optional questions 2 and 3 address acts that the plaintiff must have performed before the defendant's duty to perform is triggered. Include question 2 if the court has determined that the contract included dependent covenants, such that the failure of the plaintiff to perform some obligation would relieve the defendant of the obligation to perform. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.Rptr.3d 893].) Include question 3 if the plaintiff claims that the plaintiff was excused from having to perform an otherwise required obligation.

Optional questions 4 and 5 address conditions precedent to the defendant's performance. Include question 4 if the occurrence of conditions for performance is at issue. (See CACI No. 322, *Occurrence of Agreed Condition Precedent*.) Include question 5 if the plaintiff alleges that conditions that did not occur were excused. The most common form of excuse is the defendant's waiver. (See CACI No. 323, *Waiver of Condition Precedent*; see also Restatement Second of Contracts, section 225, Comment b.) Waiver must be proved by clear and convincing evidence. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [35 Cal.Rptr.2d 515].)

Note that questions 4 and 5 address conditions precedent, not the defendant's nonperformance after the conditions have all occurred or been excused. The defendant's nonperformance is the first option for question 6. If the defendant alleges that its nonperformance was excused or waived by the plaintiff, an additional question on excuse or waiver should be included after question 6.

If the verdict form used combines other causes of action involving both economic and noneconomic damages, use "economic" in question 8.

If specificity is not required, users do not have to itemize the damages listed in question 8. The breakdown is optional depending on the circumstances.

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

VF-400. Negligence—Single Defendant

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] negligent?**
____ Yes ____ No

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

2. Was [*name of defendant***]'s negligence a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

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

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

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

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

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

If specificity is not required, users do not have to itemize all the damages listed in question 3. The breakdown is optional depending on the circumstances.

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

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.

Instruction(s)	Commenter	Comment	Committee Response
372. Common Count: Open Book Account (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
	Public Law Center by Jonathan Bremen, Impact Litigation Staff Attorney, Lydia Tse, Staff Attorney, Consumer Law, Emily Phillips, Staff Attorney, Housing and Homelessness Prevention Santa Ana	Public Law Center (PLC) is a 501(c)(3) not-for-profit organization that provides free civil legal services to low-income individuals and families across Orange County. The civil legal services that we provide include consumer, family, immigration, housing, veterans, community organizations, and health law. PLC appreciates the opportunity to comment on Invitation CACI 24-01 regarding: (1) proposed jury instruction 4328 (Affirmative Defense—Tenant Was Victim of Abuse or Violence [Code Civ. Proc., § 1161.3]); and (2) proposed jury instruction 372 (Common Count: Open Book Account).	No response required. See below for the committee's responses to PLC's substantive comments.
		PLC supports the adoption of proposed instruction 372. Common counts make debt collection cases, which can cause extreme hardship for consumers, subject to lesser evidentiary standards than all other lawsuits. They allow evasion of modern consumer protection standards and give debt collectors special treatment in court. Code of Civil Procedure section 425.30 addresses common counts in general, not just book accounts. Thus, PLC recommends adding the section 425.30 language — prohibiting use of common courts to recover consumer debt — to the other common count jury instructions including:	The committee acknowledges PLC's support for the revisions to CACI No. 372. With respect to the four other Common Count instructions mentioned, PLC's comment goes beyond the scope of the invitation to comment.

Instruction(s)	Commenter	Comment	Committee Response
		370. Common Count: Money Had and Received 371. Common Count: Goods and Services Rendered 373. Common Count: Account Stated 374. Common Count: Mistaken Receipt The language used in the other common count jury instructions should reference Code of Civil Procedure section 425.30 as follows: Do not give this instruction for a claim involving "consumer debt" incurred on or after July 1, 2024. (See Code Civ. Proc., § 425.30 [exempting consumer debt from common counts].)	The committee will consider PLC's suggestion for CACI Nos. 370, 371, 373, and 374 during the next release cycle.
1009A. Liability to Employees of Independent Contractors for Unsafe Concealed Conditions (Revise)	Association of Southern California Defense Counsel by Edward L. Xanders Attorney Sacramento	We write on behalf of the Association of Southern California Defense Counsel (ASCDC) to comment on the proposed additions regarding CACI 1009A. We want to ensure that the Advisory Committee on Jury Instructions is aware of the concerns that the Second Appellate District, Division Three, recently voiced about CACI 1009A and its user notes, set forth in *Acosta v. MAS Realty, LLC* (2023) 96 Cal.App.5th 635 [314 Cal.Rptr.3d 507] (*Acosta*). For convenience, a copy of *Acosta* is attached [*Attachment omitted]; the Court's request for revisions is in footnote 7. As explained below, the proposed additions regarding CACI 1009A do not resolve the concerns flagged in Acosta. In particular, there is no change to the instruction's text to include a description of the independent contractor's duty to inspect for safety issues, nor do the proposed additions to the Directions for Use and Sources and Authority resolve that concern or discuss recent key cases addressing that duty.	ASCDC's comments are beyond the scope of the invitation to comment. At the time the committee posted its invitation for comment (CACI 24-01), *Acosta v. MAS Realty, LLC* (2023) 96 Cal.App.5th 635 [314 Cal.Rptr.3d 507] was not yet a final decision. The Supreme Court denied review during the invitation to comment period on January 31, 2024. The committee will consider ASCDC's comments and the *Acosta* decision during the next release cycle.

Instruction(s)	Commenter	Comment	Committee Response
		ASCDC is the nation's largest and preeminent regional organization of lawyers primarily devoted to defending civil actions. ASCDC has approximately 1,100 attorney members in Southern and Central California, who are some of the leading trial and appellate lawyers of California's civil defense bar. ASCDC is actively involved in assisting courts, the organized bar, and committees on issues of interest to its members, the judiciary, the bar as a whole, and the public. It is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing standards of civil litigation practice. ASCDC members are frequently involved in cases applying the Privette doctrine and its exceptions, and ASCDC frequently appears as an amicus in such cases. ASCDC is concerned that the proposed revisions in the recent Invitation to Comment, CACI 24-01, do not adequately address the concerns that the Court of Appeal justices (the Honorable Lee Smalley Edmon, the Honorable Luis A. Lavin, and the Honorable Anne H. Edgerton) raised in Acosta. We again thank the Advisory Committee for the substantial time and hard work it puts into the CACI instructions. We hope these suggestions are helpful.	No further response required.
		The *Acosta* decision. In *Acosta*, an electrical technician injured by a broken roof hatch sued the building's owner and management company for negligence and premises liability. He argued that the case fell within the *Kinsman* exception to the *Privette* doctrine, under which a property owner may be liable for an injury to an independent contractor's employee if the injury resulted from a *concealed* hazard that the owner knew, or reasonable should have known, about. (See *Kinsman v. Unocal Corp*. (2005) 37 Cal.4th 659; *Privette v. Superior Court* (1993) 5 Cal.4th 689.)	No further response required.

Instruction(s)	Commenter	Comment	Committee Response
		After a jury awarded a substantial verdict against the defendants, the Second Appellate District, Division Three, reversed the judgment and directed entry of judgment for the defendants. Relying on *Kinsman*, and several cases that discuss and apply that exception—*Gonzalez v. Mathis* (2021) 12 Cal.5th 29 (*Gonzalez*), *Johnson v. The Raytheon Co., Inc.* (2019) 33 Cal.App.5th 617 (*Johnson*) and *Blaylock v. DMP 250 Newport Center, LLC* (2023) 92 Cal.App.5th 863 (*Blaylock*)—the Court of Appeal recognized that *Kinsman* imposes a duty on the independent contractor to conduct a reasonable safety inspection of the worksite before work begins and that the contractor's employees therefore cannot recover under the *Kinsman* exception if a reasonable inspection by the contractor would have uncovered the hazard.	
		The *Acosta* court's concerns about CACI 1009A. The Court of Appeal recognized, in reaching its decision, that CACI 1009A, and its instructions for use, fail to adequately address the independent contractor's duty to reasonably inspect the premises, an important component of the *Kinsman* exception. The Court first noted: Although not relevant to our analysis, we note that the trial court instructed the jury on negligence (CACI No. 400–411), landowners' nondelegable duties (CACI No. 3713), and landowner liability to employees of independent contractors for unsafe concealed conditions under *Privette/Kinsman* (CACI No. 1009A). In other words, the jury was instructed that (1) defendants were negligent if they failed to use reasonable care to prevent harm to [plaintiff], (2) [the property owner] had a nondelegable duty to keep [the premises] in a safe condition, *and* (3) defendants could be liable to [plaintiff] only if they knew or reasonably should have known of an unsafe concealed condition at [the premises], and [plaintiff's independent-contractor employer] neither knew nor	No further response required.

Instruction(s)	Commenter	Comment	Committee Response
		reasonably could be expected to know of that unsafe concealed condition. (*Acosta, supra,* 96 Cal.App.5th at p. 665, fn. 7.) The Court then explained (in the same footnote) that these instructions and the relevant use notes were incomplete and misleading on two fronts, and urged the Judicial Council and this Advisory Committee to resolve the problem: 1) "The jury was not told how the separate concepts of negligence, nondelegable duty, and peculiar risk relate to one another for purposes of determining defendants' liability, and ***the CACI use notes do not appear to give trial courts any guidance about whether negligence and/or nondelegable duty instructions should be given in peculiar risk cases***." (*Acosta, supra,* 96 Cal.App.5th at p. 665, fn. 7, italics added.) 2) "CACI No. 1009A ***does not include a description of the independent contractor's duty to inspect for safety issues***, as described in *Kinsman, Gonzalez, Johnson*, and *Blaylock*. ***We urge the Judicial Council and its Advisory Committee on Civil Jury Instructions to consider CACI No. 1009A and its use notes*** in light of recent decisions, including *Gonzalez, Johnson*, and *Blaylock.* (*Ibid.*, italics added.) And, since the Second Appellate District, Division Three, granted a request to publish *Acosta*, the same comments apply equally to *Acosta* itself.	
		The current proposed additions regarding CACI 1009A. The proposed additions in the latest Invitation to Comment, CACI 24-01, do not propose *any* changes to CACI 1009A's text. The only proposed changes involve additions to the Directions for Use and Sources and Authority. The *only* proposed change to the Directions for Use entails adding language that elements 3 and 4 of the instruction	No further response required.

Instruction(s)	Commenter	Comment	Committee Response
		"express the independent contractor's limited duty to inspect the premises for potential safety hazards." Thus, this "change" leaves CACI 1009A's text exactly as before and does not address the *Acosta* court's concern that "CACI No. 1009A does not include a description of the independent contractor's duty to inspect for safety issues…." (*Acosta, supra,* 96 Cal.App.5th at p. 665, fn. 7.) The proposed addition to the Directions for Use would have no impact because juries will only see the actual instruction. And as the *Acosta* court recognized, the language in current elements 3 and 4 is vague and incomplete because it does not actually explain that the independent contractor's employees (including the plaintiff) have a duty to reasonably inspect the premises and are charged with what such an inspection would reveal. As *Acosta* recognized, the statement that the contractor "neither knew or could be reasonably expected to know of the unsafe concealed condition" is unclear and meaningless without a reference to the contractor having a duty to inspect for safety issues. Nor does the only currently proposed change to the Directions for Use address the *Acosta* court's concern that "the CACI use notes do not appear to give trial courts any guidance about whether negligence and/or nondelegable duty instructions should be given in peculiar risk cases." (*Acosta, supra,* 96 Cal.App.5th at p. 665, fn. 7.) In addition, the proposed changes to the CACI 1009A Directions for Use and Sources and Authority do not resolve the Second Appellate District, Division Three's urging that the Judicial Council and its Advisory Committee on Civil Jury Instructions consider the CACI 1009A "use notes in light of recent decisions, including *Gonzalez*, *Johnson*, and *Blaylock*." (*Acosta, supra,* 96 Cal.App.5th at p. 665, fn. 7.) The additions	

Instruction(s)	Commenter	Comment	Committee Response
		to the Directions for Use merely contain one reference to *Gonzalez*. And the references to Sources and Authority only add one snippet from *Gonzalez* and one from *Johnson*, omitting any references to *Blaylock* and *Acosta*.	
		Recommended additions in light of the Acosta court's concerns. ASCDC appreciates the enormous task the Advisory Committee faces in grappling with so many jury instructions. That daunting task is why comments by appellate courts for the need for change, such as the Second Appellate District, Division Three's comments in *Acosta*, are of crucial importance. They reflect the view of the justices in the trenches who have dealt with the need for clarity in the law and in the CACI jury instructions.	No further response required.
		Recommended change to CACI 1009A text. In light of the *Acosta* court's concern that the existing language of CACI 1009A does not explain that the independent contractor has a duty to inspect, ASCDC recommends that the instruction's text be modified to explain that the contractor has a duty to reasonably inspect the worksite and the means of access for safety issues. This could be done, for example, by adding the following language to the end of element 3: "through a reasonable\inspection of the worksite, and its means of access, for safety hazards."	No further response required.
		Recommended changes to CACI 1009A Directions for Use and Sources and Authority. As the *Acosta* court explained, the trial court in *Acosta* ended up providing the jury with the general CACI instructions on negligence (CACI Nos. 400-411), the CACI instruction on a landowners' nondelegable duties (CACI No. 3713), *and* the CACI instruction regarding the *Kinsman* exception to the	No further response required.

Instruction(s)	Commenter	Comment	Committee Response
		Privette doctrine, that is, landowner liability to employees of independent contractors for unsafe concealed conditions (CACI No. 1009A). As the *Acosta* court recognized, this resulted in the jury receiving contradictory and inconsistent instructions. (See 96 Cal.App.5th at p. 665, fn. 7.) On the one hand, the jury was told through CACI Nos. 400-411 and CACI No. 3713 that the defendants were negligent if they failed to use reasonable care to prevent harm to plaintiff and that a landowner has a nondelegable duty to keep the premises safe, which are both erroneous statements in a *Privette* doctrine context, unless the plaintiff can prove that an exception to the doctrine applies, such as the *Kinsman* exception. And, on the other hand, the jury was correctly instructed under CACI No. 1009A, in accordance with the *Kinsman* exception, that the defendants could *only* be liable if they knew or reasonably should have known of an unsafe concealed condition at the premises *and* the plaintiff or his employer neither knew nor reasonably could be expected to know of that unsafe concealed condition. The *Acosta* court recognized that such confusion could be rectified by modifying the CACI use notes to provide "guidance about whether negligence and/or nondelegable duty instructions should be given in peculiar risk cases." (96 Cal.App.5th at p. 665, fn. 7.) We therefore recommend, given the *Acosta* court's concern, that the Directions for Use for CACI 1009A be modified to explain that CACI 400-411 and CACI 3713 ***should not be given*** in cases involving CACI 1009A, and that the defendant landowner's or hirer's liability in such cases should be determined based solely on applying CACI 1009A's elements. ***The same modification should be made to the Directions for Use regarding any other exception to the Privette doctrine, such as CACI 1009B and 1009D.***	

Instruction(s)	Commenter	Comment	Committee Response
		In addition, the Directions for Use notes and/or the Sources and Authority for CACI 1009A should be expanded to clarify that (a) the independent contractor's duty to inspect for safety issues includes not only the worksite itself but also the means of accessing the worksite; and (b) that the independent contractor's employee cannot recover under the *Kinsman* exception for an alleged concealed hazard that a reasonable inspection by the contractor would uncover. They also should include references to the two relevant 2023 decisions—*Blaylock* and *Acosta*. *Gonzalez*, *Johnson*, *Blaylock*, and *Acosta* make clear that while an independent contractor's duty of inspection under *Kinsman* may be "limited" in the sense that it does not encompass portions of the premises beyond the subject worksite or means of access, or safety hazards beyond the contractor's particular expertise, the inspection duty otherwise broadly encompasses any safety hazards that the contractor's employees did not know about but could have reasonably uncovered in a reasonable pre-work inspection for safety issues. The following case law snippets address these various points, so we present them for the Committee's consideration as additions to the two current proposals that regard *Gonzalez* and *Johnson* only. ● The independent contractor's duty to inspect for safety issues includes the "means to access the worksite" because that constitutes "an inherent risk in the job for which [the contractor] was hired." (*Gonzalez, supra,* 12 Cal.5th at p. 55.) ● "[A] hirer presumptively delegates to an independent contractor all responsibility for workplace safety, such that the hirer is not responsible for any injury resulting from a known unsafe condition at the worksite—regardless of whether the	

Instruction(s)	Commenter	Comment	Committee Response
		contractor was specifically tasked with repairing the unsafe condition and regardless of whether the danger was created by the work for which the contractor was retained." (*Gonzalez*, *supra*, 12 Cal.5th at p. 52.) ● "[T]he fact that neither [plaintiff] nor his coworkers noticed any safety concerns in the crawl space, and none had recognized the panel [plaintiff] fell through as a 'trap door,' is not sufficient to suggest the trap door was concealed from the perspective of [the contractor]. [The contractor] had a duty to inspect the work premises for potential safety hazards; [plaintiff] offers no evidence that any such inspection occurred." (*Blaylock v. DMP 250 Newport Center, LLC* (2023) 92 Cal.App.5th 863, 872 [310 Cal.Rptr.3d 1].) ● "[T]he broken condition of the hatch, and the fact that the ladder did not reach all the way to the roof, were not concealed and would have been apparent had [plaintiff] or [the independent contractor] inspected the hatch and ladder. Thus, [the contractor] is deemed as a matter of law to have been aware of the condition of the hatch and ladder." (*Acosta v. MAS Realty, LLC* (2023) 96 Cal.App.5th 635, 663 [314 Cal.Rptr.3d 507].) ● "[A]lthough [plaintiff's] employer, [the independent contractor], was not hired to inspect or repair the roof hatch, the electrical work for which it was hired required roof access. Because [the contractor], through [plaintiff], chose to access the roof through the roof hatch by means of the fixed ladder, the roof hatch and ladder necessarily were part of the worksite and were within [the contractor's] duty to inspect." (*Acosta*, *supra*, 96 Cal.App.5th at p. 662.) ● "We do not agree that the duty to inspect is as limited as [plaintiff] suggests. He is correct that an independent contractor does not have a duty to inspect all of the landowner's property or to identify hazards wholly outside his area of expertise. (See *Gonzalez, supra*, 12 Cal.5th at pp. 54-55, 282 Cal.Rptr.3d 658,	

Instruction(s)	Commenter	Comment	Committee Response
		493 P.3d 212.)... But a landowner who hires an independent contractor 'presumptively delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees' ([*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 600], 129 Cal.Rptr.3d 601, 258 P.3d 737), and thus the independent contractor has a duty to determine whether its employees can safely perform the work they have been hired to do (*Gonzalez,* at p. 55, 282 Cal.Rptr.3d 658, 493 P.3d 212). That includes a duty to inspect not only the worksite itself, but the 'means to access the worksite.' (*Ibid.*)" (*Acosta, supra,* 96 Cal.App.5th at pp. 661-662.) ● "Whether the independent contractor *actually* inspected, or whether an employee of the independent contractor *actually* communicated an unsafe condition to the contractor, is irrelevant—what matters is whether the hazard would have been revealed by a reasonable inspection…. [H]ere, the information that would have been revealed if [plaintiff] or any other [contractor] employee conducted a reasonable inspection of the workplace is attributed to [the contractor] as a matter of law, regardless of [plaintiff's] actual knowledge or ability to transmit that knowledge to [the contractor]." (*Acosta, supra,* 96 Cal.App.5th at pp. 663-664, original italics.)	
	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.

Instruction(s)	Commenter	Comment	Committee Response
	Civil Justice Association of California by Lucy Chinkezian Counsel Sacramento	Thank you for the opportunity to comment on proposed revisions to California Civil Jury Instructions – CACI 24-01. 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, we confront legislation, laws, and regulations that create unfair litigation burdens on California businesses, employees, and communities. We have concerns about the proposed changes to CACI Sections 1009A, 2500, 2502, 2521A, 2521B, 2521C, and 2540, and 5009. We respectfully request that you address these concerns as recommended below.	See below for the committee's responses to CJAC's substantive comments on CACI No. 1009A. The committee's responses to CJAC's other comments are organized by instruction.
		I. Premises Liability **CACI 1009A. Liability to Employees of Independent Contractors for Unsafe Concealed Conditions** ***Directions for Use*** In this section, we propose the citation in the revision be updated as follows to conform with recent case law and to clarify what Elements 3 and 4 require of the independent contractor: "Elements 3 and 4 express the independent contractor's ~~limited~~ duty to inspect the premises for potential safety hazards. (*Acosta v. MAS Realty, LLC* (2023) 96 Cal. App. 5th 635, 659 ("Further, a contractor has a duty to inspect the work site to identify safety hazards before beginning work."), citing *Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 53–54 [282 Cal.Rptr.3d 658, 493 P.3d 212].). Elements 3 and 4 of the instruction require that the independent's contractor's employer 'neither knew nor could be reasonably expected to know' of the alleged	This comment is beyond the scope of the invitation to comment. At the time the committee posted its invitation for comment (CACI 24-01), *Acosta v. MAS Realty, LLC* (2023) 96 Cal.App.5th 635 [314 Cal.Rptr.3d 507] was not yet a final decision. The Supreme Court denied review during the invitation to comment period on January 31, 2024. The committee will consider CJAC's comment and the *Acosta*

Instruction(s)	Commenter	Comment	Committee Response
		concealed condition, and that the condition 'was not part of the work' that the independent contractor was hired to perform.	decision during the next release cycle.
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
2500. Disparate Treatment—Essential Factual Elements (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Civil Justice Association of California by Lucy Chinkezian Counsel Sacramento	**II. Fair Employment and Housing** **CACI 2500, 2502, 2521A, 2521B, 2521C, and 2540.** ***Directions for Use*** The Directions for Use in the aforementioned sections propose an overly broad definition of "other business-entities acting as agents of employers," which is not consistent with the holding in *Raines v. U.S. Healthworks Medical Group*. While the Sources and Authority sections for these instructions properly include the following limiting language from the *Raines* decision, the Directions for Use omit it: "[…] permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances *when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer*" (emphasis added). This is an important limitation and distinction. We propose the same language be included in the Directions for Use for CACI	The committee decided that the Directions for Use fairly omit the limiting language advanced by the commenter. The committee was informed by the Supreme Court's language at the end of the *Raines* decision, which states: "We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have

Instruction(s)	Commenter	Comment	Committee Response
		Sections 2500, 2502, and 2540 to avoid confusion and an overly broad application of the holding in *Raines*, as follows: If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs, and other business-entities acting as agents of employers if they are carrying out FEHA-regulated activities on behalf of the employer. (See Gov. Code, § 12940(a)–(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Further, the Directions for Use for CACI Sections 2521A, 2521B, and 2521C should be modified to read: Further modification may be necessary if the defendant is a business-entity agent of an employer carrying out FEHA-related activities on behalf of the employer. (*Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].	fewer than five employees." (*Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].)
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required
2501. Affirmative Defense—Bona fide Occupational Qualification	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.

Instruction(s)	Commenter	Comment	Committee Response
(Revise)	Bruce Greenlee Attorney (ret.) Richmond	1. You don't cite any authority supporting the new language on failure to accommodate that is proposed to be added to the introductory paragraph.	The committee recommends adding a citation to the Bona fide Occupational Qualification for Pregnancy, Childbirth and Related Conditions under Government Code section 12945(a).
		2. How would one assemble this instruction using the new language? What would the protected status be? If the protected status is disability, the instruction would say that the decision not to offer an accommodation was lawful because the job required a disabled employee. That makes no sense. Ditto if some other protected status is used. The decision not to offer an accommodation was lawful because the job requires a woman? Also no sense. Importing a component of disability law into a situation unrelated to disability does not work.	The committee recommends adding a Direction for Use note about the potential need for modification if the case involves a BFOQ for pregnancy, childbirth and related conditions.
		3. But the same issues are there even apart from the new language. True, the statute provides for an exception for "based on a bona fide occupational qualification." (I guess this is the exception to allow a Chinese restaurant to hire only Chinese cooks, or lingerie models to all be women.). But the conflict between the adverse employment action and the protected class is there in all cases. First, it's hard to imagine any other adverse employment action other than refusal to hire. I hired a Japanese cook, but then had	The committee believes that the refinements noted above resolve the concerns raised by the commenter. No further response required.

Instruction(s)	Commenter	Comment	Committee Response
		to fire him/her because I learned s/he was not Chinese? Pretty far-fetched. Then the instruction needs to state that the problem is that the plaintiff is NOT a member of the required category; not that the plaintiff is a member of some other protected category. Element 2 is wrong. It's not that substantially all Mexicans can't cook Chinese food; it's that only Chinese can do it.	No further response required.
		4. Revise introductory paragraph as follows: [Name of defendant] claims that [pronoun] decision [not to hire/other adverse employment action] [name of plaintiff] was lawful because a requirement of the job of [specify, e.g., lingerie model] is that the employee be [exclusive status, e.g., a woman].	No further response required.
		5. Make current element 2 element 1 and revise as follows: That [name of defendant] had a reasonable basis for believing that only [members of exclusive group, e.g., women] are able to perform the job of [specify, e.g., lingerie model];	No further response required.
		6. Then make current element 1 element 2 and revise as follows: That job requirement that the employee must be [[exclusive status, e.g., a woman]] was [essential/reasonably necessary] for the operation of [name of defendant]'s business;	No further response required.
		7. Given the problems with the instruction and the debatable proposition that there are jobs that can only be done by one kind of person, the best course of action might be to revoke this instruction.	The committee does not agree that the BFOQ instruction needs to be revoked.

Instruction(s)	Commenter	Comment	Committee Response
	Orange County Bar Association by Christina Zabat-Fran President	"[O]ther adverse employment action" covers what would be at issue for this instruction, and there are no changes in the sources of authority as grounds for the addition. Further, the addition of "not to offer an accommodation to" is confusing as there are various potential adverse employment actions at issue and it is not limited or specific to accommodation claims. It is also confusing because, as specified in the instruction, there are categories of consideration at issue such as race, age, etc. and it is not specific to disability.	The committee recommends adding a citation to the Bona fide Occupational Qualification for Pregnancy, Childbirth and Related Conditions under Government Code section 12945(a) and a Directions for Use note about the potential need for modification if the case involves a BFOQ for pregnancy, childbirth and related conditions.
2502. Disparate Impact—Essential Factual Elements (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Civil Justice Association of California by Lucy Chinkezian Counsel Sacramento	See CJAC's comment for CACI No. 2500.	See committee's response to CACI No. 2500.
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
	California Lawyers Association by Reuben A. Ginsburg	Agree.	No response required.

Instruction(s)	Commenter	Comment	Committee Response
2513. Business Judgment (Revise)	Chair, Jury Instructions Committee Sacramento		
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
Work Environment Harassment instructions (2521A, 2521B, and 2521C) (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Civil Justice Association of California by Lucy Chinkezian Counsel Sacramento	See CJAC's comment for CACI No. 2500.	See committee's response to CACI No. 2500.
	Bruce Greenlee Attorney (ret.) Richmond	1. I would not add this or any language to the DforU. The statement that "further modification may be necessary" is not terribly helpful without some mention of how and where. (The "why" is addressed.) It's particularly dubious here because the instructions do not attempt to define who qualifies as an employer. Hence, any modification would have to start with adding an element stating that "defendant is an employer because" and including agent as one of the options. (See, e.g., element 1 of CACI No. 2540.) I don't think this is necessary because employer status is seldom an issue in FEHA harassment cases. There currently is no instruction defining "employer," to which *Raines* would be applicable. (cf. CACI No. 2525, defining "Supervisor.") That's probably fine because I doubt that	The committee believes that users should be aware of the Supreme Court's decision in *Raines*. The committee believes it is preferable to alert users to the potential need for modification if their FEHA work environment harassment claims involve a business entity acting as an agent of an employer. The committee does not

Instruction(s)	Commenter	Comment	Committee Response
		deciding whether or not the defendant qualifies as a FEHA employer is a jury issue.	agree that the issue is so rare that it should not be mentioned in the work environment harassment instructions.
		2. While it's harmless, I don't think *Raines* really needs to be in the [Sources and Authority] for these instructions. They have very robust Sources and Authority now.	The committee believes it is important to include relevant Supreme Court authority in the Sources and Authority.
	Orange County Bar Association by Christina Zabat-Fran, President	Agree.	No response required.
Disability Discrimination instructions (2540, 2541, and 2547) (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Civil Justice Association of California by Lucy Chinkezian Counsel Sacramento	See CJAC's comment for CACI No. 2500.	See committee's response to CACI No. 2500.
	Bruce Greenlee Attorney (ret.) Richmond	1. Last paragraph of the DforU in 2540 and the corresponding paragraphs in 2541 and 2547: "Consider giving special instructions". Why wouldn't one give the special instructions if whether the employee's disability matches the statutory requirements is an issue? Current language "may be required" is better.	The committee concluded that "may be required" is not sufficiently clear. It is the committee's view that a special instruction will need to be drafted if

Instruction(s)	Commenter	Comment	Committee Response
			the existence of a qualifying disability is disputed.
		2. I don't really see any need to change the order of "physical disability," "mental disability," and "medical condition." Bottom line is I don't see any need for any revisions to this paragraph except for maybe adding the Cal Code Regs cite.	The committee decided to sequence the statutory terms in the order they are listed in the statute and in the Sources and Authority. The committee acknowledges the commenter's support for adding citations to the regulations.
	Orange County Bar Association by Christina Zabat-Fran, President	Agree.	No response required.
2743. Equal Pay Act—Retaliation—Essential Factual Elements (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Bruce Greenlee Attorney (ret.) Richmond	1. New last sentence of DforU: Use of "and/or" is generally discouraged, though I have found instances in which I thought it to be the best option. But this is not one of them. One wouldn't both modify this instruction and also give additional instructions; one would do one or the other. So "and" should not appear.	The committee finds that doing both is a possible option. The committee has chosen to retain the use of and/or in the Directions for Use of this instruction.

Instruction(s)	Commenter	Comment	Committee Response
		2. Also, I would think that only one additional instruction would be needed to express this relatively simple presumption.	The committee is not convinced that instructing on the rebuttable presumption would have to be done in one additional instruction.
		3. Revise sentence: "Consider adding language to this instruction or giving an additional instruction regarding the rebuttable presumption."	For the reasons stated above, the committee declines to make the suggested change.
	Orange County Bar Association by Christina Zabat-Fran, President	Agree.	No response required.
3066. Bane Act—Essential Factual Elements (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Orange County Bar Association by Christina Zabat-Fran, President	Agree.	No response required.
4000. Conservatorship—Essential Factual Elements (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Orange County Bar Association by Christina Zabat-Fran,	These changes are based upon SB43 effective January 1, 2024 which expanded the definition of "gravely disabled" to add two	The committee believes the instruction properly

Instruction(s)	Commenter	Comment	Committee Response
	President	new criteria for that statutory term of art: (1) a condition in which a person as a result of severe substance use disorder or co-occurring mental health disorder and a severe substance use disorder is unable to provide for their basic personal needs for food, clothing, or shelter, or (2) as a result thereof cannot meet their basic personal needs for "personal safety or necessary medical care" including when impaired by chronic alcoholism. SB43 also added other new definitions and allowed counties to defer implementation of those changes until January 1, 2026.	states the essential factual elements of an LPS conservatorship. The Directions for Use advise to give CACI No. 4002, *"Gravely Disabled" Explained*, with this instruction. CACI 4002 explains "gravely disabled" as expanded by SB 43.
		This summary of the essential factual elements for a Lanterman-Petris-Short Act [*LPS] conservatorship fails to include the new provisions of SB43 nor even references to other factual requirements. It is suggested that this instruction be amended to add language at the opening paragraph after "[…alcoholism] and" stating "is unable to provide for their basic personal needs for food, clothing, shelter, personal safety, or necessary medical care such that Respondent…." And the same language be added to numbered paragraph 2.	See the committee's response above.
		Additionally this instruction should be amended to add a new paragraph 3 referencing the language of Wel & Inst Code §5008(h)(1)(B) pertaining to the alternative factual element for "gravely disabled". That subsection refers to any condition in which a person has been found mentally incompetent under Section 1370 of the Penal Code and the four (4) additional requirements stated therein. There is no mention nor explanation of these alternative factual elements anywhere in this instruction language nor in the Directions for Use.	As stated in the Directions for Use of CACI No. 4002, the committee does not believe that the instruction would be used for a conservatorship under Penal Code section 1370. The committee recommends adding this

Instruction(s)	Commenter	Comment	Committee Response
			same warning to the Directions for Use of CACI No. 4000.
4001. "Mental Disorder" Explained (Revoke)	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
4002. "Gravely Disabled" Explained (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Bruce Greenlee Attorney (ret.) Richmond	1. New paragraph defining "Necessary Medical Care: This sentence: "necessary to prevent serious deterioration of an existing physical medical condition which, if left untreated, is likely to result in serious bodily injury." Per the rules of grammar and the dreaded "which/that" conundrum, "which" is always preceded by a comma. Move the comma to follow "condition." (Mistake is the Legislature's (W&I 5008(q)), but move it anyway.)	The committee recommends refining the sentence's punctuation to add a comma before which.

Instruction(s)	Commenter	Comment	Committee Response
	Orange County Bar Association by Christina Zabat-Fran, President	It is recommended that the definitional terms for "gravely disabled" also contain a reference to the language of Wel & Inst Code §5008(h)(1)(B) referencing persons who have been found mentally incompetent under Section 1370 of the Penal Code with the listed four (4) factual requirements. The explanation is incomplete without this statutory alternative. It is also recommended that the Directions for Use include a reference to Wel & Inst Code §15610.67 definition of "serious bodily injury" since statutory references to other definitions are already included therein.	The committee agrees in part and recommends adding to the Sources and Authority a citation for "Serious Bodily Injury" Defined. The committee does not believe that the instruction should be expanded to include options under Penal Code section 1370. As the Directions for Use state, "A different instruction will be required if this standard is alleged."
4004. Issues Not to Be Considered (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Orange County Bar Association by Christina Zabat-Fran President	This instruction only references one (1) factual issue not to be considered in determining the need for a conservatorship by the jury. However, CACI 4002 itself states that the jury may not consider the likelihood of future deterioration or relapse of a condition and the Directions for Use thereunder indicate other factors not to be considered, including whether the person previously was gravely disabled and whether the person is willing or not willing to accept various forms of treatment. These non-elements should be all included herein and not spread out among other CACI instructions, or the title of this	The committee agrees in part and recommends expanding the title as suggested.

Instruction(s)	Commenter	Comment	Committee Response
		instruction to reflect its limited use as "Issues Not to Be Considered: Type of Treatment, Care, or Supervision."	
4005. Obligation to Prove—Reasonable Doubt (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Orange County Bar Association by Christina Zabat-Fran, President	It is recommended that paragraphs 2 & 4 of this instruction be modified to correctly define the term "gravely disabled" since that is the ultimate responsibility of the jury. These two paragraphs currently do not match the statutory definition of gravely disabled as found at Wel & Inst Code §5800(h)(1)(2)(3). They especially ignore the definitions at Wel & Inst Code §5800(h)(1)(A) & (B).	Gravely disabled is explained in CACI No. 4002. The committee does not believe it is necessary to repeat the content of that instruction in CACI No. 4005, which is about the burden of proof.
4006. Sufficiency of Indirect Circumstantial Evidence (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Orange County Bar Association by Christina Zabat-Fran, President	Agree.	No response required.
4007. Third Party Assistance (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.

Instruction(s)	Commenter	Comment	Committee Response
	Bruce Greenlee Attorney (ret.) Richmond	1. New language in first paragraph expanding on "basic needs:" Where does this language come from? The only statute cited in the [Sources and Authority], W&I 5350(e), does not contain this list of requirements. If "basic needs" are defined in a different statute, that statute needs to be in the [Sources and Authority].	The committee recommends adding a citation for the definition of gravely disabled, which includes a person's basic personal needs, to the Sources and Authority.
		2. And would it really be an "or?" Seems problematic if the family only has to do one of the listed items. "Ok, we'll see that s/he gets fed, but s/he can't live here." But on the other hand, if you change it to "and," then you are requiring the family to agree to provide everything in the list, which absent statutory authority, also seem problematic.	The committee does not recommend a change to the phrasing. The issue is whether there is testimony from family, friends, or others that they are willing and able to help provide for the person's basic personal needs. The issue is not whether one person is willing to help provide all of them.
		3. New language in second paragraph: Replace "their" with "[his/her/nonbinary pronoun]". The reference is to a specific person, the respondent, so gender or lack thereof will be clear.	The committee recommends against adding the pronoun as proposed; the sentence would read: "…to help provide [*respondent*] with food, clothing, [etc.]"

Instruction(s)	Commenter	Comment	Committee Response
	Orange County Bar Association by Christina Zabat-Fran, President	Wel & Inst. Code §5350(e)(1)&(4) specifically provide that the "family and friends assistance" provisions, which negate a finding of gravely disabled do not apply to persons found gravely disabled under the Wel & Inst. Code §5008(h)(1)(B) pertaining to the Penal Code §1370 findings of mental incompetency for felony charges. This instruction should be modified either to provide such language or to provide in Directions For Use that it should not be given in those circumstances.	The Directions for Use of an earlier instruction in the LPS series states that a different instruction will be required if the standard for mental incompetence under Penal Code section 1370 is alleged. The committee does not favor repeating that information in the context of this instruction.
4008. Third Party Assistance to Minor (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Bruce Greenlee Attorney (ret.) Richmond	1. See 1 and 2 for CACI 4007, above.	The committee recommends adding a citation for the definition of gravely disabled, which includes a person's basic personal needs, to the Sources and Authority.
		2. Interesting that for 4007, the prior language was "or;" for 4008 it was "and."	No further response required.

Instruction(s)	Commenter	Comment	Committee Response
	Orange County Bar Association by Christina Zabat-Fran, President	Wel & Inst. Code §5350(e)(1)&(4) specifically provide that the "family and Friend assistance" provisions, which negate a finding of gravely disabled, do not apply to persons found gravely disabled under the Wel & Inst. Code §5008(h)(1)(B) pertaining to the Penal Code §1370 under findings of mental incompetency for felony charges. This instruction should be modified either to provide such language or to provide in the Directions for Use that it should not be given in those circumstances.	See the committee's response to OCBA's same comment for CACI No. 4007, above.
VF-4000. Conservatorship —Verdict Form (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
4328. Affirmative Defense— Tenant Was Victim of Abuse or Violence (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	a. We agree with the revisions to the title and the first series of elements in the instruction.	No response required.
		b. We would modify element 2 in the second series of elements in the instruction to more closely parallel the language in element 3: "2. That [*name of plaintiff*] gave [*name of defendant*] at least three days' notice requiring [him/her/*nonbinary pronoun*] not to voluntarily permit or consent to the presence <u>on the property</u> of the person who committed the abuse or violence ~~back to the property~~; and"	The committee recommends the refinement to element 2 suggested by the California Lawyers Association (CLA).

Instruction(s)	Commenter	Comment	Committee Response
		c. The citation in the third paragraph of the Directions for Use to Code of Civil Procedure section 1161.3(a)(1)(A), (B), (C), (D) should be to section 1161.3(a)(2)(A), (B), (C), (D).	The committee recommends updating the citation as suggested by CLA.
		d. The revised instruction refers to a "qualified third party," and the Directions for Use notes the statutory definition of "qualified third party." Because there may be a factual dispute as to whether a third party was qualified, we suggest adding to the Directions for Use: "If the parties dispute whether a third party is 'qualified,' consider giving a special instruction on the definition of 'qualified third party.' "	The committee recommends adding a sentence similar to what CLA has suggested about a factual dispute relating to whether a third party is qualified.
		e. The last paragraph of the Directions for Use states that the tenant has a "complete defense" if the tenant proves that the perpetrator is not a tenant of the same dwelling unit. We would modify this language to state that the defense is complete unless the landlord proves the exception stated in Code of Civil Procedure section 1161.3(b)(2)(B): "The tenant has a complete defense to the unlawful detainer cause of action if the tenant proves that the perpetrator is not a tenant of the same 'dwelling unit' as the tenant, the tenant's immediate family member, or household member~~.~~ (~~S~~see Code Civ. Proc., § 1161.3(d)(1)), unless the landlord proves the exception (*id*., § 1161.3(b)(2)(B))."	The committee recommends adding language to the last paragraph of the Directions for Use similar to what CLA has suggested about the exception.
	Family Violence Appellate Project by Gloria Carolina Chong Housing Attorney	The Family Violence Appellate Project ("FVAP") submits the following comments regarding the Judicial Council's ("Council") proposed changes to the California Civil Jury Instructions ("CACI") number 4328, "Affirmative Defense—	See below for the committee's responses to FVAP's substantive comments.

Instruction(s)	Commenter	Comment	Committee Response
	Oakland	Tenant Was Victim of Abuse or Violence (Code Civ. Proc., § 1161.3)". FVAP is the only nonprofit organization in California dedicated to representing domestic violence survivors in civil appeals for free. FVAP's goal is to empower abuse survivors through the court system and ensure that they and their children can live in safe and healthy environments, free from abuse. This includes a commitment to increasing survivors' access to secure and safe housing. Our connection to the domestic violence community and position as a co-sponsor of SB 1017 – a bill that revised Code of Civil Procedure section 1161.3 and added Code of Civil Procedure section 1174.27 - makes FVAP uniquely situated to assess the impact of the Council's proposed CACI revisions on survivors. We greatly appreciate the Council's work to update these important instructions. We submit the following comments to ensure these instructions serve their crucial function of accurately conveying information that court users – particularly jury participants and pro per litigants – can understand.	
		CACI No. 4328: Draft Jury Instructions A. Comments Regarding: Exceptions to the Affirmative Defense The second half of CACI instructions No. 4328 detail when a landlord may still evict a tenant who successfully asserts the Code of Civil Procedure section 1161.3 eviction defense. However, the proposed revisions do not accurately reflect the exception to the affirmative defense as detailed in Code Civ. Proc. § 1161.3.	The committee agrees and recommends refining elements 2 and 3 in the second half of the instruction to track the language of Code of Civil Procedure section 1161.3(b)(2)(B)(ii) about a three-day notice, as suggested by FVAP.

Instruction(s)	Commenter	Comment	Committee Response
		Particularly, the proposed revisions state that the plaintiff must have given defendant "at least three days' notice" requiring that defendant not allow the person who committed abuse or violence back to the property. However, Code Civ. Proc. § 1161.3 (b)(2)(B)(ii) uses clear language indicating that a plaintiff must give the defendant "a three-day notice" banning the perpetrator of abuse from the property. Currently, the proposed revisions may lead to ambiguity when interpreting the three-day notice requirement, as a juror may interpret "three days' notice" to mean that a plaintiff giving verbal notice would suffice for the purposes of this exception. Incorrectly interpreting the exception to this defense has huge implications and could lead to a survivor of abuse or violence being wrongfully evicted. The possibility of a survivor being wrongfully evicted is in direct contradiction to the legislature's intent of "provid[ing]… survivors of abuse and violence protection against being evicted on account of the very abuse or violence which they endured." (Sen. Com. On Judiciary, Analysis of Sen. Bill No. 1017 (2021-2022 Reg. Sess.) as amended Mar. 31, 2022, p.7.) Thus, the draft jury instructions should be amended to include the unambiguous language that Code Civ. Proc. § 1161.3 (b)(2)(B)(ii) uses to avoid misinterpretation of the exception to this affirmative defense. **1. Recommended Language:** Based on the reasons outlined in section A, we recommend the following text to explain the affirmative defense exception: … "2. That [name of plaintiff] gave [name of defendant] a three-day notice requiring [him/her/nonbinary pronoun] not to voluntarily permit or consent to the presence of the person who committed the abuse or violence back to the property; and 3. That, after the three-day notice expired, [name of defendant]	

Instruction(s)	Commenter	Comment	Committee Response
		voluntarily permitted or consented to the presence on the property of the person who committed the abuse or violence."	
		B. Comments Regarding: Reference to Code Civ. Proc. § 1174.27 and Partial Evictions Currently, the proposed CACI instructions fail to contemplate the partial eviction procedure as referenced in Code Civ. Proc. § 1161.3 and as detailed in Code Civ. Proc. § 1174.27. Jurors must understand how these two code sections interact when deciding whether to order a partial eviction. Although the Directions for Use briefly mention partial eviction procedures, the instructions themselves should reference partial evictions for jurors to understand what occurs when a defendant asserts that another defendant living in the dwelling unit was the perpetrator of abuse or violence. Thus, we suggest brief language be added to reference the partial eviction procedures detailed in Code Civ. Proc. § 1174.27. **1. Recommended Language:** We recommend the Council add the following language to the end of the jury instructions for the reasons outlined in Section B. Please note that our recommended language below includes reference to our proposed Verdict Form No. 4303 that we suggest the Council include later in this comment. "If the person who committed the act[s] of abuse or violence is a tenant of the same living unit as [[name of defendant who asserted the defense]/ [or] a member of [name of defendant who asserted the defense]'s immediate family]/ [or] a member of [name of defendant who asserted the defense]'s household], the jury shall proceed in accordance with Code Civ. Proc. § 1174.27. If Code Civ. Proc. § 1174.27 applies, the jury shall	This suggestion is beyond the scope of the invitation to comment. The committee will consider the suggestion for additional information about a partial eviction process under Code of Civil Procedure section 1174.27 during the next release cycle.

Instruction(s)	Commenter	Comment	Committee Response
		reference Verdict Form No. 4303 for partial eviction procedures."	
		CACI No. 4328: Directions for Use **A. Comments Regarding: Use of Additional Definitions** We suggest the Council add language that more clearly defines the documentation requirements detailed in this defense. Particularly, the Council should consider adding definitions of the terms "court order" and "law enforcement report", as each term encompasses various documents that a tenant may present when asserting this defense. Code of Civil Procedure section 1161.3(a)(2) clearly defines these terms to avoid ambiguity when interpreting the documentation requirements. Additionally, we suggest language that details who qualifies as a "health practitioner" under the Code of Civil Procedure. Currently, the Directions for Use explains who may serve as a qualified third party for the purposes of providing documentation of abuse. However, this section fails to include the detailed definition of "health practitioner" used in Code Civ. Proc. § 1161.3(a)(3). Again, the Code of Civil Procedure provides these detailed definitions to avoid ambiguity in the interpretation of this affirmative defense, and as such, the definitions should be included in the Directions for Use. **1. Recommended language:** Based on the reasons outlined above, we recommend the following text to clearly define terms used in the proposed instructions. "The acts of abuse or violence must be documented in a court order, law enforcement report, qualified third-party statement,	The committee does not agree that adding statutory definitions for "court order," "law enforcement report," and "health practitioner"—which are just three of many defined terms in the statute—would be of significant assistance to CACI users. The Directions for Use cite the relevant subdivisions of the statute that contain the additional definitions suggested. The committee, however does recommend adding a sentence to the Directions for Use about the potential need to instruct the jury about the type of documentation at issue. The committee also recommends adding a sentence similar to what CLA suggested about a factual dispute relating to whether a third party is qualified.

Instruction(s)	Commenter	Comment	Committee Response
		or any other form of documentation or evidence that reasonably verifies that the abuse or violence occurred (element 2). (Code Civ. Proc., § 1161.3(a)(2)(A), (B), (C), (D).) A "court order" is a temporary restraining order, emergency protective order, or protective order lawfully issued within the last 180 days that protects the tenant, the tenant's immediate family member, or the tenant's household member from abuse or violence. (Code Civ. Proc., § 1161.3(a)(2)(A).) A "law enforcement report" is a copy of a written report, written within the last 180 days, by a peace officer acting in their official capacity that states the tenant, the tenant's immediate family member, or the tenant's household member filed a report alleging that they are a victim of abuse or violence. (Code Civ. Proc., § 1161.3(a)(2)(B).) Further, a "qualified third party" is a health practitioner, domestic violence counselor, a sexual assault counselor, or a human trafficking caseworker, or a victim of violent crime advocate. (Code Civ. Proc., § 1161.3(a)(6).) A "health practitioner" can be any of the following: "a physician and surgeon, osteopathic physician and surgeon, psychiatrist, psychologist, registered nurse, licensed clinical social worker, licensed marriage and family therapist, or licensed professional clinical counselor." (Code Civ. Proc., § 1161.3 (a)(3).)"	
		Addition of Verdict Form No. 4303. Currently, the proposed CACI instructions do not reference the partial eviction procedures outlined in Code Civ. Proc. § 1174.27. As the fact finders of the court, the jury must also decide whether to order a partial eviction if the person who committed the abuse or violence is a tenant in residence of the same residential dwelling unit. As such, we suggest the addition of a Verdict Form to detail the steps necessary in making this partial eviction determination.	FVAP's comment is beyond the scope of the invitation to comment. The committee nevertheless thanks FVAP for drafting a proposed verdict form for the novel partial eviction process under Code of Civil Procedure section 1174.27. The

Instruction(s)	Commenter	Comment	Committee Response
		Deviating from standard unlawful detainer procedures, a partial eviction is a judgment entered against one or more defendant(s) and for plaintiff and the other defendant(s). The defendant(s) who have judgment entered for them retain possession of the dwelling unit. Without a verdict form for this novel partial eviction procedure, the jury may be more likely to inadvertently issue judgements that are contrary to law or difficult to implement. To ensure that a jury has proper instructions usable for partial evictions, we make the below recommendations for the proposed new Verdict Form. **1. Recommended language:** --Begin Form-- **Title: Verdict Form No. 4303 Partial Eviction Procedure—Affirmative Defense—Tenant Was Victim of Abuse or Violence (Code Civ. Proc., §§ 1161.3 and 1174.27)** We answer the questions submitted as follows: 1. Does plaintiff's complaint include a cause of action based on an act of abuse or violence against a tenant, a tenant's immediate family member, or a tenant's household member? _____ 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 a defendant assert the Code of Civil Procedure section 1161.3 affirmative eviction defense? _____ yes _____no If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form. 3. Did [name of defendant who raised the defense] give plaintiff a court order, law enforcement report, statement of a qualified third party or other evidence or documentation that	committee will consider the proposed new verdict form during the next release cycle.

Instruction(s)	Commenter	Comment	Committee Response
		evidences that they (or their immediate family member, or their household member) experienced abuse or violence? _____ 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. Name the defendant that perpetrated the abuse or violence. Perpetrator of abuse or violence: _____ 5. Is the perpetrator of abuse or violence a tenant in residence in the same dwelling unit as the defendant who asserted the defense? _____ 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. Is the perpetrator of abuse or violence guilty of unlawful detainer based on an act of abuse or violence against another defendant, or that defendant's immediate family member or household member? _____ 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. Is [name of defendant who raised the defense] guilty of an unlawful detainer on any other grounds? _____ yes _____no 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.	

Instruction(s)	Commenter	Comment	Committee Response
		Directions for Use This verdict form is based on CACI No. 4328, Affirmative Defense–Tenant was Victim of Abuse or Violence (Code Civ. Proc., § 1161.3). See also the Directions for Use for that instruction to determine if a partial eviction is proper. Question 3 incorporates the documentation requirements set forth in CACI No. 4328, see those instructions to determine whether the proper documentation was provided. If a partial eviction is ordered using the above verdict form, the following will apply per Code Civ. Proc. § section 1172.47: • A partial eviction will be issued ordering the removal of the perpetrator of abuse or violence and ordering the perpetrator to be immediately removed and barred from the dwelling unit. (Code Civ. Proc., § 1172.47 (f)(1)(A).) • The tenancy will not be terminated. (Code Civ. Proc., § 1172.47 (f)(1)(A).) • The landlord is ordered to change the locks and provide the remaining occupants with the new key. (Code Civ. Proc., § 1172.47 (f)(1)(B).) • The defendant raising the affirmative defense and any other occupant not found guilty of an unlawful detainer shall not be guilty of an unlawful detainer and may not be named in any judgment in favor of the landlord. (Code Civ. Proc., § 1172.47 (e)(1).) • Only the defendant who is found to be the perpetrator of abuse or violence, and thus guilty of unlawful detainer, will be held liable to the landlord for any amount associated with the unlawful detainer such as holdover damages, court costs, lease termination fees and attorney's fees. (Code Civ. Proc., § 1172.47 (f)(2).) • The court may permanently bar the perpetrator of abuse or violence from entering any portion of the residential premises. (Code Civ. Proc., § 1172.47 (f)(3)(A).)	

Instruction(s)	Commenter	Comment	Committee Response
		• The court may order as an express condition of the tenancy that the remaining occupants shall not give permission to or invite the perpetrator of abuse or violence to live in the dwelling unit. (Code Civ. Proc., § 1172.47 (f)(3)(B).) • The court must consider custody or visitation orders or arrangements and any other factor that may necessitate the temporary reentry of the perpetrator of abuse or violence. (Code Civ. Proc., § 1172.47 (f)(4).) -- End Form --	
	Bruce Greenlee Attorney (ret.) Richmond	1. Opening paragraph; [*specify crime*]: I think that the first time that you use this device in the instruction it should be expanded to say where to find one of these crimes since it has to be one of three specific crimes, not just any old crime. Revise: [*specify crime from Code of Civil Procedure section 1946.7(a)(6)-(8*)]	The committee agrees that adding information to the bracketed "specify crime" would improve clarity. The committee recommends adding a reference to Civil Code section 1946.7 to the bracket.
		2. Element 3: Why delete "also?" It emphasizes the crucial point that the exception applies only if the perpetrator and the victim are living together in the same rental unit.	The committee does not share the commenter's understanding of the affirmative defense.
		3. Is "perpetrator" a word not readily familiar to your average juror? Using it instead of "person who committed" would shorten things a bit.	The committee does not see improved clarity in the suggested change.
		4. DforU third paragraph: Change "victim of violent crime advocate" to "advocate for victims of violent crime." "Advocate" is the key word and it needs to lead rather than "victim."	"A victim of violent crime advocate" is the statutory terminology of Civil Code section 1946.7. (Civ. Code, § 1946.7(h)(5); see Code

Instruction(s)	Commenter	Comment	Committee Response
			Civ. Proc., § 1161.3(a)(2).) The committee prefers to use the precise statutory language in this sentence.
		5. "DforU last paragraph: Dwelling unit" is still not defined. So the question of whether a building with multiple apartments is a single dwelling unit under this statute remains unresolved. I would not delete this pondering.	As the Directions for Use indicate, a process for partial eviction of only the perpetrator of the violence or abuse now exists because of recent legislation (Sen. Bill 1017 (Stats. 2002; ch. 558); see Code Civil Proc., § 1174.27.) The note's pondering no longer has applicability.
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
	Public Law Center by Jonathan Bremen et al. Santa Ana	**Proposed Instruction 4328 Affirmative Defense—Tenant Was Victim of Abuse or Violence (Code Civ. Proc., § 1161.3)** In general, PLC supports the adoption of proposed CACI 4328, as it reflects the key changes to Code of Civil Procedure section 1161.3. Notably, the "[or] a member of [name of defendant]'s immediate family" language throughout the instructions clarifies that under current law, the crime victim/survivor does not need to be a tenant or a member of	The committee acknowledges PLC's general support for the changes to CACI No. 4328. See below for the committee's responses to PLC's substantive comments.

Instruction(s)	Commenter	Comment	Committee Response
		the tenant's household. In addition, the proposed revisions in the "Directions for Use" generally appear helpful to a jury. Nonetheless, PLC recommends several minor modifications to the instructions to better align with the changes in law and to protect the rights of our clients.	
		A. Paragraph 3 PLC urges the Judicial Council to remove this paragraph from the section listing what the defendant must prove. Code of Civil Procedure section 1161.3 does not require the tenant to prove that the perpetrator of violence is not a tenant to raise this as an affirmative defense. Rather, if the defendant raises this as an affirmative defense and the landlord responds with evidence that the perpetrator of violence is a tenant in the same household, the court must proceed under Code of Civil Procedure section 1174.27. Thus, PLC suggests removing Paragraph 3 and inserting the language from Paragraph 3 in Section 2, which begins with, "Even if Defendant proves all of the above, Plaintiff may still evict Defendant if . . . ."	The committee agrees that Code of Civil Procedure section 1174.27 applies if the perpetrator is a tenant of the same residential dwelling unit. The committee also agrees that the court must proceed using that process. The committee has addressed this circumstance in the Directions for Use. The committee does not believe it is appropriate to remove element 3 from the instruction, which addresses when the perpetrator is not a tenant of the residential dwelling unit under Code of Civil Procedure section 1161.3.
		B. Paragraph 4	The committee does not agree that it is necessary to restate in element 4

Instruction(s)	Commenter	Comment	Committee Response
		Paragraph 4 could be more clearly written to reflect that the violence or abuse can be against a tenant, tenant's immediate family member, or a member of tenant's household. Accordingly, PLC recommends the following revision to Paragraph 4: **That [***name of plaintiff***] filed this lawsuit because of the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime***]** against a tenant, a tenant's immediate family member, or a tenant's household member.	against whom the acts of violence were committed; element 1 states that requirement. Elements 2–4 build on element 1.
		C. Section 2 Section 2, which specifies what the Plaintiff must prove to move forward with an eviction, does not accurately reflect the exception to the affirmative defense as detailed in Code of Civil Procedure section 1161.3. Particularly, the proposed instruction state, "after at least three days' notice, [*name of defendant*] voluntarily permitted or consented to the presence on the property of the person who committed the abuse or violence." However, Code of Civil Procedure section 1161.3, subdivision (b)(2)(B)(ii) indicates that a plaintiff must give the defendant "*a three-day notice*" banning the abuser from the property. Currently, the proposed revisions may lead to ambiguity when interpreting the three-day notice requirement, as a juror may interpret "*three days' notice*" to mean that a plaintiff's verbal notice is sufficient for this exception. To avoid misinterpretation of the exception to this affirmative defense, the proposed instruction should be amended to include the unambiguous language from Code of Civil Procedure section 1161.3, subdivision (b)(2)(B)(ii).	The committee agrees and recommends revising elements 2 and 3 of the second part of the instruction as suggested by FVAP above.

Instruction(s)	Commenter	Comment	Committee Response
		The proposed instruction fails to contemplate the partial eviction procedure as referenced in Code of Civil Procedure section 1161.3 and detailed in section 1174.27. Jurors must understand how these two code sections interact when deciding whether to order a partial eviction. Although the "Directions for Use" briefly mention partial eviction procedures, the instructions themselves should reference partial evictions, so jurors understand how to proceed when a defendant asserts that another defendant living in the dwelling unit was the perpetrator of abuse or violence. Thus, PLC suggests adding a brief reference to the partial eviction procedures set forth in Code of Civil Procedure section 1174.27.	The committee has addressed the partial eviction procedure for when the perpetrator is a tenant of the same residential dwelling unit in the Directions for Use. The committee will consider developing a new instruction and/or whether to propose further revisions in the next release.
		D. Directions For Use PLC recommends several amendments to the third paragraph of the "Directions for Use" section. First, PLC suggests defining or including examples of a "court order." Code of Civil Procedure section 1161.3, subdivision (a)(2)(A) lists a temporary restraining order, emergency protective order, or other protective order. Including such examples would provide clarity to jurors, especially those without legal knowledge. Second, PLC suggests clarifying or defining "law enforcement report." The proposed instruction states, "[t]he acts of abuse or violence must be documented in a court order, law enforcement report, qualified third party statement . . . ." However, according to Code of Civil Procedure section 1161.3, not all the details of the abuse or violence need to be documented in a police report. Rather, it is sufficient that the police report states that the tenant, the tenant's immediate family member, or the tenant's household member has filed a report alleging that they are a victim of abuse or violence. (Code Civ. Proc., § 1161.3,	The Directions for Use alert users to special circumstances involving the instruction; they are not read to a jury. The committee therefore believes the explanation for element 2 in the Directions for Use alerts users to the types of evidence that may document abuse or violence and that adding additional definitions or examples about court orders or law enforcement reports is not necessary. The committee, however,

Instruction(s)	Commenter	Comment	Committee Response
		subd. (a)(2)(B).) Thus, PLC recommends changing the beginning of the sentence so that it reads, "Evidence of abuse or violence must be documented . . . ." Alternatively, PLC recommends defining "law enforcement report."	recommends refining the paragraph, as suggested, to read "Evidence of…", rather than "The acts of…".
	Western Center on Law & Poverty by Katherine J. G. McKeon Attorney, Housing Team Los Angeles	The following comments are submitted by the Western Center on Law & Poverty regarding the Judicial Council's ("Council") proposed changes to the California Civil Jury Instructions ("CACI") number 4328, "Affirmative Defense—Tenant Was Victim of Abuse or Violence (Code Civ. Proc., § 1161.3)". As a designated support center, Western Center provides technical assistance and litigation support to legal service providers across the state of California on a wide variety of housing matters, including unlawful detainer procedures and practices. Western Center also sponsors and supports legislature in the State legislature, advocating for strong, clear, and enforceable eviction protections for low-income and vulnerable communities.	See below for the committee's responses to Western Center on Law & Poverty's substantive comments.
		I. Comments Regarding: Draft Jury Instructions The second half of CACI instructions No. 4328 do not accurately reflect the exception to the affirmative defense as detailed in Code Civ. Proc., § 1161.3. Particularly, the proposed revisions state that the plaintiff must have given defendant "at least three days' notice" requiring that defendant not allow the person who committed abuse or violence back to the property. However, Code Civ. Proc., § 1161.3 (b)(2)(B)(ii) uses clear language indicating that a plaintiff must give the defendant "a three-day notice" banning the perpetrator of abuse	The committee agrees and recommends revising elements 2 and 3 of the second half of the instruction as suggested by FVAP above.

Instruction(s)	Commenter	Comment	Committee Response
		from the property. Currently, the proposed revisions may lead to ambiguity when interpreting the three-day notice requirement, as a juror may interpret "three days' notice" to mean that a plaintiff may give verbal notice, thus satisfying this exception to the statute and allowing an unlawful detainer to proceed. Thus, the draft jury instructions should be amended to include the unambiguous language that Code Civ. Proc., § 1161.3 (b)(2)(B)(ii) uses to avoid misinterpretation of the exception to this affirmative defense. Currently, the proposed CACI instructions fail to contemplate the partial eviction procedure as referenced in Code Civ. Proc., § 1161.3 and as detailed in Code Civ. Proc., § 1174.27. Jurors must understand how these two code sections interact when deciding whether to order a partial eviction. Although the Directions for Use briefly mention partial eviction procedures, the instructions themselves should reference partial evictions for jurors to understand what occurs when a defendant asserts that another defendant living in the dwelling unit was the perpetrator of abuse or violence. Thus, we suggest brief language be added to reference the partial eviction procedures detailed in Code Civ. Proc., § 1174.27.	The committee has addressed the partial eviction procedure for when the perpetrator is a tenant of the same residential dwelling unit in the Directions for Use. The committee will consider developing a new instruction and/or whether to propose further revisions in the next release.
		II. Comments Regarding: Directions for Use We suggest the Council add language that more clearly defines the documentation requirements detailed in this defense. Particularly, the Council should consider adding definitions of the terms "court order" and "law enforcement report", as each term encompasses various documents that a tenant may present when asserting this defense. Additionally, we suggest language that details who qualifies as a "health practitioner" under the Code of Civil Procedure. Code of Civil Procedure sections	The Directions for Use alert users to special circumstances involving the instruction. The committee does not believes that adding additional definitions or examples about court orders, law enforcement reports, or who qualifies

Instruction(s)	Commenter	Comment	Committee Response
		1161.3 (a)(2) and (a)(3) clearly define these terms to avoid ambiguity when interpreting the documentation requirements.	as a health practitioner is necessary. The committee, however does recommend adding a sentence to the Directions for Use about the potential need to instruct the jury about the type of documentation at issue. The committee also recommends adding, as suggested by CLA (above), a sentence similar to what CLA suggested about a factual dispute relating to whether a third party is qualified.
		III. Addition of Verdict Form for Partial Evictions Currently, the proposed CACI instructions do not reference the partial eviction procedures outlined in Code Civ. Proc., § 1174.27. As the fact finders of the court, the jury must also decide whether to order a partial eviction if the person who committed the abuse or violence is a tenant in residence of the same residential dwelling unit. As such, we suggest the addition of a Verdict Form to detail the steps necessary in making this partial eviction determination. Deviating from standard unlawful detainer procedures, a partial eviction is a judgment entered against one or more defendant(s) and for plaintiff and the other defendant(s). The defendant(s) who have judgment entered for them retain possession of the	This comment is beyond the scope of the invitation to comment. The committee will consider drafting a new verdict form for the novel partial eviction procedure during the next release cycle.

Instruction(s)	Commenter	Comment	Committee Response
		dwelling unit. Without a verdict form for this novel partial eviction procedure, the jury may be more likely to inadvertently issue judgements that are contrary to law or difficult to implement. To ensure that a jury has proper instructions usable for partial evictions, we recommend the addition of a new Verdict Form. IV. Conclusion In conclusion, we express our appreciation for the Judicial Council's work on updating these important instructions to reflect new protections for tenants under state law, and for the Council's consideration of these comments. Thank you for your consideration.	No further response required.
5009. Predeliberation Instructions (Revise)	California Lawyers Association by Reuben A. Ginsburg Chair, Jury Instructions Committee Sacramento	Agree.	No response required.
	Civil Justice Association of California by Lucy Chinkezian Counsel Sacramento	**Concluding Instructions** **CACI 5009. Predeliberation Instructions** ***Directions for Use*** As drafted, this instruction can cause confusion. The revision refers the reader back to certain "bracketed" language that should not be read if a court reporter is not being used to record the trial proceedings. However, there are *multiple* bracketed clauses in the paragraph to which the revision refers, and not all of them should be stricken if there is no court reporter. Therefore, it may not be obvious what to read in the scenario where there is no court reporter, but where not all exhibits were sent back.	The committee agrees that clarity could be improved by refining the two sentences in the Directions for Use.

Instruction(s)	Commenter	Comment	Committee Response
		We recommend breaking up these concepts into separate instructions that can be more clearly stricken when appropriate, as follows: Do not read the bracketed portion of the fifth paragraph that refers to reading back testimony if a court reporter is not being used to record the trial proceedings. Consider ~~deleting the bracketed reference to providing exhibits if the court sends all admitted exhibits into the jury room~~ deleting the entire bracketed portion of the fifth paragraph if the proceedings are not being recorded and the court sends all admitted exhibits into the jury room.	The committee recommends revising the Directions for Use in a manner similar to what has been suggested.
		We further recommend changing the instruction itself to include the word "also" within the brackets, as the word is unnecessary in the event the bracketed language is not read. The revision would look as follows: [Sometimes jurors disagree or have questions about the evidence or about what the witnesses said in their testimony. If that happens, you may [ask to have testimony read back to you] [or] [ask to see any exhibits admitted into evidence that have not already been provided to you].] Also,] jurors may need further explanation about the laws that apply to the case.	The committee recommends bracketing [Also, jurors/Jurors] in the fifth paragraph of the instruction in the event that both optional introductory sentences are not given.
		For the forgoing reasons, CJAC respectfully asks that the jury instructions be amended to address the concerns that we have raised. [*Commenter's contact information omitted.]	No further response required.
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
	California Lawyers Association	Agree.	No response required.

Instruction(s)	Commenter	Comment	Committee Response
5012. Introduction to Special Verdict Form (Revise)	by Reuben A. Ginsburg Chair, Jury Instructions Committee Sacramento		
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
Verdict Forms Globally (Revise)	Bruce Greenlee Attorney (ret.) Richmond	1. It could be clearer in the Invitation to Comment just exactly what global change is proposed. Assume it's the deletion of "that you are ready to present your verdict in the courtroom." And I assume that some change in the law or procedure now gives the job of reading the verdict to the judge rather than the foreperson. If that comes from a statute or a Rule of Court, the statute or rule needs to be in the [Sources and Authority].	The committee will clearly describe the global change in its Advisory Committee Report to the Judicial Council. The commenter correctly notes that the committee has proposed deleting the final clause of the final sentence of all verdict forms: "that you are ready to present your verdict in the courtroom." This change is being made on the suggestion of a trial court judge. It is intended to avoid discouraging jurors from agreeing to serve as a presiding juror on the mistaken belief that they will have to present orally their verdict in open court.

Instruction(s)	Commenter	Comment	Committee Response
VF-300. Breach of Contract (Revise)	California Lawyers Association by Reuben A. Ginsburg Chair, Jury Instructions Committee Sacramento	Agree.	No response required.
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
VF-400. Negligence—Single Defendant (Revise)	California Lawyers Association by Reuben A. Ginsburg Chair, Jury Instructions Committee Sacramento	Agree.	No response required.
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
All CACI instructions	Family Violence Appellate Project by Gloria Carolina Chong Housing Attorney Oakland	We also recommend making some further changes to all instructions to increase their readability and accessibility for jurors and litigants with limited English proficiency and limited literacy skills. We recommend the following: ▪ Avoid long sentences with many clauses separated by commas. Although this type of sentence structure is common in legal writing, it often leads to confusion and misunderstanding for people without a legal background. These sentences should be broken down into separate, shorter sentences. ▪ Use a variety of text formatting options throughout the forms. Individuals with limited English proficiency or limited literacy	FVAP's broader comments about the Judicial Council of California's Civil Jury Instructions (CACI) are beyond the scope of the invitation to comment. Ease of understanding by jurors, without sacrificing accuracy, is the primary goal of CACI. To that end, the committee will consider

Instruction(s)	Commenter	Comment	Committee Response
		skills would be able to understand and appropriately utilize the forms if the key words/phrases and instructions stood out from the rest of the text using italics, bold font, underlining, larger font size, ALL CAPS, and creative combinations thereof. We also encourage the Council to generally revise the CACI instructions to make them more accessible in form and content to pro per litigants and jurors. The language should be accessible for a party with a 7th or 8th grade reading level to understand. Visually, the Civil Jury Instructions should be structured to support reading comprehension for those with limited literacy skills. It is our hope that this is the beginning of a longer dialogue about ways the California courts can be more accessible to tenants, particularly survivors of domestic violence and tenants representing themselves. In conclusion, we express our appreciation for the Judicial Council's work on updating these important instructions to reflect new protections for tenants under state law, and for the Council's consideration of these comments. [*Commenter's contact information omitted.]	FVAP's comments directed to increasing readability and accessibility in future releases.