JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 20-128
For business meeting on May 15, 2020

Title
Jury Instructions: Civil Jury Instructions (Release 37)

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

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

Agenda Item Type
Action Required

Effective Date
May 15, 2020

Date of Report
March 30, 2020

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Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approving for publication the new and revised civil jury instructions prepared by the committee. These revisions bring the instructions up to date with developments in the law over the previous six months. On Judicial Council approval, the instructions will be published in the official midyear supplement to the 2020 edition of the *Judicial Council of California Civil Jury Instructions* (*CACI*).

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective May 15, 2020, approve for publication the following civil jury instructions prepared by the committee:

1. Revisions to 46 instructions and verdict forms: CACI Nos. 113, 420, 440, 1100, VF-1100, 1102, VF-1201, 1305, VF-2506A, VF-2506B, VF-2506C, VF-2507A, VF-2507B, VF-2507C, VF-2508, 2511, 2521C, 2522C, 2540, 2545, 2560, 2561, 2705, VF-3012, 3020, 3050, 3053, VF-3501, 3704, 3903C, 3903D, 3904A, 4106, 4300, 4301, 4303, 4304, 4305, 4306, 4307, 4308, 4309, 4325, 4575, VF-4602, and 4603;

2. The addition of 7 new instructions: CACI Nos. 118, 1812, 1813, 1814, 3906, 4920, and 4921; and

3. A revision to the User Guide.

A table of contents and the proposed new and revised civil jury instructions are attached at pages 8–202.

Relevant Previous Council Action

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

This is release 37 of *CACI*. The council approved release 36 at its November 2019 meeting.

Analysis/Rationale

A total of 41 instructions, 12 verdict forms, and one revision to the User Guide are presented in this release. The Judicial Council's Rules Committee has also approved changes to 169 additional instructions under a delegation of authority from the council to the Rules Committee.[2]

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

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

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

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

New instructions

CACI No. 118, *Personal Pronouns*. The California Department of Fair Employment and Housing requested that all CACI instructions be revised to permit users to select nonbinary pronouns for persons who identify as neither male nor female. CACI instructions had included many male/female pronoun options.[3] The committee has expanded these bracketed options to include "nonbinary pronoun" in each bracketed personal pronoun set. No. 118 is a new pretrial instruction addressing the use of personal pronouns.

CACI Nos. 1812–1814. New instructions on the Computer Data Access and Fraud Act. The Computer Data Access and Fraud Act, Penal Code section 502, authorizes a civil action for certain violations. The committee anticipates that litigation arising from these violations will increase as Californians rely on computers and online services to conduct more of their day-to-day activities. The committee therefore proposes three new instructions in the Right of Privacy series: No. 1812, *Comprehensive Computer Data and Access Fraud Act—Essential Factual Elements*; No. 1813, *Definition of "Access"*; and No. 1814, *Damages for Investigating Violations of Comprehensive Computer Data and Access Fraud Act*.

CACI No. 3906, *Lost Earnings and Lost Earning Capacity—Jurors Not to Consider Race, Ethnicity, or Gender (Economic Damage)*. The Legislature in Senate Bill 41 (Stats. 2019, ch. 136), effective January 1, 2020, added section 3361 to the Civil Code. That section provides, "Estimations, measures, or calculations of past, present, or future damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death shall not be reduced based on race, ethnicity, or gender." (Civ. Code, § 3361.) The committee agreed that the new provision warranted a new instruction advising jurors not to take race, ethnicity, or gender in to account when determining a reasonable amount of lost earnings or lost earning capacity. Cross-references to the new instruction were added to the Directions for Use of two other instructions in the Damages series: No. 3903C, *Past and Future Lost Earnings (Economic Damage)*, and No. 3903D, *Lost Earning Capacity (Economic Damage)*.

CACI Nos. 4920 and 4921. New instructions on Wrongful Foreclosure. The committee began thinking about instructions in this area a few years ago after two court of appeal decisions in *Majd v. Bank of America, N.A.*[4] and *Miles v. Deutsche Bank National Trust Co.*[5] Based on these cases and more recent authority, the committee proposes adding two instructions to the Real

[3] E.g., "he/she," "his/her," "him/her."

[4] (2015) 243 Cal.App.4th 1293.

[5] (2015) 236 Cal.App.4th 394.

Property Law series addressing (1) the essential factual elements of a wrongful foreclosure claim and (2) when tender of payment is excused.

Revised instructions

CACI No. 440, *Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*. Assembly Bill 392 (Stats. 2019, ch. 170), effective January 1, 2020, amended Penal Code section 835a, which is the basis for this negligence instruction. The statutory amendments principally relate to the use of deadly force by a peace officer, so the Directions for Use now note that the instruction may require modifications for cases involving the use of deadly force by a peace officer. Commenters encouraged the committee to make further revisions to No. 440 or to draft new instructions based on the new provisions of section 835a; the committee will continue to monitor developments in this area and consider revisions to this instruction (or new instructions) in future release cycles.

CACI No. 1102, *Definition of "Dangerous Condition."* Based on public comments received during the last release cycle concerning No. 1125, *Conditions on Adjacent Property*, the committee determined that the instructions in Dangerous Condition of Public Property series would be clearer if the Directions for Use for No. 1102 cross-referenced the most recent addition to the series of instructions.

CACI Nos. 2521C and 2522C; VF-2506A, VF-2606B, VF-2506C, VF-2607A, VF-2507B, and VF-2507C (Fair Employment and Housing Act series—harassment). The revisions to these instructions follow from the committee's work in release 35.[6] In that prior release, the committee first revised several work environment harassment instructions in the Fair Employment and Housing Act series based on Government Code section 12923, effective January 1, 2019. (See Sen. Bill 1300; Stats. 2018, ch. 955.)

The CACI instructions had used the terms "hostile or abusive" to express a workplace environment infected with harassing conduct. However, Government Code section 12923(a) says, "[t]he Legislature hereby declares that harassment creates a hostile, offensive, oppressive, or intimidating work environment." Section 12923(b) states, "A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has … created an intimidating, hostile, or offensive working environment." To give effect to these provisions, the committee agreed to add "intimidating, offensive, and oppressive" to the adjectives "hostile or abusive," and to remove "unwanted" because if conduct is harassing it is, by definition, unwanted. The committee also

[6] The council approved release 35 in July 2019. (See Judicial Council of Cal., Rep. (June 19, 2019), available at *https://jcc.legistar.com/View.ashx?M=F&ID=7510624&GUID=72448D53-2E72-446A-A970-0FFF29D770A3*.

changed the title of these instructions to "Work Environment Harassment"—a minor change that removed "Hostile" as a modifier.

In this release, the committee has made those same changes to other work environment harassment instructions in the series that it did not revise in release 35, and has also concluded that section 12923(b) supports the elimination of the concept "widespread" from the instructions and verdict forms for sexual favoritism claims.

CACI No. 2561, *Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship*. This instruction had used a cross-reference to No. 2545, *Disability Discrimination—Affirmative Defense—Undue Hardship*. The Directions for Use advised users to modify the disability discrimination instruction by replacing "disability" with "religious observance." The committee took this approach based on the view that the law is the same for both disability and religious creed discrimination.[7] Public comments in the last release cycle noted, however, that while the undue hardship factors are the same in both contexts, Government Code section 12940(*l*)(1) also requires employers to "explore any available reasonable alternative means of accommodating the religious belief or observance" short of an undue hardship. To give effect to the statutory language in subdivision (*l*), the committee has now drafted a separate undue hardship instruction for religious creed discrimination that is derived from No. 2545.

CACI No. 3904A, *Present Cash Value*. In *Lewis v. Ukran*,[8] the court held that the party seeking a reduction of future damages to present cash value bears the burden of presenting expert evidence of an appropriate calculation, including the appropriate discount rate, to enable the fact finder to make a rational determination. The committee revised the instruction to reflect this requirement. The instruction includes two alternative paragraphs depending on the circumstances. The first alternative is for when a party seeks a reduction and bears the burden of establishing it with expert evidence. The second alternative is for when the parties stipulate to a present cash value adjustment without expert evidence.

CACI Nos. 4300, 4301, 4303, 4304, 4305, 4306, 4307, 4308, 4309, and 4325 (Unlawful Detainer series). The Tenant Protection Act of 2019 (Assem. Bill 1482; Stats. 2019, ch. 597), effective January 1, 2020, added notice and "just cause" requirements to certain residential real property tenancies. The recentness of the legislation and its breadth is such that the committee has not yet proposed any substantive revisions to the instructions in the Unlawful Detainer series. Instead, the committee's revisions in this release note the existence of the act in the Directions

[7] Gov. Code, § 12940(*l*)(1); see Gov. Code, § 12926(u).

[8] (2019) 36 Cal.App.5th 886, 896.

for Use and/or Sources and Authority, and they advise users of the possible need to modify the instructions in light of the new legislation, if necessary.

CACI No. 4603, *Whistleblower Protection—Essential Factual Elements*. The committee added a whistleblower's actual disclosure of information to element 2, which was inadvertently omitted from the instruction. (Lab. Code, § 1102.5(b).) The committee also added a note to the Directions for Use for claims under Labor Code section 1102.5(c) based on *Nejadian v. County of Los Angeles*.[9] The Court of Appeal in *Nejadian* held that the plaintiff must show that the activity the plaintiff refused to participate in would result in a violation of or noncompliance with a statute, rule, or regulation, which is a legal determination that the court is required to make.

User Guide: Personal pronouns. In the last release, the committee took a first step to further the goals of the Gender Recognition Act (Sen. Bill 179; Stats. 2019, ch. 853), which declares that it is the policy of the State of California that intersex, transgender, and nonbinary people are entitled to full legal recognition and equal treatment under the law. The committee added in release 36 a note to the User Guide advising that the pronoun options in *CACI* (e.g., "he/she") were not intended to be limiting. In this release, the committee has added "nonbinary pronoun" to the bracketed personal pronoun options found throughout *CACI*, and the User Guide now acknowledges the expanded options and the need to use correct personal pronouns or an individual's name.

Policy implications

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

Comments

The proposed additions and revisions to *CACI* circulated for comment from January 19 through March 2, 2020. Comments were received from 12 different commenters. Some submitted comments on multiple instructions, and some commented on only a single instruction.

No single instruction generated a large number of comments.

The committee evaluated all comments and revised some of the instructions in light of the comments received. A chart summarizing the comments received on all instructions and the committee's responses is attached at pages 203–245.

Alternatives considered

Rules 2.1050(d) and 10.58(a) of the California Rules of Court require the committee to update, revise, and add topics to *CACI* on a regular basis and to submit its recommendations to the council for approval. There are no alternative actions for the committee to consider.

[9] (2019) 40 Cal.App.5th 703, 719.

Fiscal and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish the 2020 edition of *CACI* and pay royalties to the Judicial Council. Other licensing agreements with other publishers provide additional royalties.

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

Attachments

1. Jury instructions, at pages 8–202
2. Chart of comments, at pages 203–245

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113. Bias

Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against ~~any~~ parties~~y~~ or witnesses because of ~~his or her~~their disability, gender, gender identity, gender expression, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [*insert any other impermissible form of bias***]].**

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

New June 2010; Revised December 2012, May 2020

Sources and Authority

- Conduct Exhibiting Bias Prohibited. Standard 10.20(a)(2) of the California Standards of Judicial Administration.
- Judge Must Perform Duties Without Bias. Canon 3(b)(5) of the California Code of Judicial Ethics.

Secondary Sources

Witkin, California Procedure (5th ed. 2008) Trial, § 132

1 California Trial Guide, Unit 10, *Voir Dire Examination*, §§ 10.03[1], 10.21[2], 10.50, 10.80, 10.100 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 6, *Jury Selection*, § 6.21

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118. Personal Pronouns

One of the [parties/witnesses/attorneys/*specify other participant in the case***] in this case uses the personal pronouns [***specify the person's pronouns***]. You may hear the judge and attorneys refer to [***name of person***] using the pronouns: [***specify the person's pronouns***].**

New May 2020

Directions for Use

It is the policy of the State of California that intersex, transgender, and nonbinary people are entitled to full legal recognition and equal treatment under the law. In accordance with this policy, attorneys and courts should take affirmative steps to ensure that they are using correct personal pronouns. To further this policy, these instructions have been expanded to include "nonbinary pronoun" wherever appropriate. Although the advisory committee acknowledges a trend for the singular use of "they," "their," and "them," the committee also recognizes these pronouns have plural denotations with the potential to confuse jurors. For clarity in the jury instructions, the committee recommends using an individual's name rather than a personal nonbinary pronoun (such as "they") if the pronoun could result in confusion.

The court should consult with the attorneys in the case before reading this instruction to the jury. The court should also consult with the individual whose pronouns are being discussed to ensure the court acts in a way that protects the individual's dignity and privacy.

Sources and Authority

- Gender Recognition Act. Stats. 2019, ch. 853 (SB 179).
- "Sex" Defined. Gov. Code, § 12926(r)(2).
- "Gender Expression" Defined. Cal. Code Regs., tit. 2, § 11030(a).
- "Gender Identity" Defined. Cal. Code Regs., tit. 2, § 11030(b).

Secondary Sources

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420. Negligence per se: Rebuttal of the Presumption of Negligence—(Violation Excused)

A violation of a law is excused if [*name of plaintiff/name of defendant*] proves that one of the following is true:

(a) **The violation was reasonable because of [*name of plaintiff/defendant*]'s [*specify type of "incapacity"*]; [or]**

(b) **Despite using reasonable care, [*name of plaintiff/name of defendant*] was not able to obey the law; [or]**

(c) **[*Name of plaintiff/name of defendant*] faced an emergency that was not caused by [his/her/*nonbinary pronoun*] own misconduct; [or]**

(d) **Obeying the law would have involved a greater risk of harm to [*name of plaintiff/defendant*] or to others; [or]**

(e) **[*Other reason excusing or justifying noncompliance*.]**

New September 2003; Revised May 2020

Directions for Use

The burden of proof shifts from the party asserting a negligence per se claim to the party claiming an excuse for violating a law. (*Baker-Smith v. Skolnick* (2019) 37 Cal.App.5th 340, 347 [249 Cal.Rptr.3d 514].) ~~Subparagraph~~ Factor (b), regarding an attempt to comply with the applicable statute or regulation, should not be given ~~where~~ if the evidence does not show such an attempt. (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 423 [94 Cal.Rptr. 49].) ~~Subparagraph~~ Factor (b) should be used only in special cases because it relies on the concept of due care to avoid a charge of negligence per se. (*Casey v. Russell* (1982) 138 Cal.App.3d 379, 385 [188 Cal.Rptr. 18].)

Sources and Authority

- Rebuttal of Presumption of Negligence per se. Evidence Code section 669(b)(1).
- ~~The language of section 669(b)(1) appears to be based on the following Supreme Court holding:~~ "In our opinion the correct test is whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." (*Alarid v. Vanier* (1958) 50 Cal.2d 617, 624 [327 P.2d 897].)
- "[T]he presumption of negligence codified in Evidence Code section 669, subdivision (a), may be rebutted by proof that '[t]he person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who

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desired to comply with the law.' " (*Taulbee v. EJ Distribution Corp.* (2019) 35 Cal.App.5th 590, 597 [247 Cal.Rptr.3d 538, 544].)

- "An excuse instruction is improper unless special circumstances exist." (*Baker-Smith, supra,* 37 Cal.App.5th at p. 345.)
-

"The Restatement Second of Torts illustrates the types of situations which may justify or excuse a violation of the statute: [¶] '(a) [T]he violation is reasonable because of the actor's incapacity [e.g., a small child runs into the street without looking, in violation of statute requiring pedestrians to look both ways before crossing]; [¶]
'(b) [H]e neither knows nor should know of the occasion for compliance;
[¶] '(c) [H]e is unable after reasonable diligence or care to comply [e.g., a statute provides that railroads must keep fences clear of snow. A heavy blizzard covers the fences with snow and, acting promptly and reasonably, the railroad company is unable to remove all the snow for 3 days. Someone crosses the fence on the snow mound and is injured. The violation of the statute is excused];
[¶] '(d) [H]e is confronted by an emergency not due to his own misconduct [e.g., swerving into left lane to avoid child suddenly darting into the road];
[¶] '(e) [C]ompliance would involve a greater risk of harm to the actor or to others.'
Thus, in emergencies or because of some unusual circumstances, it may be difficult or impossible to comply with the statute, and the violation may be excused." (*Casey, supra,* 138 Cal.App.3d at p. 384, internal citations omitted.)~~In *Casey v. Russell* (1982) 138 Cal.App.3d 379 [188 Cal.Rptr. 18], the court held that an instruction that tracked the language of section 669(b)(1) was erroneous because it "[did] not adequately convey that there must be some special circumstances which justify violating the statute." (*Id.* at p. 385.) The court's opinion cited section 288A of the Restatement Second of Torts for a list of the types of emergencies or unusual circumstances that may justify or excuse a violation of the statute:~~

~~(a) The violation is reasonable because of the actor's incapacity;~~

~~(b) He neither knows nor should know of the occasion for compliance;~~

~~(c) He is unable after reasonable diligence or care to comply;~~

~~(d) He is confronted by an emergency not due to his own misconduct;~~

~~(e) Compliance would involve a greater risk of harm to the actor or to others.~~

- ~~According to the Restatement comment, this list of circumstances is not meant to be exclusive~~.

- "To determine whether excuse could be a defense in a negligence per se case, California law weighs the benefits and burdens of accident precautions." (*Baker-Smith, supra,* 37 Cal.App.5th at p. 345.)

Secondary Sources

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6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~871~~1002–~~896~~1028

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.28-1.31

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, § 3.13 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.81 (Matthew Bender)

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440. Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements

A law enforcement officer may use reasonable force to [arrest/detain] a person when the officer has reasonable cause to believe that that person has committed or is committing a crime. However, the officer may use only that degree of force necessary to accomplish the [arrest/detention].

[*Name of plaintiff***] claims that [***name of defendant***] used unreasonable force in [arresting/detaining] [him/her/*nonbinary pronoun*]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] used force in [arresting/detaining] [***name of plaintiff***];**

2. **That the amount of force used by [***name of defendant***] was unreasonable;**

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

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

In deciding whether [*name of defendant***] used unreasonable force, you must consider ~~all of~~ the totality of the circumstances of the [arrest/detention] and determine what force a reasonable [***insert type of ~~peace~~ officer***] in [***name of defendant***]'s position would have used under the same or similar circumstances. "Totality of the circumstances" means all facts known to the officer at the time, including the conduct of [***name of defendant***] and [***name of plaintiff***] leading up to the use of force. Among the factors to be considered are the following:**

(a) Whether [*name of plaintiff***] reasonably appeared to pose an immediate threat to the safety of [***name of defendant***] or others;**

(b) The seriousness of the crime at issue; [and]

(c) Whether [*name of plaintiff***] was actively resisting [arrest/detention] or attempting to avoid [arrest/detention] by flight[; and/.]**

[(d) [*Name of defendant***]'s tactical conduct and decisions before using ~~[deadly]~~ force on [***name of plaintiff***].]**

New June 2016; Revised May 2020

Directions for Use

Use this instruction if the plaintiff makes a negligence claim under state law arising from the force used

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in effecting an arrest or detention. Such a claim is often combined with a claimed civil rights violation under 42 United States Code section 1983 (See CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*.) It might also be combined with a claim for battery. See CACI No. 1305, *Battery by Peace Officer*. For additional authorities on excessive force by a law enforcement officer, see the Sources and Authority to these two CACI instructions.

For cases involving the use of deadly force by a peace officer, Penal Code section 835a may require modifications to the instruction.

Factors (a), (b), and (c) are often referred to as the "*Graham* factors." (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are to be applied under California negligence law. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506].) They are not exclusive (see *Glenn v. Wash. County* (9th Cir. 2011) 661 F.3d 460, 467–468.); additional factors may be added if appropriate to the facts of the case. If negligence, civil rights, and battery claims are all involved, the instructions can be combined so as to give the *Graham* factors only once. A sentence may be added to advise the jury that the factors apply to all three claims.

Give optional factor (d) if the officer's conduct leading up to the need to use force is at issue. Liability can arise if the earlier tactical conduct and decisions show, as part of the totality of circumstances, that the ultimate use of force was unreasonable. In this respect, California negligence law differs from the federal standard under the Fourth Amendment. (*Hayes v. County of San Diego* (2014) 57 Cal. 4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].)

Sources and Authority

- Legislative Findings re Use of Force by Law Enforcement. Penal Code section 835a(a).
- Use of Objectively Reasonable Force to Arrest. ~~California~~ Penal Code section 835a(b).
- When Peace Officer Need Not Retreat. Penal Code section 835a(d).
- Definitions. Penal Code section 835a(e).

- "Consistent with these principles and the factors the high court has identified, the federal court in this case did not instruct the jury to conduct some abstract or nebulous balancing of competing interests. Instead, as noted above, it instructed the jury to determine the reasonableness of the officers' actions in light of 'the totality of the circumstances at the time,' including 'the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape.' The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law. Moreover, California's civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the high court has identified and that the federal court's instructions in this case set forth. (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1305.) Thus, plaintiffs err in arguing that the federal and state standards of reasonableness differ in that the former involves a fact finder's balancing of competing interests." (*Hernandez, supra,* 46 Cal.4th at p. 514, internal citation omitted.)

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- "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of ' "the nature and quality of the intrusion on the individual's Fourth Amendment interests" ' against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra,* 490 U.S. at p. 396, internal citations omitted.)

- "The most important of these [*Graham* factors, above] is whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553].)

- "Plaintiff must prove unreasonable force as an element of the tort." (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272 [74 Cal.Rptr.2d 614].)

- " ' "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. … [T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. …" ' In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required." (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527–528 [89 Cal.Rptr.3d 801], internal citations omitted.)

- " '[A]s long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the "most reasonable" action or the conduct that is the least likely to cause harm and at the same time the most likely to result in the successful apprehension of a violent suspect, in order to avoid liability for negligence.' " (*Hayes, supra,* 57 Cal.4th at p. 632.)

- ~~"A police officer's use of deadly force is reasonable if ' " 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.' …" …' " (*Brown, supra,* 171 Cal.App.4th at p. 528.)~~

- ~~"Law enforcement personnel's tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability. Such liability can arise, for example, if the tactical conduct and decisions show, as part of the totality of circumstances, that the use of deadly force was unreasonable." (*Hayes, supra,* 57 Cal.4th at p. 639.)~~

- "The California Supreme Court did not address whether decisions before non-deadly force can be

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actionable negligence, but addressed this issue only in the context of 'deadly force.' " (*Mulligan v. Nichols* (9th Cir. 2016) 835 F.3d 983, 991, fn. 7.)

Secondary Sources

5 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § 496~~424~~

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.24 seq. (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.22 (Matthew Bender)

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1100. Dangerous Condition on Public Property—Essential Factual Elements (Gov. Code, § 835)

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was harmed by a dangerous condition of [*name of defendant*]'s property. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] owned [or controlled] the property;**

2. **That the property was in a dangerous condition at the time of the ~~incident~~injury;**

3. **That the dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred;**

4. **[That negligent or wrongful conduct of [*name of defendant*]'s employee acting within the scope of ~~his or her~~ employment created the dangerous condition;]**

   [or]

   [That [*name of defendant*] had notice of the dangerous condition for a long enough time to have protected against it;]

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

6. **That the dangerous condition was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised October 2008, June 2016, May 2020

Directions for Use

For element 4, choose either or both options depending on whether liability is alleged under Government Code section 835(a), 835(b), or both.

See also CACI No. 1102, *Definition of "Dangerous Condition,"* and CACI No. 1103, *Notice*.

Sources and Authority

- Liability of Public Entity for Dangerous Condition of Property. Government Code section 835.
- Actual Notice. Government Code section 835.2(a).
- Constructive Notice. Government Code section 835.2(b).
- Definitions. Government Code section 830.

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- "“The Government Claims Act (§ 810 et seq.; the Act) 'is a comprehensive statutory scheme that sets forth the liabilities and immunities of public entities and public employees for torts.' Section 835 … prescribes the conditions under which a public entity may be held liable for injuries caused by a dangerous condition of public property. Section 835 provides that a public entity may be held liable for such injuries 'if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, [and] that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred.' In addition, the plaintiff must establish that either: (a) '[a] negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition,' or (b) '[t]he public entity had . . . notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.' " (*Cordova v. City of Los Angeles* (2015) 61 Cal.4th 1099, 1104 [190 Cal.Rptr.3d 850, 353 P.3d 773], internal citations omitted.)

- "[A] public entity may be liable for a dangerous condition of public property even when the immediate cause of a plaintiff's injury is a third party's negligent or illegal act (such as a motorist's negligent driving), if some physical characteristic of the property exposes its users to increased danger from third party negligence or criminality. Public entity liability lies under section 835 when some feature of the property increased or intensified the danger to users from third party conduct." (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1457−1458 [192 Cal.Rptr.3d 376], internal citation omitted.)

- "Subdivisions (a) and (b) of section 835 obviously address two different types of cases. However, what distinguishes the two types of cases is not simply whether the public entity has notice of the dangerous condition. Instead, what distinguishes the two cases in practice is who created the dangerous condition. Because an entity must act through its employees, virtually all suits brought on account of dangerous conditions created by the entity will be brought under subdivision (a). In contrast, subdivision (b) can also support suits based on dangerous conditions not created by the entity or its employees." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 836 [15 Cal.Rptr.2d 679, 843 P.2d 624].)

- "[T]he res ipsa loquitur presumption does not satisfy the requirements for holding a public entity liable under section 835, subdivision (a). Res ipsa loquitur requires the plaintiff to show only (1) that the accident was of a kind which ordinarily does not occur in the absence of negligence, (2) that the instrumentality of harm was within the defendant's exclusive control, and (3) that the plaintiff did not voluntarily contribute to his or her own injuries. Subdivision (a), in contrast, requires the plaintiff to show that an employee of the public entity 'created' the dangerous condition; in view of the legislative history … ,the term 'created' must be defined as the sort of involvement by an employee that would justify a presumption of notice on the entity's part." (*Brown, supra,* 4 Cal.4th at p. 836.)

- "Focusing on the language in *Pritchard, supra,* 178 Cal. App. 2d at page 256, stating that where the public entity 'has itself created the dangerous condition it is per se culpable,' plaintiff argues that the negligence that section 835, subdivision (a), refers to is not common law negligence, but something that exists whenever the public entity creates the dangerous condition of property. We disagree. If the Legislature had wanted to impose liability whenever a public entity created a dangerous condition, it

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would merely have required plaintiff to establish that an act or omission of an employee of the public entity within the scope of his employment created the dangerous condition. Instead, section 835, subdivision (a), requires the plaintiff to establish that a '*negligent or wrongful* act or omission of an employee of the public entity within the scope of his employment created the dangerous condition.' (Italics added.) Plaintiff's interpretation would transform the highly meaningful words 'negligent or wrongful' into meaningless surplusage, contrary to the rule of statutory interpretation that courts should avoid a construction that makes any word surplusage." (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1135 [72 Cal.Rptr.3d 382, 176 P.2d 654], original italics, internal citation omitted.)

- "In order to recover under Government Code section 835, it is not necessary for plaintiff to prove a negligent act *and* notice; either negligence *or* notice will suffice." (*Curtis v. State of California* (1982) 128 Cal.App.3d 668, 693 [180 Cal.Rptr. 843], original italics.)

- "A public entity may not be held liable under section 835 for a dangerous condition of property that it does not own or control." (*Goddard v. Department of Fish & Wildlife* (2015) 243 Cal.App.4th 350, 359 [196 Cal.Rptr.3d 625].)

- "For liability to be imposed on a public entity for a dangerous condition of property, the entity must be in a position to protect against or warn of the hazard. Therefore, the crucial element is not ownership, but rather control." (*Mamola v. State of California ex rel. Dept. of Transportation* (1979) 94 Cal.App.3d 781, 788 [156 Cal.Rptr. 614], internal citation omitted.)

- "Liability for injury caused by a dangerous condition of property has been imposed when an unreasonable risk of harm is created by a combination of defect in the property and acts of third parties. However, courts have consistently refused to characterize harmful third party conduct as a dangerous condition-absent some concurrent contributing defect in the property itself." (*Hayes v. State of California* (1974) 11 Cal.3d 469, 472 [113 Cal.Rptr. 599, 521 P.2d 855], internal citations omitted.)

- "[P]laintiffs in this case must show that a dangerous condition of property--that is, a condition that creates a substantial risk of injury to the public--proximately caused the fatal injuries their decedents suffered as a result of the collision with [third party]'s car. But nothing in the statute requires plaintiffs to show that the allegedly dangerous condition also caused the third party conduct that precipitated the accident." (*Cordova, supra,* 61 Cal. 4th at p. 1106.)

- "The existence of a dangerous condition is ordinarily a question of fact but 'can be decided as a matter of law if reasonable minds can come to only one conclusion.' " (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1347 [75 Cal.Rptr.3d 168].)

Secondary Sources

5 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Torts, §§ ~~249~~301–~~285~~341

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-C, *Immunity From Liability*, ¶ 6:91 et seq. (The Rutter Group)

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Hanning et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, *Liability For "Dangerous Conditions" Of Public Property*, ¶ 2:2785 et seq. (The Rutter Group)

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.9–12.55

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, § 464.81 (Matthew Bender)

19A California Points and Authorities, Ch. 196*, Public Entities*, § 196.11 (Matthew Bender)

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1102. Definition of "Dangerous Condition" (Gov. Code, § 830(a))

A "dangerous condition" is a condition of public property that creates a substantial risk of injury to members of the general public when the property [or adjacent property] is used with reasonable care and in a reasonably foreseeable manner. A condition that creates only a minor risk of injury is not a dangerous condition. [Whether the property is in a dangerous condition is to be determined without regard to whether [*name of plaintiff*]/ [or] [*name of third party*] exercised or failed to exercise reasonable care in [his/her/*nonbinary pronoun*] use of the property.]

New September 2003; Revised June 2010, May 2020

Directions for Use

Give this instruction if a plaintiff claims that a condition of public property creates a substantial risk of injury to the plaintiff as a user of public or adjacent property when the property was used with reasonable care and in a reasonably foreseeable manner. (Gov. Code, § 830(a).) For claims involving conditions on the adjacent property that are alleged to have contributed to making the public property dangerous, give CACI No. 1125, *Conditions on Adjacent Property*.

Give the last sentence if comparative fault is at issue. It clarifies that comparative fault does not negate the possible existence of a dangerous condition. (See *Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131 [231 Cal.Rptr. 598].)

Sources and Authority

- "Dangerous Condition" Defined. Government Code section 830(a).
- No Liability for Minor Risk. Government Code section 830.2.
- "The Act defines a' "[d]angerous condition" 'as 'a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.' Public property is in a dangerous condition within the meaning of section 835 if it 'is physically damaged, deteriorated, or defective in such a way as to foreseeably endanger those using the property itself.' " (*Cordova v. City of L.A.* (2015) 61 Cal.4th 1099, 1105 [190 Cal.Rptr.3d 850, 353 P.3d 773], internal citations omitted.)
- "A public entity is not, without more, liable under section 835 for the harmful conduct of third parties on its property. But if a condition of public property 'creates a substantial risk of injury even when the property is used with due care', a public entity 'gains no immunity from liability simply because, in a particular case, the dangerous condition of its property combines with a third party's negligent conduct to inflict injury.' " (*Cordova, supra*, 61 Cal.4th at p. 1105, internal citations omitted.)
- "In general, '[whether] a given set of facts and circumstances creates a dangerous condition is usually

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a question of fact and may only be resolved as a question of law if reasonable minds can come to but one conclusion.' " (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 810 [205 Cal.Rptr. 842, 685 P.2d 1193], internal citation omitted.)

- "An initial and essential element of recovery for premises liability under the governing statutes is proof a dangerous condition existed. The law imposes no duty on a landowner—including a public entity—to repair trivial defects, or 'to maintain [its property] in an absolutely perfect condition.' " (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 566 [78 Cal.Rptr.3d 910], internal citations omitted.)

- "The status of a condition as 'dangerous' for purposes of the statutory definition does *not* depend on whether the plaintiff or other persons were actually exercising due care but on whether the condition of the property posed a substantial risk of injury to persons who *were* exercising due care." (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 768 [140 Cal.Rptr.3d 722], original italics.)

- "[T]he fact the particular plaintiff may not have used due care is relevant only to his [or her] comparative fault and not to the issue of the presence of a dangerous condition." (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1459 [192 Cal.Rptr.3d 376].)

- "The negligence of a plaintiff-user of public property ... is a defense which may be asserted by a public entity; it has no bearing upon the determination of a 'dangerous condition' in the first instance. … If, however, it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a)." (*Fredette, supra,* 187 Cal.App.3d at p. 131, internal citation omitted.)

- "Even though it is foreseeable that persons may use public property without due care, a public entity may not be held liable for failing to take precautions to protect such persons." (*Fredette, supra,* 187 Cal.App.3d at p. 132, internal citation omitted.)

- "With respect to public streets, courts have observed 'any property can be dangerous if used in a sufficiently improper manner. For this reason, a public entity is only required to provide roads that are safe for reasonably foreseeable careful use. [Citation.] "If [] it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a)." [Citation.]' " (*Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, 1183 [83 Cal.Rptr.3d 372], internal citations omitted.)

- "A public entity is not charged with anticipating that a person will use the property in a criminal way, here, driving with a 'willful or wanton disregard for safety of persons or property ....' " (*Fuller v. Department of Transportation* (2019) 38 Cal.App.5th 1034, 1042 [251 Cal.Rptr.3d 549].)

- "[A] prior dangerous condition may require street lighting or other means to lessen the danger but the absence of street lighting is itself not a dangerous condition." (*Mixon v. Pacific Gas & Electric Co.* (2012) 207 Cal.App.4th 124, 133 [142 Cal.Rptr.3d 633].)

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- "Although public entities may be held liable for injuries occurring to reasonably foreseeable users of the property, even when the property is used for a purpose for which it is not designed or which is illegal, liability may ensue only if the property creates a substantial risk of injury when it is used with due care. Whether a condition creates a substantial risk of harm depends on how the general public would use the property exercising due care, including children who are held to a lower standard of care. (§ 830.) The standard is an objective one; a plaintiff's particular condition ... , does not alter the standard." (*Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1466 [72 Cal.Rptr.2d 464], internal citations omitted.)

- "A public entity may be liable for a dangerous condition of public property even where the immediate cause of a plaintiff's injury is a third party's negligence if some physical characteristic of the property exposes its users to increased danger from third party negligence. 'But it is insufficient to show only harmful third party conduct, like the conduct of a motorist. " '[T]hird party conduct, by itself, unrelated to the condition of the property, does not constitute a "dangerous condition" for which a public entity may be held liable.' " … There must be a defect in the physical condition of the property and that defect must have some causal relationship to the third party conduct that injures the plaintiff. …' " (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1069–1070 [129 Cal.Rptr.3d 690], internal citation omitted.)

- "Nothing in the provisions of section 835, however, specifically precludes a finding that a public entity may be under a duty, given special circumstances, to protect against harmful criminal conduct on its property." (*Peterson, supra,* 36 Cal.3d at pp. 810–811, internal citations omitted.)

- "Two points applicable to this case are ... well established: first, that the location of public property, by virtue of which users are subjected to hazards on adjacent property, may constitute a 'dangerous condition' under sections 830 and 835; second, that a physical condition of the public property that increases the risk of injury from third party conduct may be a 'dangerous condition' under the statutes." (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 154 [132 Cal.Rptr.2d 341, 65 P.3d 807].)

- "[T]he absence of other similar accidents is 'relevant to the determination of whether a condition is dangerous.' But the city cites no authority for the proposition that the absence of other similar accidents is *dispositive* of whether a condition is dangerous, or that it compels a finding of nondangerousness absent other evidence." (*Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337, 1346 [107 Cal.Rptr.3d 730], original italics, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Torts, § ~~269~~321

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) § 12.15

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01[2][a] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California*

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Government Claims Act, § 464.81 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.11 (Matthew Bender)

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VF-1100. Dangerous Condition of Public Property

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] own [or control] the property?**
   ____ Yes ____ No

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

2. **Was the property in a dangerous condition at the time of the ~~incident~~injury?**
   ____ Yes ____ No

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

3. **Did the dangerous condition create a reasonably foreseeable risk that this kind of ~~incident~~ injury would occur?**
   ____ Yes ____ No

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

4. **[Did the negligent or wrongful conduct of [*name of defendant*]'s employee acting within the scope of ~~his or her~~ employment create the dangerous condition?]**

   [or]

   [Did [*name of defendant*] have notice of the dangerous condition for a long enough time for [*name of defendant*] to have protected against it?]
   ____ Yes ____ No

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

5. **Was the dangerous condition a substantial factor in causing harm to [*name of plaintiff*]?**
   ____ Yes ____ No

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

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

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, December 2016, May 2020

Directions for Use

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This verdict form is based on CACI No. 1100, *Dangerous Condition on Public Property—Essential Factual Elements*.

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

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional depending on the circumstances.

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

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

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VF-1201. Strict Products Liability—Design Defect—Affirmative Defense—Misuse or Modification

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?
____ Yes ____ No

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

2. Was the [*product*] [misused/ [or] modified] after it left [*name of defendant*]'s possession in a way that was so highly extraordinary that it was not reasonably foreseeable to [him/her/*nonbinary pronoun*/it]?
____ Yes ____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, skip question 3 and answer question 4.

3. Was the [misuse/ [or] modification] the sole cause of [*name of plaintiff*]'s harm?
____ Yes ____ No

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

[4. Is the [*product*] one about which an ordinary consumer can form reasonable minimum safety expectations?
____ Yes ____ No

If your answer to question 4 is yes, answer question 5. If your answer is no, skip question 5 and answer question 6.]

[5. Did the [*product*] fail to perform as safely as an ordinary consumer would have expected when used or misused in an intended or reasonably foreseeable way?
____ Yes ____ No

Regardless of your answer to question 5, answer question 6.]

[6. Did the ~~risk of the [*product*]'s design outweigh the~~ benefits of the [*product*]'s design outweigh the risks of the design?
____ Yes ____ No

If your answer to ~~either~~ question 5 ~~or question 6~~ is yes or your answer to question 6 is no, answer question 7. If you answered no to ~~both~~ question~~s~~ 5 and yes to question 6, stop here, answer no further questions, and have the presiding juror sign and date

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this form.]

7. Was the [*product*]'s design a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

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

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

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court

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attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised October 2004, April 2007, April 2009, December 2010, June 2011, December 2011, December 2014, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 1203, *Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements*, CACI No. 1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof*, and CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions 6 through 9 of CACI No. VF-1200, *Strict Products Liability—Manufacturing Defect—Comparative Fault at Issue*, may be added at the end.

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

This verdict form can be used in a case in which the jury will decide design defect under both the consumer expectation and the risk-benefit tests. If only the risk-benefit test is at issue, omit questions 4 and 5. If only the consumer expectation test is at issue, omit question 6. Modify the transitional language following questions 5 and 6 if only one test is at issue in the case. Include question 4 if the court has decided to give to the jury the preliminary question as to whether the consumer expectation test can be applied to the product at issue in the case. (See *Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1233–1234 [115 Cal.Rptr.3d 151].) An additional question may be needed if the defendant claims that the plaintiff's injuries were caused by some product other than the defendant's.

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

If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

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1305. Battery by Peace Officer—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] harmed [him/her/*nonbinary pronoun*] by using unreasonable force to [arrest [him/her/*nonbinary pronoun*]/prevent [his/her/*nonbinary pronoun*] escape/overcome [his/her/*nonbinary pronoun*] resistance/[*insert other applicable action*]]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] intentionally touched [*name of plaintiff*] [or caused [*name of plaintiff*] to be touched];**

2. **That [*name of defendant*] used unreasonable force to [arrest/prevent the escape of/overcome the resistance of/*insert other applicable action*] [*name of plaintiff*];**

3. **That [*name of plaintiff*] did not consent to the use of that force;**

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

5. **That [*name of defendant*]'s use of unreasonable force was a substantial factor in causing [*name of plaintiff*]'s harm.**

[A/An] [*insert type of peace officer*] may use reasonable force to arrest or detain a person when the officer ~~he or she~~ has reasonable cause to believe that that person has committed a crime. Even if the ~~[*insert type of peace officer*]~~ officer is mistaken, a person being arrested or detained has a duty not to use force to resist the ~~[*insert type of peace officer*]~~ officer unless the [*insert type of peace officer*] is using unreasonable force.

In deciding whether [*name of defendant*] used unreasonable force, you must determine the amount of force that would have appeared reasonable to [a/an] [*insert type of peace officer*] in [*name of defendant*]'s position under the same or similar circumstances. You should consider, among other factors, the following:

(a) The seriousness of the crime at issue;

(b) Whether [*name of plaintiff*] reasonably appeared to pose an immediate threat to the safety of [*name of defendant*] or others; and

(c) Whether [*name of plaintiff*] was actively resisting arrest or attempting to evade arrest.

[[A/An] [*insert type of peace officer*] who makes or attempts to make an arrest is not required to retreat or cease from ~~his or her~~ the officer's efforts because the person being arrested resists or threatens to ~~of the resistance or threatened~~ resist~~ance of the person being arrested~~.]

New September 2003; Revised December 2012, May 2020

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Directions for Use

For additional authorities on excessive force, see the Sources and Authority for CACI No. 440, *Unreasonable Force by Law Enforcement in Arrest or Other Seizure–Essential Factual Elements*, and CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*.

For cases involving the use of deadly force by a peace officer, Penal Code section 835a may require modifications to the instruction.

Sources and Authority

- Use of Objectively Reasonable Force to Arrest. ~~California~~ Penal Code section 835a.
- Duty to Submit to Arrest. ~~California~~ Penal Code section 834a.
- "Plaintiff must prove unreasonable force as an element of the tort." (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272 [74 Cal.Rptr.2d 614].)
- " ' "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. … [T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. …" ' In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required." (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527–528 [89 Cal.Rptr.3d 801], internal citations omitted.)
- "A police officer's use of deadly force is reasonable if ' " 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.' …" …' " (*Brown, supra,* 171 Cal.App.4th at p. 528.)
- "[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention ... ." (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)
- "[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer unless excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense." (*Evans, supra,* 22 Cal.App.4th at p. 331, internal citation omitted.)
- "Consistent with these principles and the factors the high court has identified, the federal court in this case did not instruct the jury to conduct some abstract or nebulous balancing of competing interests. Instead, as noted above, it instructed the jury to determine the reasonableness of the officers' actions in light of 'the totality of the circumstances at the time,' including 'the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape.' The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence

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law. Moreover, California's civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the high court has identified and that the federal court's instructions in this case set forth. (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1305.) Thus, plaintiffs err in arguing that the federal and state standards of reasonableness differ in that the former involves a fact finder's balancing of competing interests." (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Torts, § ~~424~~496

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.24 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, §§ 58.22, 58.61, 58.92 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.20 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 12:22 (Thomson Reuters)

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1812. Comprehensive Computer Data and Access Fraud Act—Essential Factual Elements (Pen. Code, § 502)

[*Name of plaintiff***] claims that [***name of defendant***] has violated the Comprehensive Computer Data and Access Fraud Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] is the [owner/lessee] of the [***specify computer, computer system, computer network, computer program, and/or data***];**

2. **That [***name of defendant***] knowingly [***specify one or more prohibited acts from Pen. Code, § 502(c), e.g., accessed [name of plaintiff]'s data on a computer, computer system, or computer network***];**

[3. **That [***name of defendant***]'s [***specify conduct from Pen. Code, § 502(c), e.g., use of the computer services***] was without [***name of plaintiff***]'s permission;]**

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

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

New May 2020

Directions for Use

Give this instruction for a claim under the Comprehensive Computer Data Access and Fraud Act (CDAFA). CDAFA makes civil remedies available to any person who suffers damage or loss by reason of the commission of certain computer-related offenses. (Pen. Code, § 502(c), (e)(1).)

For element 1, the court may need to define the technology (e.g., "computer network," "computer program or software," "computer system," or "data") or other statutory term depending on the facts and circumstances of the particular case. (See Pen. Code, § 502(b) [defining various terms].) For a definition of "access," see CACI No. 1813, *Definition of "Access."*

Some of the prohibited acts for element 2 may also require that the defendant do something specific with the access or that the defendant have a specific purpose. For example, if the defendant allegedly deleted or used plaintiff's computer data, it must have been done without permission and either to (a) devise or execute any scheme or artifice to defraud, deceive, or extort, or (b) wrongfully control or obtain money, property, or data. (See Pen. Code, § 502(c)(1).) Modify the instruction to include these elements where required.

Include element 3 regarding lack of permission depending on the violation(s) alleged. Lack of permission is a required element for violations of subdivisions (c)(1)–(7) and (c)(9)–(13), but not for violations of subdivisions (c)(8) and (c)(14). Modify element 3 accordingly. Delete element 3 for violations of the latter subdivisions.

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If plaintiff's claim involves a "government computer system" or a "public safety infrastructure computer system" and there is a factual dispute about the type of computer system involved, this instruction should be modified to add that issue as an element. (See Pen. Code, § 502(c)(10), (11), (12), (13), and (14).)

Sources and Authority

- Comprehensive Computer Data Access and Fraud Act. Penal Code section 502.

- "Penal Code section 502, subdivision (e)(1) permits a civil action to recover expenses related to investigating the unauthorized computer access." (*Verio Healthcare, Inc. v. Superior Court* (2016) 3 Cal.App.5th 1315, 1319–1321 [208 Cal.Rptr.3d 436].)

- "Four of the section 502, subdivision (c) offenses include access as an element. The provision under which [defendant] was charged does not. When different words are used in adjoining subdivisions of a statute that were enacted at the same time, that fact raises a compelling inference that a different meaning was intended. The Legislature's requirement of unpermitted access in some section 502 offenses and its failure to require that element in other parts of the same statute raise a strong inference that the subdivisions that do not require unpermitted access were intended to apply to persons who gain lawful access to a computer but then abuse that access." (*People v. Childs* (2013) 220 Cal.App.4th 1079, 1102 [164 Cal.Rptr.3d 287], internal citations omitted.)

- "[The CDAFA] does not require *unauthorized* access. It merely requires *knowing* access. What makes that access unlawful is that the person 'without permission takes, copies, or makes use of' data on the computer. A plain reading of the statute demonstrates that its focus is on unauthorized taking or use of information." (*United States v. Christensen* (9th Cir. 2015) 828 F.3d 763, 789, original italics, internal citations omitted.)

- "Because [defendant] had implied authorization to access [plaintiff]'s computers, it did not, at first, violate the [CDAFA]. But when [plaintiff] sent the cease and desist letter, [defendant], as it conceded, knew that it no longer had permission to access [plaintiff]'s computers at all. [Defendant], therefore, knowingly accessed and without permission took, copied, and made use of [plaintiff]'s data." (*Facebook, Inc. v. Power Ventures, Inc.* (9th Cir. 2016) 844 F.3d 1058, 1069.)

- "[T]aking data using a *method* prohibited by the applicable terms of use, when the taking itself generally is permitted, does not violate the CDAFA." (*Oracle USA, Inc. v. Rimini Street, Inc.* (9th Cir. 2018) 879 F.3d 948, 962, reversed in part on other grounds by *Rimini Street, Inc. v. Oracle USA, Inc.* (2019) – U.S. –, 139 S.Ct. 873, 881 [203 L.Ed.2d 180], original italics.)

Secondary Sources

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1813. Definition of "Access" (Pen. Code, § 502(b)(1))

The term "access" means to gain entry to, instruct, cause input to, cause output from, cause data processing with, or communicate with the logical, arithmetical, or memory function resources of a computer, computer system, or computer network.

A person can access a computer, computer system, or computer network in different ways. For example, access can be accomplished by sitting down at a computer and using the mouse and keyboard, or by using a wireless network or some other method or tool to gain remote entry.

New May 2020

Directions for Use

This instruction should be read with CACI No. 1812, *Comprehensive Computer Data and Access Fraud Act—Essential Factual Elements*, for claims that require that the defendant "access" a computer, computer system, or computer network. (See Pen. Code, § 502 (c)(1), (2), (4), (7), and (11).)

Sources and Authority

- "Access" Defined. Penal Code section 502(b)(1).

- "Underscoring that 'accessing' a computer's 'logical, arithmetical, or memory function' is different from the ordinary, everyday use of a computer to which people are accustomed when they speak of 'using' a computer, another subdivision criminalizes 'us[ing] or caus[ing] to be used computer services' without permission. Principles of statutory interpretation obligate us to give different meanings to the words 'use' and 'access' in order to avoid rendering either word redundant." (*Chrisman v. City of Los Angeles* (2007) 155 Cal.App.4th 29, 34 [65 Cal.Rptr.3d 701], internal citation and footnote omitted.)

- "Public access computer terminals are increasingly common in the offices of many governmental bodies and agencies, from courthouses to tax assessors. We believe subdivision (c)(7) was designed to criminalize unauthorized access to the software and data in such systems, even where none of the other illegal activities listed in subdivision (c) have occurred." (*People v. Lawton* (1996) 48 Cal.App.4th Supp. 11, 15 [56 Cal.Rptr.2d 521].)

Secondary Sources

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1814. Damages for Investigating Violations of Comprehensive Computer Data and Access Fraud Act (Pen. Code, § 502(e)(1))

To recover damages for money spent to investigate or verify whether [*name of plaintiff*]'s computer system, computer network, computer program, or data [was or was not/were or were not] altered, damaged, or deleted by [*name of defendant*]'s access, [*name of plaintiff*] must prove the amount of money reasonably and necessarily spent to conduct such an investigation.

New May 2020

Directions for Use

Give this instruction for violations of the Comprehensive Computer Data and Access Fraud Act in which there is evidence that the plaintiff spent money to investigate or verify the defendant's wrongful conduct. (See Pen. Code, § 502; CACI No. 1812, *Comprehensive Computer Data and Access Fraud Act—Essential Factual Elements*.) In some cases, it may be appropriate to tailor the instruction to specify the technology or data at issue (e.g., the name of a computer program or the plaintiff's data files).

For other damages instructions, see the Damages series, CACI Nos. 3900 et seq.

Punitive or exemplary damages are available for willful violations. (Pen. Code, § 502(e)(4).) For instructions on punitive damages, see CACI Nos. 3940–3949.

Sources and Authority

- Compensatory Damages. Penal Code section 502(e)(1).

Secondary Sources

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2511. Adverse Action Made by Decision Maker Without Animus (Cat's Paw)

In this case, the decision to [discharge/[*other adverse employment action*]] [*name of plaintiff*] was made by [*name of decision maker*]. Even if [*name of decision maker*] did not hold any [discriminatory/retaliatory] intent [or was unaware of [*name of plaintiff*]'s conduct on which the claim of retaliation is based], [*name of defendant*] may still be liable for [discrimination/retaliation] if [*name of decision maker*] followed a recommendation from or relied on facts provided by a supervisor who had [discriminatory/retaliatory] intent.

To succeed, [*name of plaintiff*] must prove~~s~~ both of the following:

1. **That [*name of plaintiff*]'s [*specify protected activity or attribute*] was a substantial motivating reason for [*name of supervisor*]'s [*specify acts of supervisor on which decision maker relied*]; and**

2. **That [*name of supervisor*]'s [*specify acts on which decision maker relied*] was a substantial motivating reason for [*name of decision maker*]'s decision to [discharge/[*other adverse employment action*]] [*name of plaintiff*].**

New December 2012; Revised June 2013, May 2020

Directions for Use

Give this instruction if the "cat's paw" rule is a factor in the case. Under the cat's paw rule, the person who actually took the adverse employment action against the employee was not acting out of any improper animus. The decision maker, however, acted on information provided by a supervisor who was acting out of discriminatory or retaliatory animus with the objective of causing the adverse employment action. The decision maker is referred to as the "cat's paw" of the person with the animus. (See *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 100 [16 Cal.Rptr.3d 717].)

The purpose of this instruction is to make it clear to the jury that they are not to evaluate the motives or knowledge of the decision maker, but rather to decide whether the acts of the supervisor with animus actually caused the adverse action. Give the optional language in the second sentence of the first paragraph in a retaliation case in which the decision maker was not aware of the plaintiff's conduct that allegedly led to the retaliation (defense of ignorance). (See *Reeves, supra,* 121 Cal.App.4th at pp. 106–108.)

Element 1 requires that the protected activity or attribute be a substantial motivating reason for the retaliatory acts. Element 2 requires that the supervisor's improper motive be a substantial motivating reason for the decision maker's action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

In both elements 1 and 2, all of the supervisor's specific acts need not be listed in all cases. Depending on the facts, doing so may be too cumbersome and impractical. If the specific acts are listed, the list should

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include all acts on which plaintiff claims the decision maker relied, not just the acts admitted to have been relied on by the decision maker.

Sources and Authority

- "This case presents the question whether an employer may be liable for retaliatory discharge when the supervisor who initiates disciplinary proceedings acts with retaliatory animus, but the cause for discipline is separately investigated and the ultimate decision to discharge the plaintiff is made by a manager with no knowledge that the worker has engaged in protected activities. We hold that so long as the supervisor's retaliatory motive was an actuating … cause of the dismissal, the employer may be liable for retaliatory discharge. Here the evidence raised triable issues as to the existence and effect of retaliatory motive on the part of the supervisor, and as to whether the manager and the intermediate investigator acted as tools or 'cat's paws' for the supervisor, that is, instrumentalities by which his retaliatory animus was carried into effect to plaintiff's injury." (*Reeves, supra,* 121 Cal.App.4th at p. 100.)

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

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

- "This concept—which for convenience we will call the 'defense of ignorance'—poses few analytical challenges so long as the 'employer' is conceived as a single entity receiving and responding to stimuli as a unitary, indivisible organism. But this is often an inaccurate picture in a world where a majority of workers are employed by large economic enterprises with layered and compartmentalized management structures. In such enterprises, decisions significantly affecting personnel are rarely if ever the responsibility of a single actor. As a result, unexamined assertions about the knowledge, ignorance, or motives of 'the employer' may be fraught with ambiguities, untested assumptions, and begged questions." (*Reeves, supra,* 121 Cal.App.4th at p. 108.)

- "Certainly a defendant does not conclusively negate the element of causation by showing only that some responsible actors, but not all, were ignorant of the occasion for retaliation." (*Reeves, supra,* 121 Cal.App.4th at p. 108.)

- "Here a rational fact finder could conclude that an incident of minor and excusable disregard for a supervisor's stated preferences was amplified into a 'solid case' of 'workplace violence,' and that this metamorphosis was brought about in necessary part by a supervisor's desire to rid himself of

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a worker who created trouble by complaining of matters the supervisor preferred to ignore. Since those complaints were protected activities under FEHA, a finder of fact must be permitted to decide whether these inferences should in fact be drawn." (*Reeves, supra,* 121 Cal.App.4th at p. 121.)

- "Our emphasis on the conduct of *supervisors* is not inadvertent. An employer can generally be held liable for the discriminatory or retaliatory actions of supervisors. The outcome is less clear where the only actor possessing the requisite animus is a nonsupervisory coworker." (*Reeves, supra*, 121 Cal.App.4th at p. 109 fn. 9, original italics, internal citation omitted.)

Secondary Sources

8 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Constitutional Law, §§ ~~921~~1025, ~~940~~1026, 1052, 1053

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶ 7:806.5 (The Rutter Group)

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37[3][a] (Matthew Bender)

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

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

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

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

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

3. ~~**That the sexual favoritism was widespread;**~~

~~4.~~ **That the sexual favoritism was severe or pervasive;**

4~~5~~. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the ~~widespread~~ sexual favoritism;**

5~~6~~. **That [***name of plaintiff***] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the ~~widespread~~ sexual favoritism;**

6~~7~~. **[***Select applicable basis of defendant's liability:***]**

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

[*or***]**

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

7~~8~~. **That [***name of plaintiff***] was harmed; and**

8~~9~~. **That the conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

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

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May 2020

Directions for Use

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

In element ~~7~~ 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.* If there are both employer and individual supervisor defendants (see CACI No. 2522C, *Work Environment Harassment—~~Widespread~~ Sexual Favoritism—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

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

Sources and Authority

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

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

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

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

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

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

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

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

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

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- "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*,

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§ 115.36 (Matthew Bender)

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

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

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

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

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

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

3. ~~**That the sexual favoritism was widespread;**~~

~~4.~~ **That the sexual favoritism was severe or pervasive;**

4~~5~~. **That a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the ~~widespread~~ sexual favoritism;**

5~~6~~. **That [*name of plaintiff*] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the ~~widespread~~ sexual favoritism;**

6~~7~~. **That [*name of defendant*] [participated in/assisted/ [or] encouraged] the sexual favoritism;**

7~~8~~. **That [*name of plaintiff*] was harmed; and**

8~~9~~. **That the conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Derived from former CACI No. 2522 December 2007; Revised December 2015, May 2018, July 2019, May 2020

Directions for Use

This instruction is for use in a hostile work environment case involving ~~widespread~~ sexual favoritism when the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521C, *Work Environment Harassment—~~Widespread~~ Sexual Favoritism—*

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

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

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

Sources and Authority

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

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

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

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

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

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

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

Secondary Sources

~~4~~ 3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

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

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

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

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

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

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

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2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

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

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

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

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

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

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

   [or]

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

   [or]

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

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

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

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

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

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defendant]**'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct].]**

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

Directions for Use

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

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

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

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

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

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

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

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

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

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

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

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

Sources and Authority

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

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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

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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

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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

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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.)

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

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

Secondary Sources

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

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

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

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

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

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

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2545. Disability Discrimination—Affirmative Defense—Undue Hardship

[*Name of defendant*] claims that accommodating [*name of plaintiff*]'s disability would create an undue hardship to the operation of [his/her/*nonbinary pronoun*/its] business. To succeed on this defense, [*name of defendant*] must prove that [an] accommodation[s] would create an undue hardship because it would be significantly difficult or expensive, ~~. In deciding whether an accommodation would create an undue hardship, you may consider the following factors:~~in light of the following factors:

- **a. The nature and cost of the accommodation;**
- **b. [*Name of defendant*]'s ability to pay for the accommodation;**
- **c. The type of operations conducted at the facility;**
- **d. The impact on the operations of the facility;**
- **e. The number of [*name of defendant*]'s employees and the relationship of the employees' duties to one another;**
- **f. The number, type, and location of [*name of defendant*]'s facilities; and**
- **g. The administrative and financial relationship of the facilities to one another.**

New September 2003; Revised November 2019, May 2020

Directions for Use

The issue of whether undue hardship is a true affirmative defense or whether the defendant only has the burden of coming forward with the evidence of hardship as a way of negating the element of plaintiff's case concerning the reasonableness of an accommodation appears to be unclear. (See *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 733 [214 Cal.Rptr.3d 113].)

For an instruction in the religious creed context, see CACI No. 2561, *Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship*.

Sources and Authority

- Employer Duty to Provide Reasonable Accommodation. Government Code section 12940(m).
- "Undue Hardship" Defined. Government Code section 12926(u).
- " 'Undue hardship' means 'an action requiring significant difficulty or expense, when considered in light of the following factors: [¶] (1) The nature and cost of the accommodation needed. [¶] (2) The

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overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility. [¶] (3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities. [¶] (4) The type of operations, including the composition, structure, and functions of the workforce of the entity. [¶] (5) The geographic separateness or administrative or fiscal relationship of the facility or facilities.' (§ 12926, subd. (u).) ' "Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case by case basis" ' and 'is a multi-faceted, fact-intensive inquiry.' " (*Atkins, supra, ~~v. City of Los Angeles~~ (2017)* 8 Cal.App.5th ~~696,~~ at p. 733 ~~[214 Cal.Rptr.3d 113]~~.)

- "[U]nder California law and the instructions provided to the jury, an employer must do more than simply assert that it had economic reasons to reject a plaintiff's proposed reassignment to demonstrate undue hardship. An employer must show *why* and *how* asserted economic reasons would affect its ability to provide a particular accommodation." (*Atkins, supra,* 8 Cal.App.5th at p. 734, original italics, internal citation omitted.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2250, 9:2345, 9:2366, 9:2367 (The Rutter Group)

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

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[4][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.35, 115.54, 115.100 (Matthew Bender)

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2560. Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements (Gov. Code, § 12940(*l*))

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her/*nonbinary pronoun*] by failing to reasonably accommodate [his/her/*nonbinary pronoun*] religious [belief/observance]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That [***name of plaintiff***] has a sincerely held religious belief that [***describe religious belief, observance, or practice***];**

4. **That [***name of plaintiff***]'s religious [belief/observance] conflicted with a job requirement;**

5. **That [***name of defendant***] knew of the conflict between [***name of plaintiff***]'s religious [belief/observance] and the job requirement;**

6. [**That [***name of defendant***] did not [explore available reasonable alternatives of accommodating [***name of plaintiff***], including excusing [***name of plaintiff***] from duties that conflict with [***name of plaintiff***]'s religious [belief/observance] or permitting those duties to be performed at another time or by another person, or otherwise reasonably accommodate] [***name of plaintiff***]'s religious [belief/observance];]**

   [*or*]

   [That [*name of defendant***] [terminated/refused to hire] [***name of plaintiff***] in order to avoid having to accommodate [***name of plaintiff***]'s religious [belief/observance];]**

7. **That [***name of plaintiff***]'s failure to comply with the conflicting job requirement was a substantial motivating reason for**

   [[*name of defendant***]'s decision to [discharge/refuse to hire/[***specify other adverse employment action***]] [***name of plaintiff***];]**

   [**or**]

   [[*name of defendant***]'s subjecting [him/her/*nonbinary pronoun*] to an adverse employment action;]**

   [**or**]

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[[his/her/*nonbinary pronoun*] constructive discharge;]

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

9. **That [*name of defendant*]'s failure to reasonably accommodate [*name of plaintiff*]'s religious [belief/observance] was a substantial factor in causing [his/her/*nonbinary pronoun*] harm.**

A reasonable accommodation is one that eliminates the conflict between the religious practice and the job requirement.

If more than one accommodation is reasonable, an employer satisfies its obligation to make a reasonable accommodation if it selects one of those accommodations in good faith.

New September 2003; Revised June 2012, December 2012, June 2013, November 2019, May 2020

Directions for Use

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

Regulations provide that refusing to hire an applicant or terminating an employee in order to avoid the need to accommodate a religious practice constitutes religious creed discrimination. (Cal. Code Regs., tit. 2, § 11062.) Give the second option for element 6 if the plaintiff claims that the employer terminated or refused to hire the plaintiff to avoid a need for accommodation.

Element 7 requires that the plaintiff's failure to comply with the conflicting job requirement be a substantial motivating reason for the employer's adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Read the first option if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 7 and also give CACI No. 2510, *"Constructive Discharge" Explained*.

Federal courts construing Title VII of the Civil Rights Act of 1964 have held that the threat of an adverse employment action is a violation if the employee acquiesces to the threat and foregoes religious observance. (See, e.g., *EEOC v. Townley Engineering & Mfg. Co.* (9th Cir. 1988) 859 F.2d 610, 614 fn. 5.) While no case has been found that construes the FEHA similarly, element 7 may be modified if the court agrees that this rule applies. In the first option, replace "decision to" with "threat to." Or in the second option, "subjecting [*name of plaintiff*] to" may be replaced with "threatening [*name of plaintiff*] with."

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Sources and Authority

- Religious Accommodation Required Under Fair Employment and Housing Act. Government Code section 12940(*l*).
- Scope of Religious Protection. Government Code section 12926(q).
- Scope of Religious Protection. Cal. Code Regs., tit. 2, § 11060(b).
- Reasonable Accommodation and Undue Hardship. Cal. Code Regs., tit. 2, § 11062.
- "In evaluating an argument the employer failed to accommodate an employee's religious beliefs, the employee must establish a prima facie case that he or she had a bona fide religious belief, of which the employer was aware, that conflicts with an employment requirement ... . Once the employee establishes a prima facie case, then the employer must establish it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship." (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370 [58 Cal.Rptr.2d 747], internal citation omitted.)
- "Any reasonable accommodation is sufficient to meet an employer's obligations. However, the employer need not adopt the most reasonable accommodation nor must the employer accept the remedy preferred by the employee. The reasonableness of the employer's efforts to accommodate is determined on a case by case basis ... . '[O]nce it is determined that the employer has offered a reasonable accommodation, the employer need not show that each of the employee's proposed accommodations would result in undue hardship.' '[W]here the employer has already reasonably accommodated the employee's religious needs, the ... inquiry [ends].' " (*Soldinger, supra,* 51 Cal.App.4th at p. 370, internal citations omitted.)
- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra,* 56 Cal.4th at p. 232, original italics.)
- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a 'but for' cause." (*Harris, supra,* 56 Cal.4th at p. 229.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 967, 1028, 1052, –1054

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair*

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Employment And Housing Act, ¶¶ 7:151, 7:215, 7:305, 7:610–7:611, 7:631–7:634, 7:641 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.52[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35[d], 115.91 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:71–2:73 (Thomson Reuters)

1 Lindemann and Grossman, Employment Discrimination Law (3d ed. 1996) Religion, pp. 219–224, 226–227; *id.* (2000 supp.) at pp. 100–101

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2561. Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship (Gov. Code, §§ 12940(*l*)(1), 12926(u))

~~**Please see CACI No. 2545, *Disability Discrimination—Affirmative Defense—Undue Hardship.***~~

[*Name of defendant*] claims that accommodating [*name of plaintiff*]'s [religious belief/religious observance] would create an undue hardship to the operation of [his/her/*nonbinary pronoun*/its] business.

To succeed on this defense, [*name of defendant*] must prove that [he/she/*nonbinary pronoun*/it] considered reasonable alternative options for accommodating the [religious belief/religious observance], including (1) excusing [*name of plaintiff*] from duties that conflict with [his/her/*nonbinary pronoun*] [religious belief/religious observance], (2) permitting those duties to be performed at another time or by another person, or (3) [*specify other reasonable accommodation*].

If you decide that [*name of defendant*] considered but did not adopt [a] reasonable accommodation[s], you must then decide if the accommodation[s] would have created an undue hardship because it would be significantly difficult or expensive, in light of the following factors:

a. The nature and cost of the accommodation;

b. [*Name of defendant*]'s ability to pay for the accommodation;

c. The type of operations conducted at the facility;

d. The impact on the operations of the facility;

e. The number of [*name of defendant*]'s employees and the relationship of the employees' duties to one another;

f. The number, type, and location of [*name of defendant*]'s facilities; and

g. The administrative and financial relationship of the facilities to one another.

New September 2003; Revoked December 2012; Restored and Revised June 2013; Revised November 2019, May 2020

Directions for Use

For religious beliefs and observances, the statute requires the employer (or other covered entity) to demonstrate that the employer explored certain means of accommodating the plaintiff, including two specific possibilities: (1) excusing the plaintiff from duties that conflict with the plaintiff's religious belief or observance or (2) permitting those duties to be performed at another time or by another person.

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(Gov. Code, § 12940(*l*)(1).) If there is evidence of another reasonable alternative accommodation, include it as a third means of accommodating the plaintiff.

~~"Undue hardship" for purposes of religious creed discrimination is defined in the same way that it is defined for disability discrimination. (Gov. Code, §§ 12940(*l*)(1); see Gov. Code, § 12926(u).) CACI No. 2545, *Disability Discrimination—Affirmative Defense—Undue Hardship*, may be given in religious accommodation cases also. Replace "disability" with "religious observance" in the first sentence of CACI No. 2545.~~

Sources and Authority

- Religious Accommodation Required Under Fair Employment and Housing Act. Government Code section 12940(*l*)(1).

- "Undue Hardship" Defined. Government Code section 12926(u).

- "If the employee proves a prima facie case and the employer fails to initiate an accommodation for the religious practices, the burden is then on the employer to prove it will incur an undue hardship if it accommodates that belief. '[T]he extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.' ..." (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 371 [58 Cal.Rptr.2d 747], internal citations omitted.)

- "It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far ... ¶¶. [¶¶] Alternatively, the Court of Appeals suggested that [the employer] could have replaced [plaintiff] on his Saturday shift with other employees through the payment of premium wages ... . To require [the employer] to bear more than a de minimus cost ... is an undue hardship. Like abandonment of the seniority system, to require [the employer] to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion." (*TWA v. Hardison* (1977) 432 U.S. 63, 81, 84 [97 S.Ct. 2264, 53 L.Ed.2d 113], footnote omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1025, 1026

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment and Housing Act*, ¶¶ 7:151, 7:215, 7:305, 7:610, 7:631, 7:640−7:641 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.52[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.35[2][a]–[c], 115.54, 115.91 (Matthew Bender)

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California Civil Practice: Employment Litigation §§ 2:71–2:73 (Thomson Reuters)

1 Lindemann and Grossman, Employment Discrimination Law (3d ed.) Religion, pp. 227–234 (2000 supp.) at pp. 100–105

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

We answer the questions submitted to us as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

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

Directions for Use

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

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

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

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

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

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

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

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

We answer the questions submitted to us as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

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

Directions for Use

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

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

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

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

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

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

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

We answer the questions submitted to us as follows:

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

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

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

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

3. **Was the sexual favoritism ~~widespread, and also~~ severe or pervasive?**
   ____ Yes ____ No

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

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

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

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

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

6. **Did [*name of defendant*] [or [his/her/*nonbinary pronoun*/its] supervisors or agents]**

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know or should [he/she/*nonbinary pronoun*/it/they] have known of the sexual favoritism?
____ Yes ____ No

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

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

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

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

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

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

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

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

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

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

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

Directions for Use

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

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

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521C. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6~~5~~ of the instruction.

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

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

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

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

We answer the questions submitted to us as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

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

Directions for Use

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

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

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

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

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

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

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

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

We answer the questions submitted to us as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TOTAL $ _____

Signed: _____

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Presiding Juror

Dated: _____

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

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

Directions for Use

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

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

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

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

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

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

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

We answer the questions submitted to us as follows:

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

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

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

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

3. **Was the sexual favoritism ~~widespread, and also~~ severe or pervasive?**
   ____ Yes ____ No

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

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

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

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

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

6. **Did [*name of defendant*] [participate in/assist/ [or] encourage] the sexual favoritism?**

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____ Yes ____ No

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

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

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

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

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

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Dated: _____

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

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

Directions for Use

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

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

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

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

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

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

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VF-2508. Disability Discrimination—Disparate Treatment

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] [an employer/[***other covered entity***]]?**
   ____ Yes ____ No

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

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**
   ____ Yes ____ No

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

3. **Did [***name of defendant***] [know that [***name of plaintiff***] had/treat [***name of plaintiff***] as if [he/she/***nonbinary pronoun***] had] [a history of having] [a] [***select term to describe basis of limitations, e.g., physical condition***] [that limited [***insert major life activity***]]?**
   ____ Yes ____ No

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

4. **Was [***name of plaintiff***] able to perform the position's essential job duties ~~[with reasonable accommodation] for [his/her] [***e.g., physical condition***]~~without an accommodation?**
   ____ Yes ____ No

   If your answer to question 4 is yes, then ~~answer~~ skip question 5 and answer question 6. If you answered no, then ~~stop here,~~ answer ~~no further~~ question 5~~s, and have the presiding juror sign and date this form~~.

5. **Was [***name of plaintiff***] able to perform the position's essential job duties with reasonable accommodation for [his/her/***nonbinary pronoun***] [***e.g., condition***]?**
   Yes No

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

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6. Did [*name of defendant*] [discharge/refuse to hire/[*other adverse employment action*]] [*name of plaintiff*]?
____ Yes ____ No

If your answer to question 6~~5~~ is yes, then answer question 7~~6~~. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7~~6~~. Was [*name of plaintiff*]'s [perceived] [history of [a]] [*e.g., physical condition*] a substantial motivating reason for [*name of defendant*]'s decision to [discharge/refuse to hire/[*other adverse employment action*]] [*name of plaintiff*]?
____ Yes ____ No

If your answer to question 7~~6~~ is yes, then answer question 8~~7~~. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8~~7~~. Was [*name of defendant*]'s [decision/conduct] a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question 8~~7~~ is yes, then answer question 9~~8~~. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9~~8~~. What are [*name of plaintiff*]'s damages?

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

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

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

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$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2007, December 2009, June 2010, December 2010, June 2013, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements.*

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

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

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2540. Depending on the facts of the case, other factual scenarios can be substituted in questions 3 and 6, as in elements 3 and 7~~6~~ of the instruction.

For question 3, select the claimed basis of discrimination: an actual disability, a history of a disability, a perceived disability, or a perceived history of a disability. For an actual disability, select "know that [*name of plaintiff*] had." For a perceived disability, select "treat [*name of plaintiff*] as if [he/she/*nonbinary pronoun*] had."

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

If specificity is not required, users do not have to itemize all the damages listed in question 9~~8~~ and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

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2705. Affirmative Defense to Labor Code, Unemployment Insurance Code, and Wage Order Violations—Plaintiff Was Not Defendant's Employee (Lab. Code, § 2750.3)

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

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

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

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

New November 2018; Revised May 2020

Directions for Use

This instruction may be needed if there is a dispute as to whether the defendant was the plaintiff's employer for purposes of a claim covered by the Labor Code, the Unemployment Insurance Code, or a California wage order. ~~The wage orders, which are constitutionally-authorized, quasi-legislative regulations that have the force of law, impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees.~~ (Lab. Code, § 2750.3; s~~S~~ee *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 913–914, & fn. 3 [232 Cal.Rptr.3d 1, 416 P.3d 1].) The defendant has the burden to prove independent contractor status. (Lab. Code, § 2750.3; *Dynamex~~Id.~~, supra,* 4 Cal.5th at p. 916.) This instruction may not be appropriate if the defendant claims independent contractor status based on one of the exceptions listed in Labor Code section 2750.3(b)–(h). For an instruction on employment status under the *Borello* test, see CACI No. 3704, *Existence of "Employee" Status Disputed*.

~~Under the wage orders, "to employ" has three alternative definitions. It means: (a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship. (*Martinez v. Combs* (2010) 49 Cal.4th 35, 64 [109 Cal.Rptr.3d 514, 231 P.3d 259].) In *Dynamex*, the Supreme Court found no need to address definition (a) on exercising control. It acknowledged that definition (c), the common law test, could be used, but held that the controlling test was definition (b), "to suffer or permit to work." It then defined this test, known as the ABC test, as involving the three factors of the instruction. (*Dynamex Operations W., supra,* 4~~

~~Cal.5th at pp. 916–917.)~~

The rule on employment status has been that if there are disputed facts, it's for the jury to decide whether one is an employee or an independent contractor. (*Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 342 [221 Cal.Rptr.3d 1].) However, on undisputed facts, the court may decide that the relationship is employment as a matter of law. (*Dynamex ~~Operations W.~~, supra,* 4 Cal.5th at p. 963.) The court may address the three factors in any order when making this determination, and if the defendant's undisputed facts fail to prove any one of them, the inquiry ends; the plaintiff is an employee as a matter of law and the question does not reach the jury.

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

~~Include the bracketed language in element 1 if there is a contract between the parties covering the work at issue.~~

Sources and Authority

- Worker Status: Employees and Independent Contractors. Labor Code section 2750.3.

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

- ~~"[W]e conclude that there is no need in this case to determine whether the exercise control over wages, hours or working conditions definition is intended to apply outside the joint employer context, because we conclude that the suffer or permit to work standard properly applies to the question whether a worker should be considered an employee or, instead, an independent contractor, and that under the suffer or permit to work standard, the trial court class certification order at issue here should be upheld. (*Dynamex Operations W., supra,* 4 Cal.5th at p. 943.)~~

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

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own independent business." (*Dynamex ~~Operations W.~~, supra,* 4 Cal.5th at pp. 948–949.)

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

- "Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. In the latter settings, the workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor." (*Dynamex ~~Operations W.~~, supra,* 4 Cal.5th at pp. 959–960, internal citations omitted.)

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

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

- "It bears emphasis that in order to establish that a worker is an independent contractor under the ABC standard, the hiring entity is required to establish the existence of each of the three parts of the ABC standard. Furthermore, inasmuch as a hiring entity's failure to satisfy any one of the three parts itself establishes that the worker should be treated as an employee for purposes of the wage order, *a court* is free to consider the separate parts of the ABC standard in whatever order it chooses. Because in many cases it may be easier and clearer for *a court* to determine whether or not part B or part C of the ABC standard has been satisfied than for *the court* to resolve questions regarding the nature or degree of a worker's freedom from the hiring entity's control for purposes

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of part A of the standard, the significant advantages of the ABC standard--in terms of increased clarity and consistency--will often be best served by first considering one or both of the latter two parts of the standard in resolving the employee or independent contractor question." (*Dynamex ~~Operations W.~~, supra,* 4 Cal.5th at p. 963, italics added.)

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

- ~~"[T]he Supreme Court's policy reasons for selecting the 'ABC' test are uniquely relevant to the issue of allegedly misclassified independent contractors. In the joint employment context, the alleged employee is already considered an employee of the primary employer; the issue is whether the employee is also an employee of the alleged secondary employer. Therefore, the primary employer is presumably paying taxes and the employee is afforded legal protections due to being an employee of the primary employer. As a result, the policy purpose for presuming the worker to be an employee and requiring the secondary employer to disprove the worker's status as an employee is unnecessary in that taxes are being paid and the worker has employment protections. [¶] In conclusion, the 'ABC' test set forth in *Dynamex* is directed toward the issue of whether employees were misclassified as independent contractors. Placing the burden on the alleged employer to prove that the worker is not an employee is meant to serve policy goals that are not relevant in the joint employment context. Therefore, it does not appear that the Supreme Court intended for the 'ABC' test to be applied in joint employment cases." (*Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289, 314 [233 Cal.Rptr.3d 295], internal citation omitted.)~~

  ~~" '*Dynamex* did not purport to replace the *Borello* standard in every instance where a worker must be classified as either an independent contractor or an employee for purposes of enforcing California's labor protections.' To the contrary, the Supreme Court recognized that different standards could apply to different statutory claims: '[B]ecause the *Borello* standard itself emphasizes the primacy of statutory purpose in resolving the employee or independent contractor question, when different statutory schemes have been enacted for different purposes, it is possible under *Borello* that a worker may properly be considered an employee with reference to one statute but not another.' " (*Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558, 570 [239 Cal.Rptr.3d 360], internal citations omitted.)~~

- ~~"Key for our purposes, *Dynamex* makes clear that the question in part C is *not* whether [defendant] *prohibited or prevented* [plaintiff] from engaging in an independently established business. Instead, the inquiry is whether [plaintiff] fits the common conception of an independent contractor—'an individual who *independently* has made the decision to go into business for himself or herself' and 'generally takes the usual steps to establish and promote his or her independent business—for example, through incorporation, licensure, advertisements, routine offerings to provide services of the independent business to the public or to a number of potential~~

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~~customers, and the like.' " (*Garcia, supra,* 28 Cal.App.5th at p. 573, original italics, internal citation omitted.)~~

Secondary Sources

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

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

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

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3020. Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] used excessive force in [arresting/detaining] [him/her/*nonbinary pronoun*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] used force in [arresting/detaining] [*name of plaintiff*];**

2. **That the force used by [*name of defendant*] was excessive;**

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

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

5. **That [*name of defendant*]'s use of excessive force was a substantial factor in causing [*name of plaintiff*]'s harm.**

Force is not excessive if it is reasonably necessary under the circumstances. In deciding whether force is reasonably necessary or excessive, you should determine, based on all of the facts and circumstances, what force a reasonable law enforcement officer on the scene would have used under the same or similar circumstances. You should consider the following:

(a) Whether [*name of plaintiff*] reasonably appeared to pose an immediate threat to the safety of [*name of defendant*] or others;

(b) The seriousness of the crime at issue; [and]

(c) Whether [*name of plaintiff*] was actively [resisting [arrest/detention]/ [or] attempting to avoid [arrest/detention] by flight][./; and]

(d) [*specify other factors particular to the case*].

New September 2003; Revised June 2012; Renumbered from CACI No. 3001 December 2012; Revised June 2015, June 2016, May 2020

Directions for Use

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

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The three factors (a), (b), and (c) listed are often referred to as the "*Graham* factors." (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are not exclusive. (See *Glenn v. Wash. County* (9th Cir. 2011) 661 F.3d 460, 467–468.) Additional factors may be added if appropriate to the facts of the case.

Claims of excessive force against law enforcement officers in the course of making an arrest, investigatory stop, or other seizure are analyzed under the Fourth Amendment's "objective reasonableness" standard. (*Graham, supra,* 490 U.S. at pp. 388, 395 fn.10.) Claims of excessive force brought by pretrial detainees are governed by the Fourteenth Amendment's Due Process Clause and are also analyzed under an objective reasonableness standard. (*Kingsley v. Hendrickson* (2015) -- U.S. --, 135 S.Ct. 2466, 2473 [192 L.Ed.2d 416].) Modify the instruction for use in a case brought by a pretrial detainee involving the use of excessive force after arrest, but before conviction.~~Additional considerations and verdict form questions will be needed if there is a question of fact as to whether the defendant law enforcement officer had time for reflective decision-making before applying force. If the officers' conduct required a reaction to fast-paced circumstances presenting competing public safety obligations, the plaintiff must prove intent to harm. (See *Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1372 [190 Cal.Rptr.3d 693].)~~ For an instruction on an excessive force claim brought by a convicted prisoner, see CACI No. 3042, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Excessive Force (42 U.S.C. § 1983).*

The legality or illegality of the use of deadly force under state law is not relevant to the constitutional question. (Cf. *People v. McKay* (2002) 27 Cal.4th 601, 610 [117 Cal.Rptr.2d 236, 41 P.3d 59] ["[T]he [United States Supreme Court] has repeatedly emphasized that the Fourth Amendment inquiry does not depend on whether the challenged police conduct was authorized by state law"]; see also Pen. Code, § 835a.)

~~No case has yet determined, and therefore it is unclear, whether the defense has either the burden of proof or the burden of producing evidence on reaction to fast-paced circumstances. (See Evid. Code, §§ 500 [party has burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense asserted], 550 [burden of producing evidence as to particular fact is on party against whom a finding on the fact would be required in absence of further evidence].)~~

For an instruction for use in a negligence claim under California common law based on the same event and facts, see CACI No. 440, *Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*. For an instruction for use alleging excessive force as a battery, see CACI No. 1305, *Battery by ~~Police~~ Peace Officer*.

Sources and Authority

- "In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct." (*Graham, supra,* 490 U.S. at p. 395, internal citations and footnote omitted.)

- "Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a

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free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons ... against unreasonable ... seizures' of the person." (*Graham, supra,* 490 U.S. at p. 394.)

- "In deciding whether the force deliberately used is, constitutionally speaking, 'excessive,' should courts use an objective standard only, or instead a subjective standard that takes into account a defendant's state of mind? It is with respect to *this* question that we hold that courts must use an objective standard." (*Kingsley v. Hendrickson* (2015) -- U.S. --, 135 S.Ct. 2466, 2472–2473 [192 L.Ed.2d 416], original italics.)

- "[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." (*Graham, supra,* 490 U.S. at p. 395.)

- " 'The intrusiveness of a seizure by means of deadly force is unmatched.' 'The use of deadly force implicates the highest level of Fourth Amendment interests both because the suspect has a "fundamental interest in his own life" and because such force "frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." ' " (*Vos v. City of Newport Beach* (9th Cir. 2018) 892 F.3d 1024, 1031.)

- "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Graham, supra,* 490 U.S. at p. 396.)

- "Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' ... its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra,* 490 U.S. at p. 396, internal citation omitted.)

- "The most important of these [factors from *Graham,* above] is whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553] .)

- "[The *Graham*] factors, however, are not exclusive. We 'examine the totality of the circumstances and consider "whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." ' Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed." (*Glenn, supra,* 661 F.3d at p. 467, internal citations omitted.)

- "With respect to the possibility of less intrusive force, officers need not employ the least intrusive means available[,] so long as they act within a range of reasonable conduct." (*Estate of Lopez v. Gelhaus* (9th Cir. 2017) 871 F.3d 998, 1006.)

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- "Although officers are not required to use the least intrusive degree of force available, 'the availability of alternative methods of capturing or subduing a suspect may be a factor to consider[.],' " (*Vos, supra,* 892 F.3d at p. 1033, internal citation omitted.)

- "Courts 'also consider, under the totality of the circumstances, the quantum of force used to arrest the plaintiff, the availability of alternative methods of capturing or detaining the suspect, and the plaintiff's mental and emotional state.' " (*Brooks v. Clark County* (9th Cir. 2016) 828 F.3d 910, 920.)

- "Because the reasonableness standard 'nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.' " (*Torres v. City of Madera* (9th Cir. 2011) 648 F.3d 1119, 1125.)

- "Justice Stevens incorrectly declares [the 'objective reasonableness' standard under *Graham*] to be 'a question of fact best reserved for a jury,' and complains we are 'usurp[ing] the jury's factfinding function.'. At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, the reasonableness of [defendant]'s actions--or, in Justice Stevens' parlance, '[w]hether [respondent's] actions have risen to a level warranting deadly force,' is a pure question of law." (*Scott v. Harris* (2007) 550 U.S. 372, 381, fn. 8 [127 S. Ct. 1769; 167 L. Ed. 2d 686], original italics, internal citations omitted.)

- "Because there are no genuine issues of material fact and 'the relevant set of facts' has been determined, the reasonableness of the use of force is 'a pure question of law.' " (*Lowry v. City of San Diego* (9th Cir. 2017) 858 F.3d 1248, 1256 (en banc).)

- "In assessing the objective reasonableness of a particular use of force, we consider: (1) 'the severity of the intrusion on the individual's Fourth Amendment rights by evaluating the type and amount of force inflicted,' (2) 'the government's interest in the use of force,' and (3) the balance between 'the gravity of the intrusion on the individual' and 'the government's need for that intrusion.' " (*Lowry, supra,* 858 F.3d at p. 1256.)

- "To be sure, the reasonableness inquiry in the context of excessive force balances 'intrusion[s] on the individual's Fourth Amendment interests' against the government's interests. But in weighing the evidence in favor of the officers, rather than the [plaintiffs], the district court unfairly tipped the reasonableness inquiry in the officers' favor." (*Sandoval v. Las Vegas Metro. Police Dep't* (9th Cir. 2014) 756 F.3d 1154, 1167, internal citation omitted.)

- "The district court found that [plaintiff] stated a claim for excessive use of force, but that governmental interests in officer safety, investigating a possible crime, and controlling an interaction with a potential domestic abuser outweighed the intrusion upon [plaintiff]'s rights. In reaching this conclusion, the court improperly 'weigh[ed] conflicting evidence with respect to . . . disputed material fact[s].' " (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 880.)

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- "The Fourth Amendment's 'reasonableness' standard is not the same as the standard of 'reasonable care' under tort law, and negligent acts do not incur constitutional liability." (*Hayes v. County of San Diego* 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].)

- "[S]tate negligence law, which considers the totality of the circumstances surrounding any use of deadly force, is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used." (*Hayes, supra,* 57 Cal.4th at p. 639, internal citations omitted.)

- "We are cognizant of the Supreme Court's command to evaluate an officer's actions 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' We also recognize the reality that 'police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.' This does not mean, however, that a Fourth Amendment violation will be found only in those rare instances where an officer and his attorney are unable to find a sufficient number of compelling adjectives to describe the victim's conduct. Nor does it mean that we can base our analysis on what officers actually felt or believed during an incident. Rather, we must ask if the officers' conduct is ' "objectively reasonable" in light of the facts and circumstances confronting them' without regard for an officer's subjective intentions." (*Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, 831, internal citations omitted.)

- "Deadly force is permissible only 'if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm.' " (*A. K. H. v. City of Tustin* (9th Cir. 2016) 837 F.3d 1005, 1011.)

- "[A]n officer may not use deadly force to apprehend a suspect where the suspect poses no immediate threat to the officer or others. On the other hand, it is not constitutionally unreasonable to prevent escape using deadly force '[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.' " (*Wilkinson v. Torres* (9th Cir. 2010) 610 F.3d 546, 550, internal citations omitted.)

- "It is clearly established law that shooting a fleeing suspect in the back violates the suspect's Fourth Amendment rights. 'Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.' " (*Foster v. City of Indio* (9th Cir. 2018) 908 F.3d 1204, 1211.)

- " '[I]f police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.' But terminating a threat doesn't necessarily mean terminating the suspect. If the suspect is on the ground and appears wounded, he may no longer pose a threat; a reasonable officer would reassess the situation rather than continue shooting." (*Zion v. County~~ty.~~ of Orange* (9th Cir. 2017) 874 F.3d 1072, 1076, internal citation omitted.)

- "Resistance, or the reasonable perception of resistance, does not entitle police officers to use any amount of force to restrain a suspect. Rather, police officers who confront actual (or perceived)

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resistance are only permitted to use an amount of force that is reasonable to overcome that resistance." (*Barnard v. Theobald* (9th Cir. 2013) 721 F.3d 1069, 1076, internal citations omitted.)

- ~~" In any event, the court correctly instructed the jury on the mental state required in a Fourteenth Amendment excessive use of force case under section 1983 because this case did not involve reflective decisionmaking by the officers, but instead their reaction to fast-paced circumstances presenting competing public safety obligations. Given these circumstances, [plaintiff] was required to prove that the officers acted with a purpose to cause harm to her son." (*Green, supra,* 238 Cal.App.4th at p. 1372.)~~

- "[T]he fact that the 'suspect was armed with a deadly weapon' does *not* render the officers' response per se reasonable under the Fourth Amendment. [¶] This is not to say that the Fourth Amendment always requires officers to delay their fire until a suspect turns his weapon on them. If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat." (*George v. Morris* (9th Cir. 2013) 724 F.3d 1191, 1200, original italics, internal citations omitted.)

- " '[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern.' Here, whether objective factors supported [defendant]'s supposed subjective fear is not a question that can be answered as a matter of law based upon the limited evidence in the record, especially given that on summary judgment that evidence must be construed in the light most favorable to [plaintiff], the non-moving party. Rather, whether [defendant]'s claim that he feared a broccoli-based assault is credible and reasonable presents a genuine question of material fact that must be resolved not by a court ruling on a motion for summary judgment but by a jury in its capacity as the trier of fact." (*Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1163–1164.)

- "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." (*Fetters v. County of Los Angeles* (2016) 243 Cal.App.4th 825, 838 [196 Cal.Rptr.3d 848].)

- "Although *Graham* does not specifically identify as a relevant factor whether the suspect poses a threat to *himself,* we assume that the officers could have used some reasonable level of force to try to prevent [decedent] from taking a suicidal act. But we are aware of no published cases holding it reasonable to use a *significant* amount of force to try to stop someone from attempting suicide. Indeed, it would be odd to permit officers to use force capable of causing serious injury or death in an effort to prevent the possibility that an individual might attempt to harm only himself. We do not rule out that in some circumstances some force might be warranted to prevent suicide, but in cases like this one the 'solution' could be worse than the problem." (*Glenn, supra,* 661 F.3d at p. 468.)

- "This Court has 'refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals.' The Court has, however, 'found that even when an emotionally disturbed individual is acting out and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted . . . with a mentally ill individual.' A reasonable jury could conclude, based upon the information available to

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[defendant officer] at the time, that there were sufficient indications of mental illness to diminish the governmental interest in using deadly force." (*Hughes v. Kisela* (9th Cir. 2016) 841 F.3d 1081, 1086.)

- "By contrast, if the officer warned the offender that he would employ force, but the suspect refused to comply, the government has an increased interest in the use of force." (*Marquez v. City of Phoenix* (9th Cir. 2012) 693 F.3d 1167, 1175, internal citation omitted.)

- "[P]reshooting conduct is included in the totality of circumstances surrounding an officer's use of deadly force, and therefore the officer's duty to act reasonably when using deadly force extends to preshooting conduct. But in a case like this one, where the preshooting conduct did not cause the plaintiff any injury independent of the injury resulting from the shooting, the reasonableness of the officers' preshooting conduct should not be considered in isolation. Rather, it should be considered in relation to the question whether the officers' ultimate use of deadly force was reasonable." (*Hayes, supra,* 57 Cal.4th at p. 632, internal citation omitted.)

- "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer by means of physical force or show of authority terminates or restrains his freedom of movement through means intentionally applied." (*Nelson v. City of Davis* (9th Cir. 2012) 685 F.3d 867, 875.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

- "We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." (*Heck v. Humphrey* (1994) 512 U.S. 477, 486–487 [114 S.Ct. 2364, 129 L.Ed.2d 383], footnotes and internal citation omitted.)

- "*Heck* requires the reviewing court to answer three questions: (1) Was there an underlying conviction or sentence relating to the section 1983 claim? (2) Would a 'judgment in favor of the plaintiff [in the

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section 1983 action] "necessarily imply" … the invalidity of the prior conviction or sentence?' (3) 'If so, was the prior conviction or sentence already invalidated or otherwise favorably terminated?' " (*Fetters, supra,* 243 Cal.App.4th at p. 834.)

- "The *Heck* inquiry does not require a court to consider whether the section 1983 claim would establish beyond all doubt the invalidity of the criminal outcome; rather, a court need only 'consider whether a judgment in favor of the plaintiff would necessarily *imply* the invalidity of his conviction or sentence.' " (*Fetters, supra,* 243 Cal.App.4th at p. 841, original italics.)

- "[A] dismissal under section 1203.4 does not invalidate a conviction for purposes of removing the *Heck* bar preventing a plaintiff from bringing a civil action." (*Baranchik v. Fizulich* (2017) 10 Cal.App.5th 1210, 1224 [217 Cal.Rptr.3d 423].)

- "[Plaintiff]'s section 1983 claim *is* barred to the extent it alleges that [the arresting officer] lacked justification to arrest him or to respond with reasonable force to his resistance. The use of deadly force in this situation, though, requires a separate analysis. 'For example, a defendant might resist a lawful arrest, to which the arresting officers might respond with excessive force to subdue him. The subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer.' " (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 899 [76 Cal.Rptr.3d 787, 183 P.3d 471], original italics.)

- "Plaintiffs contend that the use of force is unlawful because the arrest itself is unlawful. But that is not so. We have expressly held that claims for false arrest and excessive force are analytically distinct." (*Sharp v. County~~ty.~~ of Orange* (9th Cir. 2017) 871 F.3d 901, 916.)

- "[T]he district court effectively required the jury to presume that the arrest *was* constitutionally lawful, and so not to consider facts concerning the basis for the arrest. Doing so removed critical factual questions that were within the jury's province to decide. For instance, by taking from the jury the question whether [officer]'s arrest of [plaintiff] for resisting or obstructing a police officer was lawful, the district judge implied simultaneously that [plaintiff] was in fact resisting or failing to obey the police officer's lawful instructions. Presuming such resistance could certainly have influenced the jury's assessment of 'the need for force,' as well as its consideration of the other *Graham* factors, including 'whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight. By erroneously granting judgment as a matter of law on [plaintiff]'s unlawful arrest claim, the district court impermissibly truncated the jury's consideration of [plaintiff]'s excessive force claim." (*Velazquez v. City of Long Beach* (9th Cir. 2015) 793 F.3d 1010, 1027, original italics.)

Secondary Sources

~~10~~ 8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ ~~888~~981, ~~892 et seq.~~985

Chin et al., California Practice Guide: Employment Litigation, Ch.7-G, ~~*Employment Discrimination—In General—*~~*Unruh Civil Rights Act*, ¶ 7:1526 et seq. (The Rutter Group)

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3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶¶ 10.00–10.03 (Matthew Bender)

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

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

[*Name of plaintiff*] claims that [*name of defendant*] retaliated against [him/her/*nonbinary pronoun*] for exercising a constitutional right. [By [*specify conduct*], [*name of plaintiff*] was exercising [his/her/*nonbinary pronoun*] constitutionally protected right of [*insert right, e.g., privacy*].] To establish retaliation, [*name of plaintiff*] must prove all of the following:

1. **[That [he/she/*nonbinary pronoun*] was engaged in a constitutionally protected activity;]**
2. **That [*name of defendant*] [*specify alleged retaliatory conduct*];**
3. **That [*name of defendant*]'s acts were motivated, at least in part, by [*name of plaintiff*]'s protected activity;**
4. **That [*name of defendant*]'s acts would likely have deterred a person of ordinary firmness from engaging in that protected activity; and**
5. **That [*name of plaintiff*] was harmed as a result of [*name of defendant*]'s conduct.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] has proven element 1 above. But before I can do so, you must decide whether [*name of plaintiff*] has proven the following:

[*List all factual disputes that must be resolved by the jury.***]]**

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

Directions for Use

Give this instruction along with CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements,* if the claimed civil rights violation is retaliation for exercising constitutionally protected rights, including exercise of free speech rights as a private citizen. ~~The retaliation should be alleged generally in element 1 of CACI No. 3000.~~For a claim by a public employee who alleges that they suffered an adverse employment action in retaliation for their speech on an issue of public concern, see CACI No. 3053, *Retaliation for Exercise of Free Speech Rights—Public Employee—Essential Factual Elements (42 U.S.C. § 1983).*

The retaliation should be alleged generally in element 1 of CACI No. 3000. The constitutionally protected activity refers back to the right alleged to have been violated in element 3 of CACI No. 3000. Whether plaintiff was engaged in a constitutionally protected activity will usually have been resolved by the court as a matter of law. If so, include the optional statement in the opening paragraph and omit element 1. If there is a question of fact that the jury must resolve with regard to the constitutionally protected activity, include element 1 and give the last part of the instruction.

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There is perhaps some uncertainty with regard to the requirement in element 3 that the retaliatory act may be motivated, *in part*, by the protected activity. While the element is so stated in *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1062–1063 [99 Cal.Rptr.3d 661], the court also was of the view that the defendant may avoid liability by proving that, notwithstanding a retaliatory motive, it also had legitimate reasons for its actions and would have taken the same steps for those reasons alone. (*Id.* at pp. 1086–1087, finding persuasive *Greenwich Citizens Comm. v. Counties of Warren & Washington Indus. Dev. Agency* (2d Cir. 1996) 77 F.3d 26, 30.) Therefore, the fact that retaliation may have motivated the defendant only in part may not always be sufficient for liability. In the Ninth Circuit, there is authority for both a "but -for" and a "substantial or motivating factor" standard. (Compare *Karl v. City of Mountlake Terrace* (9th Cir. 2012) 678 F.3d 1062, 1072 [defendant may show that: (1) the adverse employment action was based on protected and unprotected activities; and (2) defendant would have taken the adverse action if the proper reason alone had existed] with *Blair v. Bethel Sch. Dist.* (9th Cir. 2010) 608 F.3d 540, 543 [third element expressed as "there was a substantial causal relationship between the constitutionally protected activity and the adverse action"].)

Sources and Authority

- "Where, as here, the plaintiff claims retaliation for exercising a constitutional right, the majority of federal courts require the plaintiff to prove that (1) he or she was engaged in constitutionally protected activity, (2) the defendant's retaliatory action caused the plaintiff to suffer an injury that would likely deter a person of ordinary firmness from engaging in that protected activity, and (3) the retaliatory action was motivated, at least in part, by the plaintiff's protected activity." (*Tichinin, supra,* 177 Cal.App.4th at pp. 1062–1063.)

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

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

- "The plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest." (*Nieves v. Bartlett* (2019) — U.S. — [139 S.Ct. 1715, 1724, 204 L.Ed.2d 1].)

- "[A]n individual has a right 'to be free from police action motivated by retaliatory animus but for which there was probable cause.' " (*Ford v. City of Yakima* (9th Cir. 2013) 706 F.3d 1188, 1193.)

- "Probable cause is not irrelevant to an individual's claim that he was booked and jailed in retaliation for his speech. Probable cause for the initial arrest can be evidence of a police officer's lack of retaliatory animus for subsequently booking and jailing an individual. However, that determination should be left to the trier of fact once a plaintiff has produced evidence that the officer's conduct was motivated by retaliatory animus." (*Ford, supra,* 706 F.3d at p. 1194 fn.2,

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internal citation omitted.)

- "[T]he evidence of [plaintiff]'s alleged injuries, if believed, is sufficient to support a finding that the retaliatory action against him would deter a person of ordinary firmness from exercising his or her First Amendment rights. [¶] [Defendant] argues that plaintiff did not suffer any injury—i.e., [defendant]'s action did not chill [plaintiff]'s exercise of his rights—because he continued to litigate against [defendant]. However, that [plaintiff] persevered despite [defendant]'s action is not determinative. To reiterate, in the context of a claim of retaliation, the question is not whether the plaintiff was actually deterred but whether the defendant's actions would have deterred a person of ordinary firmness." (*Tichinin, supra,* 177 Cal.App.4th at p. 1082.)

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

- ~~"To show that retaliation was a substantial or motivating factor behind an adverse employment action, a plaintiff can (1) introduce evidence that the speech and adverse action were proximate in time, such that a jury could infer that the action took place in retaliation for the speech; (2) introduce evidence that the employer expressed opposition to the speech; or (3) introduce evidence that the proffered explanations for the adverse action were false and pretextual." (*Anthoine v. N. Cent. Counties Consortium* (9th Cir. 2010) 605 F.3d 740, 750.)~~

- "To satisfy the [causation] requirement, the evidence must be sufficient to establish that the officers' desire to chill [plaintiff]'s speech was a but-for cause of their conduct. In other words, would [plaintiff] have been booked and jailed, rather than cited and arrested, but for the officers' desire to punish [him] for his speech?" (*Ford, supra,* 706 F.3d at p. 1194.)

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

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

- ~~"We employ a 'sequential five-step series of questions' to determine whether an employer impermissibly retaliated against an employee for protected speech: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech." (*Anthoine, supra,* 605 F.3d at p. 748.)~~

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Secondary Sources

8 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Constitutional Law, §§ ~~820~~894, ~~885A~~895, 978

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

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

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

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

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

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3053. Retaliation for Exercise of Free Speech Rights—Public Employee—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her/*nonbinary pronoun*] because [he/she/*nonbinary pronoun*] exercised [his/her/*nonbinary pronoun*] right to speak as a private citizen about a matter of public concern. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That [***name of plaintiff***] was speaking as a private citizen and not as a public employee when [he/she/*nonbinary pronoun*] [***describe speech alleged to be protected by the First Amendment, e.g., criticized the mayor at a city council meeting***];]**

2. **That [***name of defendant***] [***specify retaliatory acts, e.g., terminated plaintiff's employment***];**

3. **That [***name of plaintiff***]'s [***e.g., speech to the city council***] was a substantial motivating reason for [***name of defendant***]'s decision to [***e.g., terminate plaintiff's employment***];**

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

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

If [*name of plaintiff***] proves all of the above, [***name of defendant***] is not liable if [he/she/*nonbinary pronoun*/it] proves either of the following:**

6. **That [***name of defendant***] had an adequate employment-based justification for treating [***name of plaintiff***] differently from any other member of the general public; or**

7. **That [***name of defendant***] would have [***specify adverse action, e.g., terminated plaintiff's employment***] anyway for other legitimate reasons, even if [he/she/*nonbinary pronoun*/it] also retaliated based on [***name of plaintiff***]'s protected conduct.**

In deciding whether [*name of plaintiff***] was speaking as a public citizen or a public employee (element 1), you should consider whether [his/her/*nonbinary pronoun*] [***e.g., speech***] was within [his/her/*nonbinary pronoun*] job responsibilities. [However, the listing of a given task in an employee's written job description is neither necessary nor sufficient alone to demonstrate that conducting the task is part of the employee's professional duties.]**

New November 2017; Revised May 2020

Directions for Use

This instruction is for use in a claim by ~~a~~ public employee~~s~~ who allege~~s~~ that ~~he or she~~ they suffered an adverse employment action in retaliation for ~~his or her~~ their private speech on an issue of public concern.

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Speech made by public employees in their official capacity is not insulated from employer discipline by the First Amendment but speech made in one's private capacity as a citizen is. (*Garcetti v. Ceballos* (2006) 547 U.S. 410, 421 [126 S.Ct. 1951, 164 L.Ed.2d 689].) For a claim by a private citizen who alleges retaliation, see CACI No. 3050, *Retaliation—Essential Factual Elements (42 U.S.C. § 1983).*

Element 1, whether the employee was speaking as a private citizen or as a public employee, and element 6, whether the public employer had an adequate justification for the adverse action, are ultimately determined as a matter of law, but may involve disputed facts. (*Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1071.) If there are no disputed facts, these elements should not be given. They may be modified to express the particular factual issues that the jury must resolve.

Give the bracketed optional sentence in the last paragraph if the defendant has placed the plaintiff's formal written job description in evidence. (See *Garcetti, supra,* 547 U.S. at p. 424.)

Note that there are two causation elements. The protected speech must have caused the employer's adverse action (element 3), and the adverse action must have caused the employee harm (element 5). This second causation element will rarely be disputed in a termination case. For optional language if the employer claims that there was no adverse action, see CACI No. 2505, *Retaliation—Essential Factual Elements* (under California's Fair Employment and Housing Act). See also CACI No. 2509, *"Adverse Employment Action" Explained* (under FEHA).

Sources and Authority

- " '[C]itizens do not surrender their First Amendment rights by accepting public employment.' Moreover, '[t]here is considerable value . . . in encouraging, rather than inhibiting, speech by public employees,' because 'government employees are often in the best position to know what ails the agencies for which they work.' At the same time, '[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions.' Accordingly, government employees may be subject to some restraints on their speech 'that would be unconstitutional if applied to the general public.' " (*Moonin v. Tice* (9th Cir. 2017) 868 F.3d 853, 860-861, internal citations omitted.)

- "First Amendment retaliation claims are governed by the framework in *Eng.* See 552 F.3d at 1070-72. [Plaintiff] must show that (1) he spoke on a matter of public concern, (2) he spoke as a private citizen rather than a public employee, and (3) the relevant speech was a substantial or motivating factor in the adverse employment action. Upon that showing, the State must demonstrate that (4) it had an adequate justification for treating [plaintiff] differently from other members of the general public, or (5) it would have taken the adverse employment action even absent the protected speech. '[A]ll the factors are necessary, in the sense that failure to meet any one of them is fatal to the plaintiff's case.' " (*Kennedy v. Bremerton Sch. Dist.* (9th Cir. 2017) 869 F.3d 813, 822, internal citations omitted.)

- "In a First Amendment retaliation case, an adverse employment action is an act that is reasonably likely to deter employees from engaging in constitutionally protected speech." (*Greisen v. Hanken* (9th Cir. 2019) 925 F.3d 1097, 1113.)

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- "*Pickering* [*v. Bd. of Educ.* (1968) 391 U.S. 563 [88 S.Ct. 1731, 20 L.Ed.2d 811]] and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." (*Garcetti, supra,* 547 U.S. at p. 418, internal citations omitted.)

- "In the forty years since *Pickering,* First Amendment retaliation law has evolved dramatically, if sometimes inconsistently. Unraveling *Pickering*'s tangled history reveals a sequential five-step series of questions: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech. Analysis of these questions, further complicated by restraints on our interlocutory appellate jurisdiction, involves a complex array of factual and legal inquiries requiring detailed explanation." (*Eng, supra,* 552 F.3d at p. 1070.)

- "Whether speech is on a matter of public concern is a question of law, determined by the court…. The speech need not be entirely about matters of public concern, but it must 'substantially involve' such matters. '[S]peech warrants protection when it "seek[s] to bring to light actual or potential wrongdoing or breach of public trust." ' " (*Greisen, supra,* 925 F.3d at p. 1109.)

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

- "Whether an individual speaks as a public employee is a mixed question of fact and law. 'First, a factual determination must be made as to the "scope and content of a plaintiff's job responsibilities." ' 'Second, the "ultimate constitutional significance" of those facts must be determined as a matter of law.' " (*Barone v. City of Springfield* (9th Cir. 2018) 902 F.3d 1091, 1099, internal citations omitted.)

- "An employee does not speak as a citizen merely because the employee directs speech towards the public, or speaks in the presence of the public, particularly when an employee's job duties include interacting with the public." (*Barone, supra,* 902 F.3d at p. 1100.)

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- "[T]he parties in this case do not dispute that [plaintiff] wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate. We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." (*Garcetti, supra,* 547 U.S. at p. 424.)

- "To show that retaliation was a substantial or motivating factor behind an adverse employment action, a plaintiff can (1) introduce evidence that the speech and adverse action were proximate in time, such that a jury could infer that the action took place in retaliation for the speech; (2) introduce evidence that the employer expressed opposition to the speech; or (3) introduce evidence that the proffered explanations for the adverse action were false and pretextual." (*Anthoine v. N. Cent. Counties Consortium* (9th Cir. 2010) 605 F.3d 740, 750.)

- "[I]n synthesizing relevant Ninth Circuit precedent since *Garcetti*, an en banc panel of this Court in *Dahlia v. Rodriguez,* 735 F.3d 1060, 1074–76 (9th Cir. 2013), announced three guiding principles for undertaking the practical factual inquiry of whether an employee's speech is insulated from employer discipline under the First Amendment. … The guiding principles are: [¶] 1. 'First, particularly in a highly hierarchical employment setting such as law enforcement, whether or not the employee confined his communications to his chain of command is a relevant, if not necessarily dispositive, factor in determining whether he spoke pursuant to his official duties. When a public employee communicates with individuals or entities outside of his chain of command, it is unlikely that he is speaking pursuant to his duties.' [¶] 2. 'Second, the subject matter of the communication is also of course highly relevant to the ultimate determination whether the speech is protected by the First Amendment … When an employee prepares a routine report, pursuant to normal departmental procedure, about a particular incident or occurrence, the employee's preparation of that report is typically within his job duties. . . By contrast, if a public employee raises within the department broad concerns about corruption or systemic abuse, it is unlikely that such complaints can reasonably be classified as being within the job duties of an average public employee, except when the employee's regular job duties involve investigating such conduct.' [¶] 3. 'Third, we conclude that when a public employee speaks in direct contravention to his supervisor's orders, that speech may often fall outside of the speaker's professional duties. Indeed, the fact that an employee is threatened or harassed by his superiors for engaging in a particular type of speech provides strong evidence that the act of speech was not, as a 'practical' matter, within the employee's job duties notwithstanding any suggestions to the contrary in the employee's formal job description.' " (*Brandon v. Maricopa County* (9th Cir. 2017) 849 F.3d 837, 843–844, internal citations omitted.)

- "Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' - or, to put it in other words, that it was a 'motivating factor' in the [defendant]'s decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to

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determine whether the [defendant] had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct." (*Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle* (1977) 429 U.S. 274, 287 [97 S.Ct. 568, 50 L.Ed.2d 471].)

- "Although the *Pickering* balancing inquiry is ultimately a legal question, like the private citizen inquiry, its resolution often entails underlying factual disputes. Thus we must once again assume any underlying disputes will be resolved in favor of the plaintiff to determine, as a matter of law, whether the state has 'adequate justification' to restrict the employee's speech. If the allegations, viewed in light most favorable to the plaintiff, indicate adequate justification, qualified immunity should be granted." (*Eng, supra,* 552 F.3d at pp. 1071–1072, internal citations omitted.)

- "Although the *Pickering* framework is most often applied in the retaliation context, a similar analysis is used when assessing prospective restrictions on government employee speech. Where a 'wholesale deterrent to a broad category of expression' rather than 'a post hoc analysis of one employee's speech and its impact on that employee's public responsibilities' is at issue, the Court weighs the impact of the ban as a whole—both on the employees whose speech may be curtailed and on the public interested in what they might say—against the restricted speech's ' "necessary impact on the actual operation" of the Government,' '[U]nlike an adverse action taken in response to actual speech,' a prospective restriction 'chills potential speech before it happens.' The government therefore must shoulder a heavier burden when it seeks to justify an ex ante speech restriction as opposed to 'an isolated disciplinary action.' " (*Moonin, supra,* 868 F.3d at p. 861, internal citations omitted.)

Secondary Sources

~~7~~ 8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 563

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

1 Civil Rights Actions, Ch. 2, *Governmental Liability and Immunity*, ¶ 2.03 (Matthew Bender)

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VF-3012. Unreasonable Search or Seizure—Search or Seizure Without a Warrant (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [search/seize] [***name of plaintiff***]'s [person/home/automobile/office/property/[***insert other***]] without a warrant?**
   ____ Yes ____ No

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

2. **Was [***name of defendant***] acting or purporting to act in the performance of [his/her/***nonbinary pronoun***] official duties?**
   ____ Yes ____ No

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

3. **Was [***name of defendant***]'s [search/seizure] a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ Yes ____ No

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

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

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

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010; Renumbered from CACI No. VF-3003 December 2012; Revised December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 3023, *Unreasonable Search or Seizure—Search or Seizure Without a Warrant—Essential Factual Elements.*

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

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

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

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VF-3501. Fair Market Value Plus Severance Damages

We answer the questions submitted to us as follows:

1. What was the fair market value of the property taken on [*date of valuation*]?

$_____

Answer question 2.

2. What was the fair market value of the remaining property on [*date of valuation*]?

$_____

Answer question 3.

3. What ~~will~~ would the fair market value of the remaining property have been on [*date of valuation*] if ~~be after~~ the [*name of public entity*]'s proposed project ~~is~~ were completed as planned?

$_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised December 2010, December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 3501, *"Fair Market Value" Explained,* and CACI No. 3511, *Permanent Severance Damages*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. For example, if the public entity's project was completed before the date of valuation, modify question 3 accordingly.

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

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3704. Existence of "Employee" Status Disputed

[*Name of plaintiff***] must prove that [***name of agent***] was [***name of defendant***]'s employee.**

In deciding whether [*name of agent***] was [***name of defendant***]'s employee, the most important factor is whether [***name of defendant***] had the right to control how [***name of agent***] performed the work, rather than just the right to specify the result. One indication of the right to control is that the hirer can discharge the worker [without cause]. It does not matter whether [***name of defendant***] exercised the right to control.**

In deciding whether [*name of defendant***] was [***name of agent***]'s employer, in addition to the right of control, you must consider the full nature of their relationship. You should take into account the following additional factors, which, if true, may show that [***name of defendant***] was the employer of [***name of agent***]. No one factor is necessarily decisive. Do not simply count the number of applicable factors and use the larger number to make your decision. It is for you to determine the weight and importance to give to each of these additional factors based on all of the evidence.**

(a) **[***Name of defendant***] supplied the equipment, tools, and place of work;**

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

(c) **[***Name of defendant***] was in business;**

(d) **The work being done by [***name of agent***] was part of the regular business of [***name of defendant***];**

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

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

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

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

(i) **[***Name of defendant***] and [***name of agent***] believed that they had an employer-employee relationship[./; and]**

(j) **[***Specify other factor***].**

New September 2003; Revised December 2010, June 2015, December 2015, November 2018, May 2020

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Directions for Use

This instruction is based on *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354–355 [256 Cal.Rptr. 543, 769 P.2d 399] and the Restatement Second of Agency, section 220. It is sometimes referred to as the *Borello* test or the common law test. (See *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 934 [232 Cal.Rprt.3d 1, 416 P.3d 1].) It is intended to address the employer-employee relationship for purposes of assessing vicarious responsibility on the employer for the employee's acts. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships, see CACI No. 3705, *Existence of "Agency" Relationship Disputed.*

Secondary factors (a)–(i) come from the Restatement section 220. (See also *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532 [173 Cal.Rptr.3d 332, 327 P.3d 165]; Rest.3d Agency, § 7.07, com. f,) They have been phrased so that a yes answer points toward an employment relationship. Omit any that are not relevant. Additional factors have been endorsed by the California Supreme Court and may be included if applicable. (See *S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at pp. 354–355.) Therefore, an "other" option (j) has been included.

Borello was a workers' compensation case. In *Dynamex, supra,* the court, in holding that *Borello* did not control the specific wage order dispute at issue, noted that "it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue." (*Dynamex ~~Operations W.~~*, *supra*, 4 Cal.5th at p. 934.) The court also said that "[t]he *Borello* decision repeatedly emphasizes statutory purpose as the touchstone for deciding whether a particular category of workers should be considered employees rather than independent contractors for purposes of social welfare legislation." (*Id.* at p. 935.) With respondeat superior, there is no statutory provision or social welfare legislation to be considered. (Cf. Lab. Code, § 2750.3 ~~*Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558, 571 [239 Cal.Rptr.3d 360] [no reason to apply *Dynamex* categorically to every working relationship~~[codifying *Dynamex* for purposes of the provisions of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission, with limited exceptions for specified occupations].)

Sources and Authority

- Principal-Agent Relationship. Civil Code section 2295.
- Rebuttable Presumption that Contractor Is Employee Rather Than Independent Contractor; Proof of Independent Contractor Status. Labor Code section 2750.5.
- "[S]ubject to certain policy considerations, a hirer … cannot be held vicariously liable for the negligence of his independent contractors." (*Blackwell v. Vasilas* (2016) 244 Cal.App.4th 160, 168 [197 Cal.Rptr.3d 753].)
- "Whether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control how the end result is achieved." (*Ayala, supra,* 59 Cal.4th at p. 528.)

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- "However, the courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the 'most important' or 'most significant' consideration, the authorities also endorse several 'secondary' indicia of the nature of a service relationship." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 350, internal citations omitted.)

- "While the extent of the hirer's right to control the work is the foremost consideration in assessing whether a common law employer-employee relationship exists, our precedents also recognize a range of secondary indicia drawn from the Second and Third Restatements of Agency that may in a given case evince an employment relationship. Courts may consider '(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.' " (*Ayala, supra,* 59 Cal.4th at p. 532.)

- " 'Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' " (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 351, internal citations omitted.)

- "[T]he Restatement guidelines heretofore approved in our state remain a useful reference." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 354.)

- "We also note the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation. Besides the 'right to control the work,' the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. [¶] As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at pp. 354–355, internal cross-reference omitted.)

- "[A]t common law the problem of determining whether a worker should be classified as an employee or an independent contractor initially arose in the tort context--in deciding whether the hirer of the worker should be held vicariously liable for an injury that resulted from the worker's actions. In the vicarious liability context, the hirer's right to supervise and control the details of the worker's actions was reasonably viewed as crucial, because ' "[t]he extent to which the employer had a right to control [the details of the service] activities was . . . highly relevant to the question whether the employer ought to be legally liable for them . . . ." ' For this reason, the question whether the hirer controlled the details of the worker's activities became the primary common law standard for determining

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whether a worker was considered to be an employee or an independent contractor." (*Dynamex ~~Operations W.~~, supra,* 4 Cal.5th at p. 927, internal citations omitted.)

- "[A]lthough we have sometimes characterized *Borello* as embodying the common law test or standard for distinguishing employees and independent contractors, it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue. In other words, *Borello* calls for application of a *statutory purpose* standard that considers the control of details and other potentially relevant factors identified in prior California and out-of-state cases in order to determine which classification (employee or independent contractor) best effectuates the underlying legislative intent and objective of the statutory scheme at issue." (*Dynamex ~~Operations W.~~, supra,* 4 Cal.5th at p. 934, original italics, internal citation omitted.)

- ~~" '*Dynamex* did not purport to replace the *Borello* standard in every instance where a worker must be classified as either an independent contractor or an employee for purposes of enforcing California's labor protections.' To the contrary, the Supreme Court recognized that different standards could apply to different statutory claims: … ." (*Garcia, supra,* 28 Cal.App.5th at p. 570, internal citation omitted.)~~

- ~~"In the absence of an argument that the statutory purposes underlying those claims compel application of a different standard, we conclude *Borello* furnishes the proper standard as to non-wage order claims." (*Garcia, supra,* 28 Cal.App.5th at p. 571.)~~

- "The trial court's determination of employee or independent contractor status is one of fact if it depends upon the resolution of disputed evidence or inferences. ' "Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact … ." ' The question is one of law only if the evidence is undisputed." (*Linton v. DeSoto Cab Co., Inc.* (2017) 15 Cal.App.5th 1208, 1225 [223 Cal.Rptr.3d 761.)

- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)

- "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 349.)

- "[A]lthough the Caregiver Contract signed by Plaintiff stated she was an independent contractor, not an employee, there is evidence of other indicia of employment and Plaintiff averred in her declaration that the Caregiver Contract was presented to her 'on a take it or leave it basis.' 'A party's use of a label to describe a relationship with a worker … will be ignored where the evidence of the parties' actual conduct establishes that a different relationship exists.' " (*Duffey v. Tender Heart Home Care Agency, LLC* (2019) 31 Cal.App.5th 232, 257–258 [242 Cal.Rptr.3d 460].)

- "It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an

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agency relationship." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)

- " '[W]hat matters is whether a hirer has the "legal right to control the activities of the alleged agent" … . That a hirer chooses not to wield power does not prove it lacks power.' " (*Duffey, supra,* 31 Cal.App.5th at p. 257.)

- "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because '[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities.' " (*Ayala, supra,* 59 Cal.4th at p. 531.)

- "The worker's corresponding right to leave is similarly relevant: ' "An employee may quit, but an independent contractor is legally obligated to complete his contract." ' " (*Ayala, supra,* 59 Cal.4th at p. 531 fn. 2.)

- "A finding of employment is supported where the workers are 'a regular and integrated portion of [the] business operation.' " (*Garcia v. Seacon Logix Inc.* (2015) 238 Cal.App.4th 1476, 1487 [190 Cal.Rptr.3d 400].)

- "Where workers are paid weekly or by the hour, rather than by the job, it suggests an employment relationship." (*Garcia, supra,* 238 Cal.App.4th at p. 1488.)

- "In cases where there is a written contract, to answer that question [the right of control] without full examination of the contract will be virtually impossible. … [¶] … [T]he rights spelled out in a contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms." (*Ayala, supra,* 59 Cal.4th at p. 535.)

- "[T]he right to exercise complete or authoritative control must be shown, rather than mere suggestion as to detail. A worker is an independent contractor when he or she follows the employer's desires only in the result of the work, and not the means by which it is achieved." (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1179 [183 Cal.Rptr.3d 394].)

- " '[T]he owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect [citation], … the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation]—without changing the relationship from that of owner and independent contractor … .' " (*Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138, 1143 [159 Cal.Rptr.3d 102], quoting *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790 [285 P.2d 902].)

- "Agency and independent contractorship are not *necessarily* mutually exclusive legal categories as independent contractor and servant or employee are. In other words, an agent may also be an independent contractor. One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*Jackson, supra,* 233 Cal.App.4th at p. 1184, original italics, internal citations omitted].)

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- "[W]hen a statute refers to an 'employee' without defining the term, courts have generally applied the common law test of employment to that statute." (*Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 586 [135 Cal.Rptr.3d 213].)

- "[A] termination at-will clause for both parties may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee." (*Arnold, supra,* 202 Cal.App.4th at p. 589.)

- Restatement Second of Agency, section 220, provides: "
- (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control. [¶]
- (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: [¶]
- (a) the extent of control which, by the agreement, the master may exercise over the details of the work; [¶]
-
- (b) whether or not the one employed is engaged in a distinct occupation or business; [¶]
-
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; [¶]
-
- (d) the skill required in the particular occupation; [¶]
-
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; [¶]
-
- (f) the length of time for which the person is employed; [¶]
-
- (g) the method of payment, whether by the time or by the job; [¶]
-
- (h) whether or not the work is a part of the regular business of the employer; [¶]
-
- (i) whether or not the parties believe they are creating the relation of master and servant; and [¶]
-
- (j) whether the principal is or is not in business."

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 2–45

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

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

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21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, §§ 248.15, 248.22, 248.51 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.13 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, §§ 100A.25, 100A.34 (Matthew Bender)

1 California Civil Practice: Torts §§ 3:5–3:6 (Thomson Reuters)

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3903C. Past and Future Lost Earnings (Economic Damage)

[*Insert number, e.g.,* "3."**] [Past] [and] [future] lost earnings.**

[To recover damages for past lost earnings, [*name of plaintiff***] must prove the amount of [***insert one or more of the following:* **income/earnings/salary/wages] that [he/she/***nonbinary pronoun***] has lost to date.]**

[To recover damages for future lost earnings, [*name of plaintiff***] must prove the amount of [***insert one or more of the following:* **income/earnings/salary/wages] [he/she/***nonbinary pronoun***] will be reasonably certain to lose in the future as a result of the injury.]**

New September 2003; Revised May 2020

Directions for Use

This instruction is not intended for use in employment cases.

Use this instruction along with CACI No. 3906, *Lost Earnings and Lost Earning Capacity—Jurors Not to Consider Race, Ethnicity, or Gender (Economic Damages).*

Sources and Authority

- "We know of no rule of law that requires that a plaintiff establish the amount of his actual earnings at the time of the injury in order to obtain recovery for loss of wages although, obviously, the amount of such earnings would be helpful to the jury in particular situations." (*Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 656 [151 Cal.Rptr. 399].)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- " 'Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury." ' " (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368, 695 P.2d 665], internal citations omitted.)

- "Requiring the plaintiff to prove future economic losses are reasonably certain 'ensures that the jury's fixing of damages is not wholly, and thus impermissibly, speculative.' " (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 738 [214 Cal.Rptr.3d 113].)

- "[T]he majority view is that no deduction is made for the injured party's expected living expenses

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during the lost years." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 171 [87 Cal.Rptr.2d 626], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1842, 1843

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.39–1.41

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.10–52.11 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages,* § 177.46 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort,* § 64.190 (Matthew Bender)

1 California Civil Practice: Torts, § 5:15 (Thomson Reuters)

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3903D. Lost Earning Capacity (Economic Damage)

[*Insert number, e.g.,* "4."] The loss of [*name of plaintiff*]'s ability to earn money.

To recover damages for the loss of the ability to earn money as a result of the injury, [*name of plaintiff*] must prove:

1. **That it is reasonably certain that the injury that [*name of plaintiff*] sustained will cause [him/her/*nonbinary pronoun*] to earn less money in the future than [he/she/*nonbinary pronoun*] otherwise could have earned; and**

2. **The reasonable value of that loss to [him/her/*nonbinary pronoun*].**

In determining the reasonable value of the loss, compare what it is reasonably probable that [*name of plaintiff*] could have earned without the injury to what [he/she/*nonbinary pronoun*] can still earn with the injury. [Consider the career choices that [*name of plaintiff*] would have had a reasonable probability of achieving.] It is not necessary that [he/she/*nonbinary pronoun*] have a work history.

New September 2003; Revised April 2004, April 2008, May 2017, May 2020

Directions for Use

This instruction is not intended for use in employment cases.

Use this instruction along with CACI No. 3906, *Lost Earnings and Lost Earning Capacity—Jurors Not to Consider Race, Ethnicity, or Gender (Economic Damages).*

If lost profits are asserted as an element of damages, see CACI No. 3903N, *Lost Profits (Economic Damage)*.

If there is a claim for both lost future earnings and lost earning capacity, give also CACI No. 3903C, *Past and Future Lost Earnings (Economic Damage)*. The verdict form should ensure that the same loss is not computed under both standards.

In the last paragraph, include the bracketed sentence if the plaintiff is of sufficient age that reasonable probabilities can be projected about career opportunities.

Sources and Authority

- "Before [lost earning capacity] damages may be awarded, a jury must (1) find the injury that the plaintiff sustained will result in a loss of earning capacity, and (2) assign a value to that loss by comparing what the plaintiff could have earned without the injury to what she can still earn with the injury." (*Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881, 887 [208 Cal.Rptr.3d 170].)

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- "Loss of earning power is an element of general damages which can be inferred from the nature of the injury, without proof of actual earnings or income either before or after the injury, and damages in this respect are awarded for the loss of ability thereafter to earn money." (*Connolly v. Pre-Mixed Concrete Co.* (1957) 49 Cal.2d 483, 489 [319 P.2d 343].)

- "Because these damages turn on the plaintiff's earning capacity, the focus is 'not [on] what the plaintiff would have earned in the future[,] but [on] what she could have earned.' Consequently, proof of the plaintiff's prior earnings, while relevant to demonstrate earning capacity, is not a prerequisite to the award of these damages, nor a cap on the amount of those damages. Indeed, proof that the plaintiff had any prior earnings is not required because the 'vicissitudes of life might call upon [the plaintiff] to make avail of her capacity to work,' even if she had not done so previously." (*Licudine, supra,* 3 Cal.App.5th at pp. 893−894, internal citations omitted.)

- "Such damages are '. . . awarded for the purpose of *compensating* the plaintiff for injury suffered, i.e., restoring . . . [her] as nearly as possible to . . . [her] former position, or giving . . . [her] some pecuniary equivalent.' Impairment of the capacity or power to work is an injury separate from the actual loss of earnings." (*Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 412 [196 Cal.Rptr. 117], original italics, internal citations omitted.)

- "[T]he jury must fix a plaintiff's future earning capacity based on what it is 'reasonably probable' she could have earned." (*Licudine, supra,* 3 Cal.App.5th at p. 887.)

- "A plaintiff's earning capacity without her injury is a function of two variables—the career(s) the plaintiff could have pursued and the salaries attendant to such career(s)." (*Licudine, supra,* 3 Cal.App.5th at p. 894.)

- "How is the jury to assess what career(s) are available to the plaintiff? Is the sky the limit? In other words, can a plaintiff urge the jury to peg her earning capacity to the salary of a world-class athlete, neuroscientist, or best-selling author just by testifying that is what she wanted to do? Or must the jury instead determine a plaintiff's earning capacity by reference to the career choices the plaintiff stood a realistic chance of accomplishing? We conclude some modicum of scrutiny by the trier of fact is warranted, and hold that the jury must look to the earning capacity of the career choices that the plaintiff had a reasonable probability of achieving." (*Licudine, supra,* 3 Cal.App.5th at p. 894.)

- "Once the jury has determined which career options are reasonably probable for the plaintiff to achieve, how is the jury to value the earning capacity of those careers? Precedent suggests three methods: (1) by the testimony of an expert witness; (2) by the testimony of lay witnesses, including the plaintiff; or (3) by proof of the plaintiff's prior earnings in that same career. As these options suggest, expert testimony is not always required." (*Licudine, supra,* 3 Cal.App.5th at p. 897.)

- "[E]xpert testimony is not vital to a claim for loss of earning capacity." (*Lewis v. Ukran* (2019) 36 Cal.App.5th 886, 893 [248 Cal.Rptr.3d 839].)

- "A trier of fact may draw the inference that the plaintiff has suffered a loss of earning capacity from the nature of the injury, but it is not required to draw that inference." (*Martinez v. State Dept. of*

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Health Care Services (2017) 19 Cal.App.5th 370, 374 [227 Cal.Rptr.3d 483].)

- " 'Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury." ' " (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368, 695 P.2d 665], internal citations omitted.)

- "[T]he majority view is that no deduction is made for the injured party's expected living expenses during the lost years." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 175 [87 Cal.Rptr.2d 626], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1666, 1667

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.42

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.10, 52.11 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.140, 64.175 (Matthew Bender)

1 California Civil Practice: Torts, § 5:15 (Thomson Reuters)

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3904A. Present Cash Value

[*Name of defendant*] claims that [*name of plaintiff*]'s future [economic] damages for [loss of earnings/future medical expenses/lost profits/[*insert other economic damages*]], if any, should be reduced to present cash value. This is because money received now will, through investment, grow to a larger amount in the future.

[[*Name of defendant*] must prove, through expert testimony, the present cash value of [*name of plaintiff*]'s future [economic] damages. It is up to you to decide the present cash value of [*name of plaintiff's*] future [economic] damages in light of all the evidence presented by the parties.]
~~**If you decide that [*name of plaintiff*]'s harm includes future [economic] damages for [loss of earnings/future medical expenses/lost profits/[*insert other economic damages*]], then the amount of those future damages must be reduced to their present cash value. This is necessary because money received now will, through investment, grow to a larger amount in the future. [*Name of defendant*] must prove the amount by which future damages should be reduced to present value.**~~

~~**To find present cash value, you must determine the amount of money that, if reasonably invested today, will provide [*name of plaintiff*] with the amount of [his/her/its] future damages.**~~

~~**[You may consider expert testimony in determining the present cash value of future [economic] damages.] [**~~**[If you decide that [*name of plaintiff*]'s harm includes future [economic] damages for [loss of earnings/future medical expenses/lost profits/[*insert other economic damages*]], then you must reduce the amount of those future damages to their present cash value.** **You must [use the interest rate of __ percent/ [and] [*specify other stipulated information*]] as agreed to by the parties in determining the present cash value of future [economic] damages.]**

New September 2003; Revised April 2008; Revised and renumbered from former CACI No. 3904 December 2010; Revised June 2013, May 2020

Directions for Use

Give this instruction if future economic damages are sought and there is evidence from which a reduction to present value can be made. Include "economic" if future noneconomic damages are also sought. Future noneconomic damages are not reduced to present cash value because the amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585]; CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*.)

The defendant bears the burden of presenting expert evidence of an appropriate present value calculation, including the appropriate discount rate, to enable the fact finder to make a rational determination on the issue. (*Lewis v. Ukran* (2019) 36 Cal.App.5th 886, 896 [248 Cal.Rptr.3d 839].) ~~Give the next-to-last sentence if there has been expert testimony on reduction to present value.~~ Unless there is a stipulation, expert testimony ~~will usually be~~ is required to accurately establish present values for future economic losses. (*Id.*) ~~Give the last sentence if there has been a stipulation as to the interest rate to use or any other~~

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~~facts related to present cash value.~~

~~It would appear that because reduction to present value benefits the defendant, the defendant bears the burden of proof on the discount rate. (See *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 613–614 [102 Cal.Rptr. 31] [no error to refuse instruction on reduction to present value when defendant presented no evidence].)~~ Give the last bracketed paragraph if there has been a stipulation as to the interest rate to use or any other facts related to present cash value, and omit the second paragraph to account for the parties' stipulation.

The parties may stipulate to use p~~P~~resent-value tables ~~may~~ to assist the jury in making its determination of present cash value. Tables, worksheets, and an instruction on how to use them are provided in CACI No. 3904B, *Use of Present-Value Tables*.

Sources and Authority

- "The present value of a gross award of future damages is that sum of money prudently invested at the time of judgment which will return, over the period the future damages are incurred, the gross amount of the award. 'The concept of present value recognizes that money received after a given period is worth less than the same amount received today. This is the case in part because money received today can be used to generate additional value in the interim.' The present value of an award of future damages will vary depending on the gross amount of the award, and the timing and amount of the individual payments." (*Holt v. Regents of the University of California* (1999) 73 Cal.App.4th 871, 878 [86 Cal.Rptr.2d 752], internal citations omitted.)

- "[I]n a contested case, a party (typically a defendant) seeking to reduce an award of future damages to present value bears the burden of proving an appropriate method of doing so, including an appropriate discount rate. A party (typically a plaintiff) who seeks an upward adjustment of a future damages award to account for inflation bears the burden of proving an appropriate method of doing so, including an appropriate inflation rate. This aligns the burdens of proof with the parties' respective economic interests. A trier of fact should not reduce damages to present value, or adjust for inflation, absent such evidence or a stipulation of the parties." (*Lewis, supra,* 36 Cal.App.5th at p. 889.)

- "[W]e hold a defendant seeking reduction to present value of a sum awarded for future damages has the burden of presenting expert evidence of an appropriate present value calculation, including the appropriate discount rate, to enable the fact finder to make a rational determination on the issue." (*Lewis, supra,* 36 Cal.App.5th at p. 896.)

- "Exact actuarial computation should result in a lump-sum, present-value award which if prudently invested will provide the beneficiaries with an investment return allowing them to regularly withdraw matching support money so that, by reinvesting the surplus earnings during the earlier years of the expected support period, they may maintain the anticipated future support level throughout the period and, upon the last withdrawal, have depleted both principal and interest." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 521 [196 Cal.Rptr. 82].)

- "[I]t is not a violation of the plaintiff's jury trial right for the court to submit only the issue of the gross amount of future economic damages to the jury, with the timing of periodic payments—and

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hence their present value—to be set by the court in the exercise of its sound discretion." (*Salgado, supra,* 19 Cal.4th at p. 649, internal citation omitted.)

- "Neither party introduced any evidence of compounding or discounting factors, including how to calculate an appropriate rate of return throughout the relevant years. Under such circumstances, the 'jury would have been put to sheer speculation in determining ... "the present sum of money which ... will pay to the plaintiff ... the equivalent of his [future economic] loss ... . " ' " (*Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 877 [9 Cal.Rptr.2d 716], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Torts, § ~~1552~~1719

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.96

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.21–52.22 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

1 California Civil Practice: Torts § 5:22 (Thomson Reuters)

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3906. Lost Earnings and Lost Earning Capacity—Jurors Not to Consider Race, Ethnicity, or Gender (Economic Damage)

In determining a reasonable amount of [*name of plaintiff*]'s [[lost earnings] [*and/or*] [lost ability to earn money]], you must not consider race, ethnicity, or gender.

New May 2020

Directions for Use

Give this instruction in cases where the plaintiff seeks damages for lost earnings and/or lost earning capacity from personal injury or wrongful death. Depending on the circumstances, select the type(s) of damages at issue: lost earnings, lost ability to earn money, or both. If this instruction is used, it should follow the applicable instruction(s) in the items of economic damage series (see CACI No. 3903C, *Past and Future Lost Earnings (Economic Damage)*; CACI No. 3903D, *Lost Earning Capacity (Economic Damage)*).

Sources and Authority

- Estimations, Measures, or Calculations of Past, Present, or Future Damages. Civil Code section 3361.

Secondary Sources

4106. Breach of Fiduciary Duty by Attorney—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/*nonbinary pronoun*/it] was harmed because [***name of defendant***] breached an attorney's duty [***describe duty, e.g., "not to represent clients with conflicting interests"***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] breached the duty of an attorney [***describe duty***];**

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

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

New September 2003; Revised April 2004; Renumbered from CACI No. 605 December 2007; Revised May 2019, May 2020

Directions for Use

The existence of a fiduciary relationship is a question of law. Whether an attorney has breached that fiduciary duty is a question of fact. (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890 [250 Cal.Rptr. 339], disapproved on other grounds in *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239 [191 Cal.Rptr.3d 536, 354 P.3d 334].)

Give CACI No. 430, *Causation: Substantial Factor*, with this instruction.

~~If the attorney's breach of duty is negligent rather than intentional or fraudulent, the "but for" ("would have happened anyway") causation standard applicable to legal malpractice (see *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046]) applies. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1093–1094 [236 Cal.Rptr.3d 473].) If so, the optional last sentence of CACI No. 430, *Causation: Substantial Factor*, should be given: "Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct."~~

The causation standard for an attorney's intentional breach of fiduciary duty differs from that for a negligent breach. If the plaintiff alleges an attorney's intentional breach of duty, do not include the optional last sentence of CACI No. 430, *Causation: Substantial Factor* on "but for" causation. The "but for" causation standard does not apply to an intentional breach of fiduciary duty. If the plaintiff alleges an attorney's negligent breach of duty, the "but for" ("would have happened anyway") causation standard applies. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1093–1094 [236 Cal.Rptr.3d 473]; see *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046].) If the plaintiff alleges a negligent breach of duty, give the optional last sentence of CACI No. 430: "Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct."

If the plaintiff alleges both negligent breach and intentional or fraudulent breach, the jury must be instructed on both causation standards and it should be made clear which causation standard applies to which claim.

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If the harm allegedly caused by the defendant's conduct involves the outcome of a legal claim, the jury should be instructed with CACI No. 601, *Damages for Negligent Handling of Legal Matter*, for the "but for" standard. (See *Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 928, 933–937 [125 Cal.Rptr.3d 210] [discussing circumstances when a client need not show that they objectively would have obtained a better result in the underlying case in the absence of the attorney's breach (the trial-within-a-trial method)].)

Sources and Authority

- " 'The relation between attorney and client is a fiduciary relation of the very highest character.' " (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189 [98 Cal.Rptr. 837, 491 P.2d 421].)

- " 'The breach of fiduciary duty can be based upon either negligence or fraud depending on the circumstances. It has been referred to as a species of tort distinct from causes of action for professional negligence [citation] and from fraud [citation].' 'The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages.' " (*Knutson, supra,* 25 Cal.App.5th at pp. 1093–1094, internal citation omitted.)

- "Substantial factor causation is the correct causation standard for an intentional breach of fiduciary duty." (*Knutson, supra,* 25 Cal.App.5th at p. 1094.)

- "The trial court applied the legal malpractice standard of causation to [plaintiff]'s intentional breach of fiduciary duty cause of action. The court cited The Rutter Group's treatise on professional responsibility to equate causation for legal malpractice with causation for all breaches of fiduciary duty: ' "The rules concerning causation, damages, and defenses that apply to lawyer negligence actions … also govern actions for breach of fiduciary duty." ' This statement of the law is correct, however, only as to claims of breach of fiduciary duty arising from negligent conduct." (*Knutson, supra,* 25 Cal.App.5th at p. 1094, internal citations omitted.)

- "Expert testimony is not required, but is admissible to establish the duty and breach elements of a cause of action for breach of fiduciary duty where the attorney conduct is a matter beyond common knowledge." (*Stanley, supra,* 35 Cal.App.4th at p. 1087, internal citations omitted.)

- "The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, 'together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client.' " (*Stanley, supra,* 35 Cal.App.4th at p. 1087.)

Secondary Sources

1 Witkin, California Procedure (45th ed. ~~1996~~2008) Attorneys, § ~~118~~ 90

Vapnek et al., California Practice Guide: Professional Responsibility ~~(The Rutter Group)~~ ¶ 6:425 (The Rutter Group)

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3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.02 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, § 76.150 (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, §§ 24A.27[3][d], 24A.29[3][j] (Matthew Bender)

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4300. Introductory Instruction

This is an action for what is called unlawful detainer. [*Name of plaintiff***], the [landlord/tenant], claims that [***name of defendant***] is [his/her/nonbinary pronoun/its] [tenant/subtenant] under a [lease/rental agreement/sublease] and that [***name of defendant***] no longer has the right to occupy the property [by subleasing to [***name of subtenant***]]. [***Name of plaintiff***] seeks to recover possession of the property from [***name of defendant***]. [***Name of defendant***] claims that [he/she/nonbinary pronoun/it] still has the right to occupy the property because [***insert defenses at issue***].**

The property involved in this case is [*describe property: e.g., "an apartment," "a house," "space in a commercial building"***] located in [***city or area***] at [***address***].**

New August 2007

Directions for Use

If the plaintiff is the landlord or owner and the defendant is the tenant, select "landlord" and "tenant," in the first sentence. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "tenant" and "subtenant." (Code Civ. Proc., § 1161(3).)

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the first sentence. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease."

If the defendant is a tenant who has subleased the premises to someone else, add the bracketed language in the first paragraph referring to subleasing.

Sources and Authority

- Right to Jury Trial. Code of Civil Procedure section 1171.
- Right of Tenant to Bring Unlawful Detainer Against Subtenant. Code of Civil Procedure section 1161(3).
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- Definition of "Just Cause." Civil Code section 1946.2(b).
- "The remedy of unlawful detainer is designed to provide means by which the timely possession of premises which are wrongfully withheld may be secured to the person entitled thereto." (*Knowles v. Robinson* (1963) 60 Cal.2d 620, 625 [36 Cal.Rptr. 33, 387 P.2d 833].)

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- "Chapter 4 of title 3 of part 3 of the Code of Civil Procedure is commonly known as the Unlawful Detainer Act (hereafter, the Act). The Act is broad in scope and available to both lessors and lessees who have suffered certain wrongs committed by the other. Procedures and proceedings in unlawful detainer were not known at common law and are entirely creatures of statute. As such, they are governed solely by the statutes which created them. Thus, where the Act 'deals with matters of practice, its provisions supersede the rules of practice contained in other portions of the code.' " (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 113 [78 Cal.Rptr.2d 799], internal citations omitted.)

Secondary Sources

12 Witkin, Summary of California Law (~~10~~11th ed. ~~2006~~2017) Real Property, § ~~703~~734

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 9.5, 9.34–9.36

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 1.4–1.5

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.01 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.02

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.12 (Matthew Bender)

Miller & Starr California Real Estate 4th, §§ 34:195, 34:200, 34:205 ~~, California Real Estate, Ch. 19, *Landlord-Tenant*, § 19:214~~ (Thomson Reuters)

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4301. Expiration of Fixed-Term Tenancy—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because the [lease/rental agreement/sublease] has ended. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of plaintiff***] [leased/subleased] the property to [***name of defendant***] until [***insert end date***];**

3. **That [***name of plaintiff***] did not give [***name of defendant***] permission to continue occupying the property after the [lease/rental agreement/sublease] ended; and**

4. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

New August 2007; Revised June 2011, May 2020

Directions for Use

If the plaintiff is the landlord or owner, select "lease" or "rental agreement" in the first sentence and in element 3 as appropriate, "owns" in element 1, and "leased" in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

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

If persons other than the tenant-defendant are occupying the premises, include the bracketed language in the first paragraph and in element 4.

The Tenant Protection Act of 2019 imposes additional requirements for the termination of a rental agreement for certain residential tenancies. (Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Sources and Authority

- Holding Over After Expiration of Lease Term. Code of Civil Procedure section 1161.
- Conversion to Ordinary Civil Action If Possession Not at Issue. Civil Code section 1952.3(a).

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- Tenant Protection Act of 2019. Civil Code section 1946.2.

- " 'In order that such an action may be maintained the conventional relation of landlord and tenant must be shown to exist. In other words, the action is limited to those cases in which the tenant is estopped to deny the landlord's title.' " (*Fredericksen v. McCosker* (1956) 143 Cal.App.2d 114, 116 [299 P.2d 908], internal citations omitted.)

- "The most important difference between a periodic tenancy and a tenancy for a fixed term—such as six months—is that the latter terminates at the end of such term, without any requirement of notice as in the former. In order to create an estate for a definite period, the duration must be capable of exact computation when it becomes possessory, otherwise no such estate is created." (*Camp v. Matich* (1948) 87 Cal.App.2d 660, 665–666 [197 P.2d 345], internal citations omitted.)

- "It is well established that it is the duty of the tenant as soon as his tenancy expires by its own limitations, to surrender the possession of the premises and that no notice of termination is necessary, the lease itself terminating the tenancy; and if he continues in possession beyond that period without the permission of the landlord, he is guilty of unlawful detainer, and an action may be commenced against him at once, under the provisions of subdivision 1 of section 1161 of the Code of Civil Procedure, without the service upon him of any notice." (*Ryland v. Appelbaum* (1924) 70 Cal.App. 268, 270 [233 P. 356], internal citations omitted.)

- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

Secondary Sources

12 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2006~~2017) Real Property, §§ ~~664~~691, ~~678~~705, ~~721~~754

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) § 8.82

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.4, 7.8

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.42 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

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Miller & Starr, California Real Estate 4th ~~(3d ed. 2008) Ch. 19, *Landlord-Tenant*~~, § 19:43 (Thomson Reuters)

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4303. Sufficiency and Service of Notice of Termination for Failure to Pay Rent

[*Name of plaintiff***] contends that [he/she/*nonbinary pronoun*/it] properly gave [***name of defendant***] three days' notice to pay the rent or vacate the property. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that [he/she/*nonbinary pronoun*/it] must pay the amount due within three days or vacate the property;**

2. **That the notice stated [no more than/a reasonable estimate of] the amount due, and the name, telephone number, and address of the person to whom the amount should be paid, and**

   [*Use if payment was to be made personally:*

   the usual days and hours that the person would be available to receive the payment; and]

   [*or: Use if payment was to be made into a bank account:*

   the number of an account in a bank located within five miles of the rental property into which the payment could be made, and the name and street address of the bank; and]

   [*or: Use if an electronic funds transfer procedure had been previously established:*

   that payment could be made by electronic funds transfer; and]

3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***].**

[The three-day notice period excludes Saturdays, Sundays, and judicial holidays, but otherwise begins the day after the notice to pay the rent or vacate the property was given to [*name of defendant***].]**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s residence or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her/*nonbinary pronoun*] residence/the commercial property]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail][./; or]]**

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[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[A notice stating a reasonable estimate of the amount of rent due that is within 20 percent of the amount actually due is reasonable unless [*name of defendant***] proves that it was not reasonable. In determining the reasonableness of the estimate, you may consider whether calculating the amount of rent required information primarily within the knowledge of [***name of defendant***] and whether [***name of defendant***] accurately furnished that information to [***name of plaintiff***].]**

New August 2007; Revised December 2010; June 2011, December 2011, November 2019, May 2020

Directions for Use

Use the reasonable-estimate option in the first sentence of element 2 and include the final paragraph only in cases involving commercial leases. (Code Civ. Proc., § 1161.1(a); see also Code Civ. Proc., § 1161.1(e) [presumption that if amount found to be due is within 20 percent of amount stated in notice, then estimate was reasonable].)

In element 2, select the applicable manner in which the notice specifies that payment is to be made; directly to the landlord, into a bank account, or by electronic funds transfer. (Code Civ. Proc., § 1161(2).)

Select the manner of service used: personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial rental property, or substituted service by posting on the property. (See Code Civ. Proc., § 1162.)

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There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second, third, and fourth bracketed options for the manner of service.

Read the paragraph that follows the elements if any of the three days of the notice period fell on a Saturday, Sunday, or judicial holiday. (See Code Civ. Proc., § 1161(2).) Judicial holidays are shown on the judicial branch website, www.courts.ca.gov/holidays.htm.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout, provided that it is not less than three days.

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

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

The Tenant Protection Act of 2019 and/or ~~L~~local ordinances may impose additional notice requirements for the termination of a rental agreement. (See Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Sources and Authority

- Conclusive Presumption of Receipt of Rent Sent to Address Provided in Notice. Code of Civil Procedure section 1161(2).
- Commercial Tenancy: Estimate of Rent Due in Notice. Code of Civil Procedure 1161.1.
- Manner of Service of Notice. Code of Civil Procedure section 1162.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- " '[P]roper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. [Citations.]' [Citation.] 'A lessor must allege and prove proper service of the

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requisite notice. [Citations.] Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained. [Citations.]' " (*Borsuk v. Appellate Division of Superior Court* (2015) 242 Cal.App.4th 607, 611 [195 Cal.Rptr.3d 581].)

- "A three-day notice must contain 'the amount which is due.' A notice which demands rent in excess of the amount due does not satisfy this requirement. This rule ensures that a landlord will not be entitled to regain possession in an unlawful detainer action unless the tenant has had the opportunity to pay the delinquent rent." (*Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 697 [32 Cal.Rptr.2d 635], internal citations and footnote omitted.)

- "As compared to service of summons, by which the court acquires personal jurisdiction, service of the three-day notice is merely an element of an unlawful detainer cause of action that must be alleged and proven for the landlord to acquire possession." (*Borsuk, supra,* 242 Cal.App.4th at pp. 612–613.)

- "[W]e do not agree that a proper notice may not include anything other than technical rent. It is true that subdivision 2 of Code of Civil Procedure section 1161 relates to a default in the payment of rent. However, the subdivision refers to the 'lease or agreement under which the property is held' and requires the notice state 'the amount which is due.' The language is not 'the amount of rent which is due' or 'the rent which is due.' We think the statutory language is sufficiently broad to encompass any sums due under the lease or agreement under which the property is held." (*Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 492 [144 Cal.Rptr. 474].)

- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)

- "We … hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)

- "We … hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)

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- "An unlawful detainer action based on failure to pay rent must be preceded by a three-day notice to the tenant to pay rent or quit the premises. Failure to state the exact amount of rent due in the notice is fatal to the subsequent unlawful detainer action." (*Lynch & Freytag v. Cooper* (1990) 218 Cal.App.3d 603, 606, fn. 2 [267 Cal.Rptr. 189], internal citations omitted.)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 753, 755–758, 760~~745–760~~

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1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.26–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.10–6.30, Ch. 8

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶¶ 5:224.3, 5:277.1 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:98.10, 7:327 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.22 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.13, 236.13A (Matthew Bender)

Miller & Starr, California Real Estate 4th ~~(2015)~~, §§ 34:183-34:187 ~~(Ch. 34, *Landlord-Tenant)*~~ (Thomson Reuters)

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

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

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

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

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

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

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

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

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

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

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

Directions for Use

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

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the opening paragraph and in element 3, "owns" in element 1, and "rented" in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

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

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

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

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

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

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

The Tenant Protection Act of 2019 and/or ~~L~~local or federal law may impose additional requirements for the termination of a rental agreement based on breach of a condition. (See, e.g., Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

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

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

Sources and Authority

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- Unlawful Detainer Based on Failure to Perform Conditions. Code of Civil Procedure section 1161(3), (4).

- Tenant Protection Act of 2019. Civil Code section 1946.2.

- Conversion of Unlawful Detainer to Ordinary Civil Action if Possession No Longer at Issue. Civil Code section 1952.3(a).

- "[Code of Civil Procedure section 1161(3)] provides, that where the conditions or covenants of a lease can be performed, a lessee may within three days after the service of the notice perform them, and so save a forfeiture of his lease. By performing, the tenant may defeat the landlord's claim for possession. Where, however, the covenants cannot be performed, the law recognizes that it would be an idle and useless ceremony to demand their performance, and so dispenses with the demand to do so. And this is all that it does dispense with. It does not dispense with the demand for the possession of the premises. It requires that in any event. If the covenants can be performed, the notice is in the alternative, either to perform them or deliver possession. When the covenants are beyond performance an alternative notice would be useless, and demand for possession alone is necessary. Bearing in mind that the object of this statute is to speedily permit a landlord to obtain possession of his premises where the tenant has violated the covenants of the lease, the only reasonable interpretation of the statute is, that before bringing suit he shall take that means which should be most effectual for the purpose of obtaining possession, which is to demand it. If upon demand the tenant surrenders possession, the necessity for any summary proceeding is at an end, and by the demand is accomplished what the law otherwise would accord him under the proceeding." (*Schnittger v. Rose* (1903) 139 Cal. 656, 662 [73 P. 449].)

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

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

- "The law sensibly recognizes that although every instance of noncompliance with a contract's terms constitutes a breach, not every breach justifies treating the contract as

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terminated. Following the lead of the Restatements of Contracts, California courts allow termination only if the breach can be classified as 'material,' 'substantial,' or 'total.' " (*Superior Motels, Inc., supra,* 195 Cal.App.3d at p. 1051, internal citations omitted.)

- " '[A] lease may be terminated only for a substantial breach thereof, and not for a mere technical or trivial violation.' This materiality limitation even extends to leases which contain clauses purporting to dispense with the materiality limitation." (*Boston LLC, supra,* 245 Cal.App.4th at p. 81, internal citation omitted.)

- " 'Normally the question of whether a breach of an obligation is a material breach … is a question of fact,' however ' "if reasonable minds cannot differ on the issue of materiality, the issue may be resolved as a matter of law." ' " (*Boston LLC, supra,* 245 Cal.App.4th at p. 87.)

- "As to the substantiality of the violation, the evidence shows that the violation was wilful. Therefore, the court will not measure the extent of the violation." (*Hignell v. Gebala* (1949) 90 Cal.App.2d 61, 66 [202 P.2d 378].)

- "Where a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action." (*Salton Community Services Dist., supra,* 256 Cal.App.2d at p. 529.)

- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra,* 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil

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Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2005) Real Property, §§ 720, 726

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.50–8.54

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.38–6.49

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 12-G, *"Section 8" Government-Subsidized Housing—Termination of Section 8 Tenancies*, ¶ 12:200 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Terminating the Tenancy and Related Remedies—Bases For Terminating Tenancy*, ¶ 7:93 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.20 (Matthew Bender)

Miller & Starr California Real Estate 4th, ~~Ch. 34, *Landlord-Tenant,*~~ § 34.182 (Thomson Reuters)

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4305. Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement

[*Name of plaintiff***] contends that [he/she/*nonbinary pronoun*/it] properly gave [***name of defendant***] three days' notice to [either comply with the requirements of the [lease/rental agreement/sublease] or] vacate the property. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that [he/she/*nonbinary pronoun*/it] must, within three days, [either comply with the requirements of the [lease/rental agreement/sublease] or] vacate the property;**

2. **That the notice described how [***name of defendant***] failed to comply with the requirements of the [lease/rental agreement/sublease] [and how to correct the failure];**

3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***].**

[The three-day notice period excludes Saturdays, Sundays, and judicial holidays, but otherwise begins on the day after the notice to correct the failure or vacate the property was given to [*name of defendant***].]**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s home or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her/*nonbinary pronoun*] residence/the commercial property]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail][./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

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[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

New August 2007; Revised December 2010, June 2011, December 2011, November 2019, May 2020

Directions for Use

If the violation of the condition or covenant involves assignment, subletting, or waste, or if the breach cannot be cured, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4); *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 [64 Cal.Rptr. 246].) In such a case, omit the bracketed language in the first paragraph and in elements 1 and 2. If the violation involves nuisance or illegal activity, give CACI No. 4309, *Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use*.

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the optional language in the opening paragraph and in elements 1 and 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease." (Code Civ. Proc., § 1161(3).)

Select the manner of service used: personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial rental property, or substituted service by posting on the property. (See Code Civ. Proc., § 1162.)

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second, third, and fourth bracketed options for the manner of service.

Read the paragraph that follows the elements if any of the three days of the notice period fell on a Saturday, Sunday, or judicial holiday. (See Code Civ. Proc., § 1161(3).) Judicial holidays are shown on the judicial branch website, www.courts.ca.gov/holidays.htm.

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If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout the instruction, provided that it is not less than three days.

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

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

The Tenant Protection Act of 2019 and/or ~~L~~local ordinances may impose additional notice requirements for the termination of a rental agreement. (See, e.g., Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Sources and Authority

- Unlawful Detainer Based on Failure to Perform Conditions. Code of Civil Procedure section 1161(3), (4).
- Manner of Service of Notice. Code of Civil Procedure section 1162.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)
- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)
- "We … hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three

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days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)

- "We … hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)

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

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

- "Where a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action." (*Salton Community Services Dist., supra,* 256 Cal.App.2d at p. 529.)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

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- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 753, 759, 760~~745–760~~

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.26–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.10–6.16, 6.25–6.29, 6.38–6.49, Ch. 8

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.12 (Matthew Bender)

Miller & Starr, California Real Estate 4th ~~(2015)~~, §§ 34:182, 34:183, 34:187 ~~34:183–34:187 (Ch. 34, *Landlord–Tenant*)~~ (Thomson Reuters)

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4306. Termination of Month-to-Month Tenancy—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] [and [*name of subtenant*], a subtenant of [*name of defendant*],] no longer [has/have] the right to occupy the property because the tenancy has ended. To establish this claim, [*name of plaintiff*] must prove all of the following:

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

2. **That [*name of plaintiff*] [rented/subleased] the property to [*name of defendant*] under a month-to-month [lease/rental agreement/sublease];**

3. **That [*name of plaintiff*] gave [*name of defendant*] proper [30/60] days' written notice that the tenancy was ending; and**

4. **That [*name of defendant*] [or subtenant [*name of subtenant*]] is still occupying the property.**

New August 2007; Revised June 2011, December 2011, May 2020

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph and in element 4 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1 and "rented" and either "lease" or "rental agreement" in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

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

In element 3, select the applicable number of days' notice required by statute. Thirty days is sufficient for commercial tenancies, residential tenancies of less than a year's duration, and certain transfers of the ownership interest to a bona fide purchaser. For residential tenancies of a year or more's duration, 60 days' notice is generally required. (Civ. Code, §§ 1946, 1946.1(b)–(d).) The Tenant Protection Act of 2019 may impose additional requirements for the termination of a residential tenancy. (Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property*

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Investments, LLC v. Yadegar (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

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

Do not give this instruction to terminate a tenancy if the tenant is receiving federal financial assistance through the Section 8 program. (See *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1115 [29 Cal.Rptr.3d 262, 112 P.3d 647]; Civ. Code, § 1954.535 (90 days' notice required).) Specific grounds for terminating a federally subsidized low-income housing tenancy are required and must be set forth in the notice. (See, e.g., 24 C.F.R. § 982.310.)

See CACI No. 4307, *Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy,* for an instruction on proper advanced written notice.

Sources and Authority

- Unlawful Detainer Based on Holdover After Expiration of Term. Code of Civil Procedure section 1161(1).
- Automatic Renewal Absent Notice of Termination on Expiration of Term. Civil Code section 1946.
- Time and Manner of Giving Notice of Termination. Civil Code section 1946.1.
- Presumption That Term Is Based on Period for Which Rent Is Paid. Civil Code section 1944.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- Conversion of Unlawful Detainer to Ordinary Civil Action if Possession Not at Issue. Civil Code section 1952.3(a).
- " 'In order that such an action may be maintained the conventional relation of landlord and tenant must be shown to exist. In other words, the action is limited to those cases in which the tenant is estopped to deny the landlord's title.' " (*Fredericksen v. McCosker* (1956) 143 Cal.App.2d 114, 116 [299 P.2d 908], internal citations omitted.)
- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

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- "The Act provides that as a prerequisite to filing an unlawful detainer action based on a terminated month-to-month tenancy, the landlord must serve the tenant with a 30-day written notice of termination." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 113 [78 Cal.Rptr.2d 799], internal citations omitted.)

- "Proper service on the lessee of a valid … notice … is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a … notice … by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra,* 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the … notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a … notice … provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the … notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (~~10~~11th ed. ~~2005~~2017) Real Property, § ~~680~~707 et seq.

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 8-B, *Unlawful Detainer Complaint*, ¶ 8:85 (The Rutter Group)

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.69–8.80

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.3, 7.5, 7.11

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7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.40 (Matthew Bender)

Miller & Starr~~,~~ California Real Estate ~~3d~~ 4th, § 34:147 ~~19:188~~ (Thomson Reuters)

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4307. Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy

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[*Name of plaintiff***] contends that [he/she/*nonbinary pronoun*/it] properly gave [***name of defendant***] written notice that the tenancy was ending. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that the tenancy would end on a date at least [30/60] days after notice was given to [him/her/*nonbinary pronoun*/it];**

2. **That the notice was given to [***name of defendant***] at least [30/60] days before the date that the tenancy was to end; and**

3. **That the notice was given to [***name of defendant***] at least [30/60] days before [***insert date on which action was filed***];**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[the notice was sent by certified or registered mail in an envelope addressed to [*name of defendant***], in which case notice is considered given on the date the notice was placed in the mail[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s home or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her/*nonbinary pronoun*] residence/the commercial property]. In this case, notice is considered given on the date the second notice was placed in the mail[./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was placed in the mail.]**

[*or for a commercial tenancy:*

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at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant***]. In this case, notice is considered given on the date the second notice was placed in the mail.]**

[The [30/60]-day notice period begins on the day after the notice was given to [*name of defendant***]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [***name of defendant***]'s time to vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]**

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

Directions for Use

Select the applicable number of days' notice required by statute. Thirty days is sufficient for commercial tenancies, residential tenancies of less than a year's duration, and certain transfers of the ownership interest to a bona fide purchaser. For residential tenancies of a year or more's duration, 60 days is generally required. (Civ. Code, §§ 1946, 1946.1(b)–(d).)

If 30 days' notice is sufficient and the lease provided for a notice period other than the statutory 30-day period (but not less than 7), insert that number instead of "30" or "60" throughout the instruction. (Civ. Code, § 1946.)

Select all manners of service used, including personal service, certified or registered mail, substituted service by leaving the notice at the defendant's home or place of work or at the rental property, and substituted service by posting on the property. (See Civ. Code, §§ 1946, 1946.1(f); Code Civ. Proc., § 1162.)

Read the next-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

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

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

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The Tenant Protection Act of 2019 and/or ~~L~~local ordinances may impose additional ~~notice~~ requirements for the termination of a rental agreement. (See, e.g., Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Sources and Authority

- Automatic Renewal of Tenancy at End of Term. Civil Code section 1946.
- Time and Manner of Giving Notice of Termination. Civil Code section 1946.1.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- Manner of Service of Notice. Code of Civil Procedure section 1162.
- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)
- "Section 1162 does not authorize service of a … notice … by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)
- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)
- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the … notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a … notice … provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)
- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the … notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be

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shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2005) Real Property, §§ 680, 727

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 8-B, *Unlawful Detainer Complaint*, ¶¶ 8:68, 8:69 (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:119, 7:190 et seq. (The Rutter Group)

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.69–8.80

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) § 5.3, Ch. 7

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.10–236.12 (Matthew Bender)

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Miller & Starr~~,~~ California Real Estate ~~3d~~ 4th, §§ 34:175, 34:181, 34:182 ~~19:188, 19:192~~ (Thomson Reuters)

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4308. Termination for Nuisance or Unlawful Use—Essential Factual Elements (Code Civ. Proc., § 1161(4))

[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has [created a nuisance on the property/ [or] used the property for an illegal purpose]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That [***name of defendant***] [***include one or both of the following:***]**

   created a nuisance on the property by [*specify conduct constituting nuisance***];**

   [or]

   used the property for an illegal purpose by [*specify illegal activity***];**

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

5. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

New December 2010; Revised June 2011, December 2011, May 2020

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph and in elements 4 and 5 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1, and "rented" in element 2.

If the plaintiff is a tenant seeking to recover possession from a subtenant, include the bracketed language on subtenancy in the opening paragraph and in element 4, "leases" in element 1, and "subleased" in element 2. (Code Civ. Proc., § 1161(3).)

Certain conduct or statutory violations that constitute or create a rebuttable presumption of a nuisance are set forth in Code of Civil Procedure section 1161(4). If applicable, insert the appropriate ground in element 3. (See also Health & Saf. Code, § 17922 [adopting various uniform housing and building codes].)

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

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

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 4.

For nuisance or unlawful use, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4).)

The Tenant Protection Act of 2019, l~~L~~ocal law, and/or federal law may impose additional requirements for the termination of a rental agreement based on nuisance or illegal activity. (See Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined], (b)(1)(C) [nuisance is "just cause"], (b)(1)(I) [unlawful purpose is "just cause"].) This instruction should be modified accordingly if applicable.

See CACI No. 4309, *Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use,* for an instruction on proper written notice.

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

Sources and Authority

- Unlawful Detainer Based on Tenant Conduct. Code of Civil Procedure section 1161(4).
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- "Nuisance" Defined. Civil Code section 3479.
- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter

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to allege such facts, but this he did not do." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 29 [341 P.2d 749].)

- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra,* 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 674, 726

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.55, 8.58, 8.59

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.46, 6.48, 6.49

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶ 7:136 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination of Tenancies*, § 200.38 (Matthew Bender)

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Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.23

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.11 (Matthew Bender)

Miller & Starr~~,~~ California Real Estate 4th, § 34:181 ~~(3d ed. 2008) Ch. 19, Landlord-Tenant, §§ 19:200–19.205~~ (Thomson Reuters)

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4309. Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use

[*Name of plaintiff***] contends that [he/she/*nonbinary pronoun*/it] properly gave [***name of defendant***] three days' notice to vacate the property. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that [he/she/*nonbinary pronoun*/it] must vacate the property within three days;**

2. **That the notice described how [***name of defendant***] [created a nuisance on the property/ [or] used the property for an illegal purpose]; and**

3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***].**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s residence or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her/*nonbinary pronoun*] residence/the commercial property]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail][./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

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[The three-day notice period begins on the day after the notice was given to [*name of defendant*]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [*name of defendant*]'s time to correct the failure or to vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]

New December 2010; Revised June 2011, December 2011, May 2020

Directions for Use

Select the manner of service used: personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial property, or substituted service by posting on the property. (See Code Civ. Proc., § 1162.)

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second, third, and fourth bracketed options for the manner of service.

Read the next-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout the instruction, provided that it is not less than three days.

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

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

The Tenant Protection Act of 2019 and/or ~~L~~local ordinances may impose additional notice requirements for the termination of a rental agreement. (See, e.g., Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

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Sources and Authority

- Unlawful Detainer Based on Tenant Conduct. Code of Civil Procedure section 1161(4).
- Manner of Service of Notice. Code of Civil Procedure section 1162.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)
- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)
- "We … hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)
- "We … hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)
- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 29 [341 P.2d 749].)
- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

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- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the … notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a … notice … provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the … notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (~~10~~11th ed. ~~2006~~2017) Real Property, §§ 701, 759, 760 ~~674, 726, 727~~

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.62–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.25–6.29

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:98.5 et seq., 7:137 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.24 (Matthew Bender)

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Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.23

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.11 (Matthew Bender)

Miller & Starr~~,~~ California Real Estate 4th~~(3d ed. 2008) Ch. 19, Landlord-Tenant~~, §§ 34:182, 34:183 ~~19:200–19:205~~ (Thomson Reuters)

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4325. Affirmative Defense—Failure to Comply With Rent Control Ordinance/Tenant Protection Act

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[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/*nonbinary pronoun*] because [***name of plaintiff***] violated [[***insert name of local governmental entity***]'s rent control law]/[the Tenant Protection Act]. To succeed on this defense, [***name of defendant***] must prove the following:**

[*Insert elements of rent control defense.***]**

New August 2007; Revised May 2020

Directions for Use

Insert the elements of the Tenant Protection Act of 2019 and/or the relevant local rent control law into this instruction.

Sources and Authority

- Tenant Protection Act of 2019. Civil Code section 1946.2.
- "[T]he statutory remedies for recovery of possession and of unpaid rent do not preclude a defense based on municipal rent control legislation enacted pursuant to the police power imposing rent ceilings and limiting the grounds for eviction for the purpose of enforcing those rent ceilings." (*Birkenfeld v. Berkeley* (1976) 17 Cal.3d 129, 149 [130 Cal.Rptr. 465, 550 P.2d 1001], internal citations and footnote omitted.)
- "Although municipalities have power to enact ordinances creating substantive defenses to eviction, such legislation is invalid to the extent it conflicts with general state law." (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 697 [209 Cal.Rptr. 682, 693 P.2d 261]~~, affd. (1986) 475 U.S. 260 [106 S.Ct. 1045, 89 L.Ed.2d 206]~~, internal citations omitted.)

Secondary Sources

12 Witkin, Summary of California Law (~~10~~11th ed. ~~2006~~2017) Real Property, § 618~~594~~

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 7.53–7.76

2 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 17

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

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

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.74 (Matthew Bender)

Miller & Starr~~,~~ California Real Estate 4th, §§ 34:204, 34:256 (Thomson ~~West~~Reuters) ~~Ch. 19, *Landlord-Tenant*, § 19:102~~

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4575. Right to Repair Act—Affirmative Defense—Failure to ~~Properly~~ Follow Recommendations or to Maintain ~~Home~~ (Civ. Code, § 945.5(c))

[*Name of defendant*] claims that [he/she/*nonbinary pronoun*/it] is not responsible for [*name of plaintiff*]'s harm because [*name of plaintiff*] failed to properly maintain the home. To establish this defense, [*name of defendant*] must prove [all/both] of the following:

1. That [*name of plaintiff*] failed to follow [[*name of defendant*]'s/ [or] a manufacturer's] recommendations/ [or] commonly accepted homeowner maintenance obligations];

[2. That [*name of plaintiff*] had written notice of [*name of defendant*]'s recommended maintenance schedules;~~]~~

~~[~~3. That the recommendations and schedules were reasonable at the time they were issued;]

4. That [*name of plaintiff*]'s harm was caused by [his/her/*nonbinary pronoun*] failure to follow [[*name of defendant*]'s/ [or] a manufacturer's] recommendations/ [or] commonly accepted homeowner maintenance obligations].

New November 2019; Revised May 2020

Directions for Use

This instruction sets forth a builder's affirmative defense to a homeowner's construction defect claim under the Right to Repair Act, asserting that the homeowner failed to follow the builder's or manufacturer's recommendations, or properly maintain the property. The homeowner is responsible for any maintenance failures by any of ~~his or her~~ the homeowner's agents, employees, general contractors, subcontractors, independent contractors, or consultants. (Civ. Code, § 945.5(c).) Include elements 2 and 3 if the defendant contractor is relying on its own recommended maintenance schedule.

Sources and Authority

- Right to Repair Act Affirmative Defense of Homeowner's Failure to Maintain. Civil Code section 945.5(c).

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1310 et seq.

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.263-104.265 (Matthew Bender)

9 California Legal Forms Transaction Guide, Ch. 23, *Real Property Sales Agreements*, § 23.20A (Matthew Bender)

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12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.70 (Matthew Bender)

Miller & Starr California Real Estate 4th, § 33:4 (Thomson Reuters)

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4603. Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5)

[*Name of plaintiff***] claims that [***name of defendant***] [discharged/[***other adverse employment action***]] [him/her/*nonbinary pronoun*] in retaliation for [his/her/*nonbinary pronoun*] [disclosure of information of/refusal to participate in] an unlawful act. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s employer;**

2. **[That [[***name of plaintiff***] disclosed]/[[***name of defendant***] believed that [***name of plaintiff***] [had disclosed/might disclose] to a [government agency/law enforcement agency/person with authority over [***name of plaintiff***]/ [or] an employee with authority to investigate, discover, or correct legal [violations/noncompliance]] that [***specify information disclosed***]];]**

   [*or***]**

   [That [*name of plaintiff***] [provided information to/testified before] a public body that was conducting an investigation, hearing, or inquiry;]**

   [*or***]**

   [That [*name of plaintiff***] refused to [***specify activity in which plaintiff refused to participate***];]**

3. **[That [***name of plaintiff***] had reasonable cause to believe that the information disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

   [*or***]**

   [That [*name of plaintiff***] had reasonable cause to believe that the [information provided to/testimony before] the public body disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

   [*or***]**

   [That [*name of plaintiff***]'s participation in [***specify activity***] would result in [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

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

5. **That [***name of plaintiff***]'s [disclosure of information/refusal to [***specify***]] was a contributing factor in [***name of defendant***]'s decision to [discharge/[***other adverse employment action***]] [***name of plaintiff***];**

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

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

[The disclosure of policies that an employee believes to be merely unwise, wasteful, gross misconduct, or the like, is not protected. Instead, [*name of plaintiff*] must have reasonably believed that [*name of defendant*]'s policies violated federal, state, or local statutes, rules, or regulations.]

[It is not [*name of plaintiff*]'s motivation for [his/her/*nonbinary pronoun*] disclosure, but only the content of that disclosure, that determines whether the disclosure is protected.]

[A disclosure is protected even though disclosing the information may be part of [*name of plaintiff*]'s job duties.]

New December 2012; Revised June 2013, December 2013; Revoked June 2014; Restored and Revised December 2014; Renumbered from CACI No. 2730 and Revised June 2015; Revised June 2016, November 2019, May 2020

Directions for Use

The whistleblower protection statute of the Labor Code prohibits retaliation against an employee who, or whose family member, discloses information about, or refuses to participate in, an illegal activity. (Lab. Code, § 1102.5(b), (c), (h).) Liability may be predicated on retaliation by "any person acting on behalf of the employer." (Lab. Code, § 1102.5(a)–(d).) Select any of the optional paragraphs as appropriate to the facts of the case. For claims under Labor Code section 1102.5(c), the plaintiff must show that the activity in question actually would result in a violation of or noncompliance with a statute, rule, or regulation, which is a legal determination that the court is required to make. (*Nejadian v. County of Los Angeles* (2019) 40 Cal.App.5th 703, 719 [253 Cal.Rptr.3d 404].)

Modifications to the instruction may be required if liability is predicated on an agency theory and the agent is also a defendant. Modifications will also be required if the retaliation is against an employee whose family member engaged in the protected activity.

Select the first option for elements 2 and 3 for claims based on actual disclosure of information or a belief that plaintiff disclosed or might disclose information. (Cf. *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648–649 [163 Cal.Rptr.3d 392] [under prior version of statute, no liability for anticipatory or preemptive retaliation based on fear that plaintiff might file a complaint in the future].) Select the second options for providing information to or testifying before a public body conducting an investigation, hearing, or inquiry. Select the third options for refusal to participate in an unlawful activity, and instruct the jury that the court has made the determination that the specified activity would have been unlawful. In the first option for element 2, choose "might disclose" if the allegation is that the employer believed that the employee might disclose the information in the future. (Cf. *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648–649 [163 Cal.Rptr.3d 392] [under prior version of statute, no liability for anticipatory or preemptive retaliation based on fear that plaintiff might file a complaint in the future].)

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It has been held that a report of publicly known facts is not a protected disclosure. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858 [136 Cal.Rptr.3d 259].) Another court, however, has held that protection is not necessarily limited to the first public employee to report unlawful acts to the employer. (*Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548−1553 [176 Cal.Rptr.3d 268]; see Lab. Code, § 1102.5(b), (e).)

"Adverse employment action" is viewed the same as it is under the Fair Employment and Housing Act. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387 [37 Cal.Rptr.3d 113]; see CACI No. 2505, *Retaliation—Essential Factual Elements.*) Element 4 may be modified to allege constructive discharge or adverse acts that might not be obviously prejudicial. See CACI No. 2509, *"Adverse Employment Action" Explained,* and CACI No. 2510, *"Constructive Discharge" Explained,* for instructions that may be adapted for use with this instruction.

The employee must demonstrate by a preponderance of evidence that a protected activity was a contributing factor in the adverse action against the employee. The employer may then attempt to prove by clear and convincing evidence that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. (See Lab. Code, § 1102.6; CACI No. 4604, *Affirmative Defense—Same Decision*.)

Sources and Authority

- Retaliation Against Whistleblower Prohibited. Labor Code section 1102.5.
- Affirmative Defense: Same Decision. Labor Code section 1102.6.
- "The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. [¶] We are concerned here with the first element of a section 1102.5(b) retaliation claim, establishing a prima facie case of retaliation. To do that, a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*Patten, supra,* 134 Cal.App.4th at p. 1384, internal citations omitted.)
- "In order to prove a claim under section 1102.5(b), the plaintiff must establish a prima facie case of retaliation. It is well-established that such a prima facie case includes proof of the plaintiff's employment status." (*Bennett v. Rancho California Water Dist.* (2019) 35 Cal.App.5th 908, 921 [248 Cal.Rptr.3d 21, 31], internal citations omitted.)
- "In 1984, our Legislature provided 'whistle-blower' protection in section 1102.5, subdivision (b), stating that an employer may not retaliate against an employee for disclosing a violation of state or federal regulation to a governmental or law enforcement agency. This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. Section 1102.5, subdivision (b), concerns employees who report to public agencies. It does not protect plaintiff, who reported his suspicions directly to his employer.

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Nonetheless, it does show the Legislature's interest in encouraging employees to report workplace activity that may violate important public policies that the Legislature has stated. The state's whistle-blower statute includes administrative regulations as a policy source for reporting an employer's wrongful acts and grants employees protection against retaliatory termination. Thus, our Legislature believes that fundamental public policies embodied in regulations are sufficiently important to justify encouraging employees to challenge employers who ignore those policies." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76–77 [78 Cal.Rptr.2d 16, 960 P.2d 1046].)

- "[T]he purpose of … section 1102.5(b) 'is to ' "encourag[e] workplace whistle-blowers to report unlawful acts without fearing retaliation." ' " (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 923 [180 Cal.Rptr.3d 359].)

- "Once it is determined that the activity would result in a violation or noncompliance with a statute, rule, or regulation, the jury must then determine whether the plaintiff refused to participate in that activity and, if so, whether that refusal was a contributing factor in the defendant's decision to impose an adverse employment action on the plaintiff." (*Nejadian, supra,* 40 Cal.App.5th at p. 719.)

- "As a general proposition, we conclude the court could properly craft instructions in conformity with law developed in federal cases interpreting the federal whistleblower statute. As the court acknowledged, it was not bound by such federal interpretations. Nevertheless, the court could properly conclude that the jury required guidance as to what did and did not constitute 'disclosing information' or a 'protected disclosure' under the California statutes." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 847.)

- "The court erred in failing to distinguish between the disclosure of policies that plaintiff believed to be unwise, wasteful, gross misconduct or the like, which are subject to the [debatable differences of opinion concerning policy matters] limitation, and the disclosure of policies that plaintiff reasonably believed violated federal or state statutes, rules, or regulations, which are not subject to this limitation, even if these policies were also claimed to be unwise, wasteful or to constitute gross misconduct." (*Mize-Kurzman, supra,* 202 Cal.App.4th at pp. 852–853.)

- "[I]t is not the *motive* of the asserted whistleblower, but the nature of the communication that determines whether it is covered." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 852, original italics.)

- "[I]f we interpret section 1102.5 to require an employee to go to a different public agency or directly to a law enforcement agency before he or she can be assured of protection from retaliation, we would be encouraging public employees who suspected wrongdoing to do nothing at all. Under the scenario envisioned by the [defendant], if the employee reports his or her suspicions to the agency, … , he or she will *have to suffer any retaliatory* conduct with no legal recourse. If the employee reports suspicions to an outside agency or law enforcement personnel, he or she risks subjecting the agency to negative publicity and loss of public support which could ensue without regard to whether the charges prove to be true. At the same time, a serious rift in the employment relationship will have occurred because the employee did not go through official

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channels within the agency which was prepared to investigate the charges. We see no reason to interpret the statute to create such anomalous results." (*Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 243 [101 Cal.Rptr.2d 893].)

- "Labor Code section 1102.5, subdivision (b) protects employee reports of unlawful activity by third parties such as contractors and employees, as well unlawful activity by an employer. In support of our conclusion, we note that an employer may have a financial motive to suppress reports of illegal conduct by employees and contractors that reflect poorly on that employer." (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471 [152 Cal.Rptr.3d 595], internal citation omitted.)

- "We are persuaded that [instructing the jury that reporting publicly known facts is not a protected disclosure] was a proper limitation on what constitutes disclosure protected by California law." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 858.)

- "The report of 'publicly known' information or 'already known' information is distinct from a rule in which only the first employee to report or disclose unlawful conduct is entitled to protection from whistleblower retaliation." (*Hager, supra,* 228 Cal.App.4th at p. 1552.)

- "Protection only to the first employee to disclose unlawful acts would defeat the legislative purpose of protecting workplace whistleblowers, as employees would not come forward to report unlawful conduct for fear that someone else already had done so. The 'first report' rule would discourage whistleblowing. Thus, the [defendant]'s interpretation is a disincentive to report unlawful conduct. We see no such reason to interpret the statute in a manner that would contradict the purpose of the statute." (*Hager, supra,* 228 Cal.App.4th at p. 1550.)

- "Matters such as transferring employees, writing up employees, and counseling employees are personnel matters. 'To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected "whistleblowers" arising from the routine workings and communications of the job site. … ' " (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 [98 Cal.Rptr.3d 281].)

- " 'A wrongful termination action is viable where the employee alleges he [or she] was terminated for reporting illegal activity which could cause harm, not only to the interests of the employer but also to the public.' 'An action brought under the whistleblower statute is inherently such an action.' To preclude a whistleblower from revealing improper conduct by the government based on confidentiality would frustrate the legislative intent underlying the whistleblower statutes. For reasons of public policy, actions against a public entity for claims of discharge from or termination of employment grounded on a whistleblower claim are not barred by governmental immunity." (*Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, 365 [225 Cal.Rptr.3d 321], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 373, 374

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Chin et al., California Practice Guide: Employment Litigation, Ch. 5(~~2~~II)-B, ~~*Retaliation Claims:*~~ *Retaliation Under Other Whistleblower Statutes*, ¶ 5:1740 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.42 et seq. (Matthew Bender)

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VF-4602. Whistleblower Protection—Affirmative Defense of Same Decision (Lab. Code, §§ 1102.5, 1102.6)

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] [***name of plaintiff***]'s employer?**
____ Yes ____ No

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

2. **Did [[***name of plaintiff***] disclose/[***name of defendant***] believe that [***name of plaintiff***] [had disclosed/might disclose]] to a [government agency/law enforcement agency/person with authority over [***name of plaintiff***]/ [or] an employee with authority to investigate, discover, or correct legal [violations/noncompliance]] that [***specify information disclosed***]?**
____ Yes ____ No

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

[3. **Did [***name of plaintiff***] have reasonable cause to believe that the information disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation]?**
____ Yes ____ No

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

4. **Did [***name of defendant***] [discharge/***specify other adverse action***] [***name of plaintiff***]?**
____ Yes ____ No

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

5. **Was [***name of plaintiff***]'s disclosure of information a contributing factor in [***name of defendant***]'s decision to [discharge/***other adverse action***] [him/her/***nonbinary pronoun***]?**
____ Yes ____ No

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

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

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

7. Would [*name of defendant*] have [discharged/*specify other adverse action*] [*name of plaintiff*] anyway at that time, for legitimate, independent reasons?
____ Yes ____ No

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

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

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

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

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

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

TOTAL $ _____

Signed: _____

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Presiding Juror

Dated: _____

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

New December 2015; Revised December 2016, May 2020

Directions for Use

This verdict form is based on CACI No. 4603, *Whistleblower Protection—Essential Factual Elements*, and CACI No. 4604, *Affirmative Defense—Same Decision*.

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

Questions 2 and 3 may be replaced with one of the other options for elements 2 and 3 in CACI No. 4603. ~~If the third options are used, replace "disclosure of information" in question 5 with "refusal to (*specify*).")~~Omit question 3 entirely, however, if the plaintiff allegedly refused to participate in an activity that would result in a violation or noncompliance with a statute, rule, or regulation. (*Nejadian v. County of Los Angeles* (2019) 40 Cal.App.5th 703, 719 [253 Cal.Rptr.3d 404].) ~~If the third options are used,~~ If the plaintiff allegedly refused to participate in an activity that would result in a violation or noncompliance with a statute, rule, or regulation, replace "disclosure of information" in question 5 with "refusal to [~~(~~*specify activity employee refused to participate in and what specific statute, rule, or regulation would be violated by that activity*].~~)~~."

Questions 4 and 5 may be modified to allege constructive discharge. Questions 2 through 5 of CACI No. VF-2408, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy*, should be adapted and included in such a case.

Question 7 presents the employer's affirmative defense that it would have made the same decision anyway for legitimate reasons even though the jury finds that retaliation for whistleblowing was also a contributing factor for the adverse action. Question 7 must be proved by clear and convincing evidence. (See Lab. Code, § 1102.6.)

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

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

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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.

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4920. Wrongful Foreclosure—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongly foreclosed on [***name of plaintiff***]'s [home/***specify other real property***]. In order to establish a wrongful foreclosure, [***name of plaintiff***] must prove all of the following:**

1. That [*name of defendant***] caused a foreclosure sale of [***name of plaintiff***]'s [home/***specify other real property***] under a power of sale in a [mortgage/deed of trust];**

2. That this sale was wrongful because [*specify reason(s) supporting illegality, fraud, or willful oppression***];**

3. That [*name of plaintiff***] [tendered all amounts that were due under the loan secured by the [mortgage/deed of trust], but [***name of defendant***] [refused the tender]/[was excused from tendering all amounts that were due under loan secured by the [mortgage/deed of trust]];**

4. [That [*name of plaintiff***] was not materially in breach of any other condition and had not failed to perform any other material requirement of the loan agreement that would otherwise justify the foreclosure;]**

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

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

New May 2020

Directions for Use

Use this instruction for a claim for wrongful foreclosure.

For element 3, use the optional language depending on the circumstances. If plaintiff claims that tender is excused, give CACI No. 4921, *Wrongful Foreclosure—Tender Excused*.

There is a split in authority as to whether the plaintiff must prove element 4. (Compare *Turner v. Seterus, Inc.* (2018) 27 Cal.App.5th 516, 525 [238 Cal.Rptr.3d 528] [stating the elements of a wrongful foreclosure claim without element 4] with *Majd v. Bank of America, N.A.* (2015) 243 Cal.App.4th 1293, 1306-1307 [197 Cal.Rptr.3d 151] [including element 4 as a basic element of a wrongful foreclosure claim].) If the defendant does not claim that the plaintiff is in material breach of some loan condition, however, omit element 4.

Sources and Authority

- Curing Default. Civil Code section 2924c.

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- "The elements of the tort of wrongful foreclosure are: ' "(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering" '; and (4) ' "no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the power of sale." ' " (*Majd, supra,* 243 Cal.App.4th at pp. 1306-1307 [197 Cal.Rptr.3d 151].)

- " 'The basic elements of a tort cause of action for wrongful foreclosure track the elements of an equitable cause of action to set aside a foreclosure sale. They are: "(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering." ' " (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1184–1185 [201 Cal.Rptr.3d 390, 421].)

- "Justifications for setting aside a trustee's sale from the reported cases, which satisfy the first element, include the trustee's or the beneficiary's failure to comply with the statutory procedural requirements for the notice or conduct of the sale. Other grounds include proof that (1) the trustee did not have the power to foreclose; (2) the trustor was not in default, no breach had occurred, or the lender had waived the breach; or (3) the deed of trust was void." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 104-105 [134 Cal.Rptr.3d 622], internal citations omitted.)

- "Wrongful foreclosure is a common law tort claim." (*Turner, supra,* 27 Cal.App.5th at p. 525.)

- "[A] trustee or mortgagee may be liable to the trustor or mortgagor for damages sustained where there has been an illegal, fraudulent or wil[l]fully oppressive sale of property under a power of sale contained in a mortgage or deed of trust. [Citations.] This rule of liability is also applicable in California, we believe, upon the basic principle of tort liability declared in the Civil Code that every person is bound by law not to injure the person or property of another or infringe on any of his rights." (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408 [186 Cal.Rptr.3d 625].)

- "To successfully challenge a foreclosure sale based on a procedural irregularity, the plaintiff must show both that there was a failure to comply with the procedural requirements for the foreclosure sale and that the irregularity prejudiced the plaintiff." (*Citrus El Dorado, LLC v. Chicago Title Co.* (2019) 32 Cal.App.5th 943, 950 [244 Cal.Rptr.3d 372].)

- "[M]ere technical violations of the foreclosure process will not give rise to a tort claim; the foreclosure must have been entirely unauthorized on the facts of the case. This is a sound addition." (*Miles, supra,* 236 Cal.App.4th at p. 409.)

- " '[O]nly the entity currently entitled to enforce a debt may foreclose on the mortgage or deed of trust

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securing that debt … .' 'It is no mere "procedural nicety," from a contractual point of view, to insist that only those with authority to foreclose on a borrower be permitted to do so.' " (*Sciarratta v. U.S. Bank National Assn*. (2016) 247 Cal.App.4th 552, 562 [202 Cal.Rptr.3d 219], internal citation omitted.)

- "[W]here a mortgagee or trustee makes an unauthorized sale under a power of sale he and his principal are liable to the mortgagor for the value of the property at the time of the sale in excess of the mortgages and liens against said property." (*Miles, supra,* 236 Cal.App.4th at p. 409.)

- "[L]ost equity in the property … is a recoverable item of damages. It is not, however, the *only* recoverable item of damages. Wrongfully foreclosing on someone's home is likely to cause other sorts of damages, such as moving expenses, lost rental income (which plaintiff claims here), and damage to credit. It may also result in emotional distress (which plaintiff also claims here). As is the case in a wrongful eviction cause of action, ' "The recovery includes all consequential damages occasioned by the wrongful eviction (personal injury, including infliction of emotional distress, and property damage) … and, upon a proper showing … , punitive damages." ' " (*Miles, supra,* 236 Cal.App.4th at p. 409.)

- "Civil Code section 2924c thus limits the beneficiary's contractual power of sale by giving the trustor a right to cure a default and reinstate the loan within the stated time, even if the beneficiary does not voluntarily agree. ' "The law does not require plaintiff to tender the purchase price to a trustee who has no right to sell the property at all." ' To adequately plead a cause of action for wrongful foreclosure, all plaintiffs had to allege was that they met their statutory obligation by timely tendering the amount required by Civil Code section 2924c to stop the foreclosure sale, but [defendant] refused that tender and thus allowed the foreclosure sale to go forward when [defendant] should have accepted their tender and canceled the sale. Plaintiffs did so. If [defendant] had accepted the tender, which [defendant's employee] stated was sufficient to cure the default, a rescission of the foreclosure sale and reinstatement of the loan was *mandatory,* and the subsequent sale was without legal basis and void. (*Turner, supra,* 27 Cal.App.5th at pp. 530–531, original italics, internal citations omitted.)

- " '[A] tender is an *offer* of performance ....' Subdivision (a)(1) of Civil Code section 2924c provides in pertinent part that '[w]henever all or a portion of the principal sum of any obligation secured by deed of trust ... has ... been declared due by reason of default in payment of interest or of any installment of principal ..., the trustor ... may pay to the beneficiary ... the entire amount due, at the time payment is tendered ... other than the portion of principal as would not then be due had no default occurred, and thereby cure the default theretofore existing, and thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and deed of trust ... shall be reinstated and shall be and remain in force and effect ....' Here, for purposes of Civil Code section 2924c, [plaintiff] effectively tendered payment of the amount then due when he told [an agent of defendant] that he would like to pay off the entire amount of the default. Actual submission of a payment was not required." (*Turner, supra,* (2018) 27 Cal.App.5th pp. 531–532.)

- "A tender is an unconditional offer to perform an order to extinguish an obligation." (*Crossroads Investors, L.P. v. Federal National Mortgage Association* (2017) 13 Cal.App.5th 757, 783 [222 Cal.Rptr.3d 1, 24].)

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- "The third element--tender--requires the trustor to make 'an offer to pay the full amount of the debt for which the property was security.' " (*Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 11 [183 Cal.Rptr.3d 638, 644].)

- " 'A full tender must be *made* to set aside a foreclosure sale, based on equitable principles.' Courts, however, have not required tender when the lender has not yet foreclosed and has allegedly violated laws related to avoiding the necessity for a foreclosure." (*Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1280 [150 Cal.Rptr.3d 673], original italics.)

- "*Pfeifer*[*, supra,* 211 Cal.App.4th 1250] and the other tender cases are inapplicable here because [plaintiff] has not sued to set aside or prevent a foreclosure sale. In the sixth cause of action, he sought to quiet title to the property, which he cannot do without paying the outstanding indebtedness." (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 87 [163 Cal.Rptr.3d 804, 836].)

- "Here, neither the deed of trust nor the governing statutes expressly create a duty on the part of [defendant] to verify that the beneficiary received a valid assignment of the loan or to verify the authority of the person who signed the substitution of trustee. [Plaintiff] has not cited, and we have not discovered, any authority holding a trustee liable for wrongful foreclosure or any other cause of action based on similar purported failures to investigate. To the contrary, the trustee generally 'has no duty to take any action except on the express instructions of the parties or as expressly provided in the deed of trust and the applicable statutes.' " (*Citrus El Dorado, LLC, supra,* 32 Cal.App.5th at pp. 948–949.)

Secondary Sources

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4921. Wrongful Foreclosure—Tender Excused

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was not required to tender all amounts that were due under loan secured by the [mortgage/deed of trust]. Tender is excused if [***insert one or more of the following***]:**

a. The underlying debt was not valid because [*specify reason(s)***];**

b. [*Name of plaintiff***] has a claim for money against [***name of defendant***] and the claim, if valid, would completely offset the amount due on the loan secured by the [mortgage/deed of trust];**

c. It would be unfair to require tender of [*name of plaintiff***] because [***specify reason(s)***];**

d. The trust deed is void on its face because [*specify reason(s)***];**

e. The loan was illegal or made in violation of [the loan agreement/an agreement to modify the loan] because [*specify reason(s)***]; or**

f. [*Name of plaintiff***] was not in default and there is no basis for a foreclosure.**

New May 2020

Directions for Use

Give this instruction if the plaintiff alleges that tender is excused in element 3 of CACI No. 4920, *Wrongful Foreclosure—Essential Factual Elements*.

Sources and Authority

- "Courts have applied equitable exceptions to the tender rule, such as: '(1) where the borrower's action attacks the validity of the underlying debt, tender is not required since it would constitute affirmation of the debt; (2) when the person who seeks to set aside the trustee's sale has a counter-claim or set-off against the beneficiary, the tender and the counter-claim offset each other and if the offset is greater than or equal to the amount due, tender is not required; (3) a tender may not be required if it would be 'inequitable' to impose such a condition on the party challenging the sale; … (4) tender is not required where the trustor's attack is based not on principles of equity but on the basis that the trustee's deed is void on its face (such as where the original trustee had been substituted out before the sale occurred)[;] [(5)] when the loan was made in violation of substantive law, or in breach of the loan agreement or an agreement to modify the loan[;] [and (6)] when the borrower is not in default and there is no basis for the foreclosure … .' " (*Turner v. Seterus, Inc.* (2018) 27 Cal.App.5th 516, 525–526 [238 Cal.Rptr.3d 528].)

- "Because [plaintiff] alleges a void as distinguished from a voidable assignment, she is excused from having to allege tender as an element of her wrongful foreclosure cause of action." (*Sciarratta v. U.S.*

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Bank National Association (2016) 247 Cal.App.4th 552, 565, fn. 10 [202 Cal.Rptr.3d 219].)

Secondary Sources

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Guide for Using Judicial Council of California Civil Jury Instructions

USER GUIDE

USER GUIDE

Ease of understanding by jurors, without sacrificing accuracy, is the primary goal of these Judicial Council instructions. A secondary goal is ease of use by lawyers. This guide provides an introduction to the instructions, explaining conventions and features that will assist in the use of both the print and electronic editions.

Jury Instructions as a Statement of the Law: While jury instructions are not a primary source of the law, they are a statement or compendium of the law, a secondary source. That the instructions are in plain English does not change their status as an accurate statement of the law.

Instructions Approved by Rule of Court: Rule 2.1050 of the California Rules of Court provides: "The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California … The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law … Use of the Judicial Council instructions is strongly encouraged."

Absence of Instruction: The fact that there is no CACI instruction on a claim, defense, rule, or other situation does not indicate that no instruction would ever be appropriate.

Using the Instructions

Revision Dates: The original date of approval and all revision dates of each instruction are presented. An instruction is considered as having been revised if there is a nontechnical change to the title, instruction text, or Directions for Use. Additions or changes to the Sources and Authority and Secondary Sources do not generate a new revision date.

Directions for Use: The instructions contain Directions for Use. The directions alert the user to special circumstances involving the instruction and may include references to other instructions that should or should not be used. In some cases the directions include suggestions for modifications or for additional instructions that may be required. Before using any instruction, reference should be made to the Directions for Use.

Sources and Authority: Each instruction sets forth the primary sources that present the basic legal principles that support the instruction. Applicable statutes are listed along with quoted material from cases that pertain to the subject matter of the instruction. Authorities are included to support the text of the instruction, the burden of proof, and matters of law and of fact.

Cases included in the Sources and Authority should be treated as a digest of relevant citations. They are not meant to provide a complete analysis of the legal subject of the instruction. Nor does the inclusion of an excerpt necessarily mean that the committee views it as binding authority. Rather, they provide a starting point for further legal research on the subject. The standard is that the committee believes that the excerpt would be of interest and relevant to CACI users.

Secondary Sources are also provided for treatises and practice guides from a variety of legal

publishers.

Instructions for the Common Case: These instructions were drafted for the common type of case and can be used as drafted in most cases. When unique or complex circumstances prevail, users will have to adapt the instructions to the particular case.

Multiple Parties: Because jurors more easily understand instructions that refer to parties by name rather than by legal terms such as "plaintiff" and "defendant," the instructions provide for insertion of names. For simplicity of presentation, the instructions use single party plaintiffs and defendants as examples. If a case involves multiple parties or cross-complaints, the user will usually need to modify the parties in the instructions. Rather than naming a number of parties in each place calling for names, the user may consider putting the names of all applicable parties in the beginning and thereafter identifying them as "plaintiffs," "defendants," "cross-complaints," etc. Different instructions often apply to different parties. The user should only include the parties to whom each instruction applies.

Personal Pronouns: Many CACI instructions include an option to insert the personal pronouns "he/she/*nonbinary pronoun*," "his/her/*nonbinary pronoun*," or "him/her/*nonbinary pronoun*." ~~The committee does not intend these options to be limiting.~~ It is the policy of the State of California that intersex, transgender, and nonbinary people are entitled to full legal recognition and equal treatment under the law. In accordance with this policy, attorneys and courts should take affirmative steps to ensure that they are using ~~litigants'~~ individuals' ~~preferred~~ correct personal pronouns. Although the advisory committee acknowledges a trend for the use of "they," "their," and "them" as singular personal pronouns, the committee also recognizes these same pronouns have plural denotations with the potential to confuse jurors. For clarity in the jury instructions, the committee recommends using an individual's name rather than a personal nonbinary pronoun (such as "they") if the pronoun's use could result in confusion.

Reference to "Harm" in Place of "Damage" or "Injury": In many of the instructions, the word harm is used in place of damage, injury, or other similar words. The drafters of the instructions felt that this word was clearer to jurors.

Substantial Factor: The instructions frequently use the term "substantial factor" to state the element of causation, rather than referring to "cause" and then defining that term in a separate instruction as a "substantial factor." An instruction that defines "substantial factor" is located in the Negligence series. The use of the instruction is not intended to be limited to cases involving negligence.

Listing of Elements and Factors: For ease of understanding, elements of causes of action or affirmative defenses are listed by numbers (*e.g.*, 1, 2, 3) and factors to be considered by jurors in their deliberations are listed by letters (*e.g.*, a, b, c).

Uncontested Elements: Although some elements may be the subject of a stipulation that the element has been proven, the instruction should set forth all of the elements and indicate those that are deemed to have been proven by stipulation of the parties. Omitting uncontested elements may leave the jury with an incomplete understanding of the cause of action and the plaintiff's full burden of proof. It is better to include all the elements and then indicate the parties have agreed that one or more of them has been established and need not be decided by the jury. One possible approach is as follows:

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

1. That [plaintiff] and [defendant] entered into a contract (which is not disputed in this case);

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

3. That all conditions required for [defendant]'s performance had occurred (which is also not disputed in this case).

Irrelevant Factors: Factors are matters that the jury might consider in determining whether a party's burden of proof on the elements has been met. A list of possible factors may include some that have no relevance to the case and on which no evidence was presented. These irrelevant factors may safely be omitted from the instruction.

Burdens of Proof: The applicable burden of proof is included within each instruction explaining a cause of action or affirmative defense. The drafters felt that placing the burden of proof in that position provided a clearer explanation for the jurors.

Affirmative Defenses: For ease of understanding by users, all instructions explaining affirmative defenses use the term "affirmative defense" in the title.

Titles and Definitions

Titles of Instructions: Titles to instructions are directed to lawyers and sometimes use words and phrases not used in the instructions themselves. Since the title is not a part of the instruction, the titles may be removed before presentation to the jury.

Definitions of Legal Terms: The instructions avoid separate definitions of legal terms whenever possible. Instead, definitions have been incorporated into the language of the instructions. In some instances (*e.g.*, specific statutory definitions) it was not possible to avoid providing a separate definition.

Evidence

Circumstantial Evidence: The words "indirect evidence" have been substituted for the expression "circumstantial evidence." In response to public comment on the subject, however, the drafters added a sentence indicating that indirect evidence is sometimes known as circumstantial evidence.

Preponderance of the Evidence: To simplify the instructions' language, the drafters avoided the phrase preponderance of the evidence and the verb preponderate. The instructions substitute in place of that phrase reference to evidence that is "more likely to be true than not true."

Using Verdict Forms

Verdict Forms are Models: A large selection of special verdict forms accompanies the instructions. Users of the forms must bear in mind that these are models only. Rarely can they be used without modifications to fit the circumstances of a particular case.

Purpose of Verdict Forms: The special verdict forms generally track the elements of the applicable cause of action. Their purpose is to obtain the jury's finding on the elements defined in the instructions. "The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law." (Code Civ. Proc., § 624; *see Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285 [73 Cal.Rptr.2d 596].) Modifications made to the instructions in particular cases ordinarily will require corresponding modifications to the special verdict form.

Multiple Parties: The verdict forms have been written to address one plaintiff against one defendant. In nearly all cases involving multiple parties, the issues and the evidence will be such that the jury could reach different results for different parties. The liability of each defendant should always be evaluated individually, and the damages to be awarded to each plaintiff must usually be determined separately. Therefore, separate special verdicts should usually be prepared for each plaintiff with regard to each defendant. In some cases, the facts may be sufficiently simple to include multiple parties in the same verdict form, but if this is done, the transitional language from one question to another must be modified to account for all the different possibilities of yes and no answers for the various parties.

Multiple Causes of Action: The verdict forms are self-contained for a particular cause of action. When multiple causes of action are being submitted to the jury, it may be better to combine the verdict forms and eliminate duplication.

Modifications as Required by Circumstances: The verdict forms must be modified as required by the circumstances. It is necessary to determine whether any lesser or greater specificity is appropriate. The question in special verdict forms for plaintiff's damages provides an illustration. Consistent with the jury instructions, the question asks the jury to determine separately the amounts of past and future economic loss, and of past and future noneconomic loss. These four choices are included in brackets. In some cases it may be unnecessary to distinguish between past and future losses. In others there may be no claim for either economic or noneconomic damages. In some cases the court may wish to eliminate the terms "economic loss" and "noneconomic loss" from both the instructions and the verdict form. Without defining those terms, the court may prefer simply to ask the jury to determine the appropriate amounts for the various components of the losses without categorizing them for the jury as economic or noneconomic. The court can fix liability as joint or several under Civil Code sections 1431 and 1431.2, based on the verdicts. A more itemized breakdown of damages may be appropriate if the court is concerned about the sufficiency of the evidence supporting a particular component of damages. Appropriate special verdicts are preferred when periodic payment schedules may be required by Code of Civil Procedure section 667.7. (*Gorman v. Leftwich* (1990) 218 Cal.App.3d 141, 148–150 [266 Cal. Rptr. 671].)

May ~~2019~~2020

Hon. Martin J. Tangeman
Chair, Judicial Council Advisory Committee on Civil Jury Instructions

Instruction(s)	Commenter	Comment	Committee Response
N/A	Joshua Ingram, Rancho Cordova	[Comment received from private citizen that was unrelated to civil jury instructions.]	No response required.
113. *Bias*	SacLEGAL by Lexi P. Howard, Sacramento	"We agree with the addition of 'gender identity' and 'gender expression' throughout."	No response required.
		"We agree with the changes in places that revise 'him or her' or 'he or she' to either 'their' or 'the homeowner's' or another noun that describes the person. (See also changes to Jury Instructions 1305, 2540, 3053, and 4575)"	Nonsubstantive changes like these are being made throughout CACI.
118. *Personal Pronouns*	Association of Southern California Defense Counsel by Lisa Perrochet, Burbank	New CACI 118 offers a useful template for counsel and courts to use when addressing questions that may arise concerning pronoun usage. We offer one suggestion, however, which would help trial lawyers—like those who are ASCDC's members—when customizing jury instructions. Instead of instructions and verdict forms that refer to "[him/her/nonbinary pronoun/it]," or "[he/she/nonbinary pronoun]," or "[his/her/nonbinary pronoun/its]," they could instead refer simply to "[pronoun]." The proposed Directions for Use accompanying CACI 118 explains that, throughout CACI, the "instructions have been expanded to include "nonbinary pronoun" to indicate that personal pronoun choices may be made. The suggestion to use party names where to do so would foster clarity is a good one, but the proposal to expand the already cumbersome bracketed selections does not similarly foster clarity. If anything, it makes it somewhat more difficult as a practical matter for those who wish to "search and replace" to substitute the appropriate pronoun. Using "[pronoun]" instead should not cause any confusion, and will streamline the CACI text in a way that makes it easier to read and modify. Moreover, the proposed change would have the salutary effect of avoiding the placement throughout of 'he' before "she" in each option, which is a default convention that some might say is not supported by the rationale underlying the proposed revisions. Although it seems highly unlikely that users would have difficulty selecting the	The committee notes the commenter's support for the substance of instruction 118. With respect to the commenter's suggestion to offer only [pronoun] without any further information, the committee concluded that this option would not assist users in making the appropriate personal pronoun selections, and that eliminating personal pronoun brackets may affect the way pronouns are generated in automated software. The committee appreciates the commenter's concern about the work required to find and replace pronouns in each instruction and verdict form, but the committee is not persuaded that the proposed alternatives would improve the situation. The committee also acknowledges that the sequence of personal pronouns may be anachronistic. However, given the overwhelming support for the change, the committee favors an incremental change to the commenter's alternative.

Instruction(s)	Commenter	Comment	Committee Response
		grammatically correct pronoun without prompts, any concerns the Committee might have on that score could be remedied by inserting "[subjective pronoun]," "[objective pronoun]" and "[possessive pronoun]." Also, if the Committee wishes to capture the idea of using party names as an alternative, it could substitute "[pronoun/name]" throughout. The Association does not recommend these alternatives, because "[pronoun]" alone should suffice. But the alternatives would be preferable to the proposal that is out for comment—and indeed would be preferable to the formulations as they appear in CACI as currently framed.	Adding *nonbinary pronoun* in each bracket is a uniform change throughout CACI's two volumes, which are comprised of over 1,000 instructions. And the committee recognizes that not all CACI users are sophisticated grammarians, so simplifying all brackets to [pronoun] would leave too much room for error.
	Bruce Greenlee	"Excellent"	No response required.
	Legal Aid Association of California (LAAC) by Salena Copeland, Executive Director, Oakland	By recognizing the pronouns of non-binary, transgender, and gender nonconforming people in the court system, the Judicial Council is both abiding by California law (Gender Recognition Act of 2019) and making the choice to ensure equitable access and the removal of discriminatory barriers for all. Our one suggestion is to remove the term "preferred" before "personal pronouns" in accordance with the now-common practice to recognize pronouns as not just a "preference." California here takes an important affirmative step to ensure that attorneys and courts are using the appropriate pronouns. Thank you again for this opportunity to comment, and your efforts to ensure the California court system is an inclusive, accessible place for all.	The committee acknowledges LAAC's support for these changes. See response to SacLEGAL's comment, below, with respect to use of the word *preferred*.
	SacLEGAL by Lexi P. Howard, Sacramento	"It is not clear to us what problem this suggested revision would resolve, where this would result in the court highlighting for the jury that someone involved in the case has a particular gender, gender identity, or gender expression. If 'they' is the personal pronoun used by the person, we agree that 'they' should be used unless it is confusing, in which case the person's name should be used. While we appreciate the intent of the instruction, given the possibility of confusion, and the disparate treatment that may result depending on a variety of factors, including the geographic area or jury composition, we respectfully suggest	The committee appreciates the concerns raised by the commenter, and has made revisions as suggested to the instruction. The instruction will no longer highlight a person's gender or gender identity. The Directions for Use will advise courts that they should consult with the individual(s) if possible.

Instruction(s)	Commenter	Comment	Committee Response
		that such an instruction should be given only in very limited circumstances, where there is a valid reason that can be clearly elucidated that it necessary to raise gender with the jury. The mere fact that an individual is nonbinary, nonconforming, etc. should not generally suffice to require the instruction to be given. We suggest that the Directions to the instruction more clearly indicate to the court the limited circumstances when the instruction should be given. As the California Legislature stated in passing the Gender Recognition Act, 'gender identification is fundamentally personal.' For that reason, we also suggest that, where possible, the court should consult with not only the attorneys in the case but also with the individual(s) whose pronouns are being discussed to ensure the court acts in a way that protects the individual's dignity and privacy. Further to this, we recommend the following changes, which we think would accomplish the goal without drawing undue attention to identifying the details of the person's gender/gender identity/gender expression. Recommended additions are underscored, deletions are in strikethrough: **One of the [parties/witnesses/attorneys** */specify other participant in the case*] **in this case <u>uses the personal pronouns of [</u>***<u>specify the person's pronouns</u>*<u>]</u> ~~**identifies as [gender nonbinary/gender nonconforming/gender fluid]**~~**. You may hear the judge and attorneys refer to [***name of person***] using the pronouns [***specify the person's ~~preferred~~ pronouns***].**"	

Instruction(s)	Commenter	Comment	Committee Response
		"With regard to the use of the term 'preferred personal pronouns' or 'preferred pronouns', we agree that the use of a person's personal pronouns is very important. However, we are concerned that as used here, the word 'preferred' could result in a misunderstanding about the use of the person's pronouns as something that that person would 'prefer', or even that using the correct personal pronoun is optional. For this reason, we recommend that where the word 'preferred' is used, it be stricken, and replaced with only 'personal pronouns' or 'pronouns'. For similar reasons, where an instruction refers to an individual's gender identity, we suggest any instruction or comment state, for example, that the individual 'is gender nonbinary,' rather than 'identifies as gender nonbinary.' "	The committee has revised the instruction to eliminate use of the word *preferred* and the concept of gender identity.
118. *Personal Pronouns* and User Guide	Legal Aid Association of California (LAAC) by Salena Copeland, Executive Director, Oakland	Ensuring an inclusive and accessible civil justice system comes down to the fine procedural details, including civil jury instructions. We would like to commend the Judicial Council for additions and modifications to the civil jury instructions regarding personal pronouns. Specifically, we write in support of the changes to the "Personal Pronouns" section of the "User Guide" to the instructions as well as the addition of section 118, regarding "Personal Pronouns."	The committee acknowledges LAAC's support for these changes.
420. *Negligence per se: Rebuttal of the Presumption of Negligence—Violation Excused*	American Property Casualty Insurers Association by Denneile Ritter Assistant Vice President, Sacramento	A proposed revision to the Sources and Authority section of this jury instruction is a detailed reference to the Restatement Second of Torts. We respectfully submit that this reference should be moved from Sources and Authority to the Secondary Sources section as a restatement is neither case law nor statute.	CACI treats Restatements as authoritative (as do most courts) and includes them in its Sources and Authority. (See, e.g., CACI Nos. 307, 401, 908, 4408.)
	Association of Southern California	We offer conditional support for the Advisory Committee's proposed revision to CACI 420, 'Negligence per se: Rebuttal of the Presumption of Negligence—Violation Excused.'	The committee notes the commenter's conditional support. See responses

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	Defense Counsel (ASCDC) by Mark A. Kressel, Horvitz & Levy LLP, Burbank		below to ASCDC's substantive comments.
		The current version of CACI 420 refers to these lettered bases as 'subparagraphs,' but the proposed revision aptly refers to them as 'factors.' The revision further clarifies that it is the party who claims the violation was excused who bears the burden to prove the elements of that defense This is a salutary revision because it guides the parties and the jury on who bears the burden of proof. The current version of CACI 420 lacks that guidance	No response required.
		"The proposed revision also removes the word 'or' from all but the second-to-last factor. Although the current version's use of "or" after every one of the factors reminds jurors that the party need prove only one of the factors to prove that the violation of the law is excused, the proposed revision is more consistent with proper grammatical convention and the structure of many other CACI instructions. Counsel may highlight for the jury the disjunctive nature of the applicable factors during closing argument."	For clarity, the committee has restored the "or" after each factor.
		ASCDC's concern lies with the discussion in the Sources and Authorities regarding factor (b), which provides that a violation of a law is excused if, "[d]espite using reasonable care, [name of plaintiff/name of defendant] was not able to obey the law." Revisions to the proposed fourth bulleted summary of authority along these lines would provide helpful clarification: • Where a party invokes the excuse set forth in factor (b), "[a]An excuse instruction is improper unless special circumstances exist." (*Baker-Smith*, supra, 37 Cal.App.5th at p. 345.) Our reasoning is as follows. Of the five factors, factor (b) is unique in that it invokes the concept of reasonable care. Under factor (b), once the party who invokes the negligence per se doctrine against an opponent has demonstrated a violation of law, the opponent charged with the presumption of negligence now has the burden to prove it did use reasonable care but was	Although the suggested language may be helpful to understanding the *Baker-Smith* court's statement concerning factor (b), the format for Sources and Authority are direct quotes. Adding an editorial clarification would not follow that format.

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		nevertheless "not able to obey the law." For this reason, as explained in *Baker-Smith v. Skolnick* (2019) 37 Cal.App.5th 340, 347, and *Casey v. Russell* (1982) 138 Cal.App.3d 379, 385, factor (b) should be used only in special cases where there is evidence from which a jury could find that the party requesting the instruction actually attempted to obey the law or use due care. Without the changes suggested here, some courts may be misled to believe that evidence of "special circumstances" (*Baker-Smith*, *supra*, 37 Cal.App.5th at p. 345) or "unusual circumstances" (*Casey*, supra, 138 Cal.App.3d at p. 384) must exist to give this instruction under any circumstances, regardless of which factors are applicable to a particular case. The requirement of special or unusual circumstances discussed in *Baker-Smith* and *Casey* was addressed to only factor (b), and does not apply to the other factors. In other words, if a party intends to argue that a violation of law was excused because of the party's capacity (factor (a)), because the party faced an emergency not caused by its own misconduct (factor (c)), or because obeying the law would have involved a greater risk of harm to that party or to others (factor (d)), the instruction is appropriate even if there is no evidence of other "special" or "unusual" circumstances. The proposed further revisions to the Sources & Authorities outlined here would make that clear. [footnote omitted]" The Committee's proposed revisions to Sources and Authority include commentary from Baker-Smith and *Casey* regarding the burden of proving "special" or "unusual" circumstances without clarifying that this burden applies only with respect to factor (b). The fourth bulleted summary of authority misleadingly states, "An excuse instruction is improper unless special circumstances exist," citing *Baker-Smith*, *supra*, 37 Cal.App.5th at p. 345. ASCDC generally supports the Committee's proposed revision to CACI 420 but requests that the Committee revise the proposed new fourth bulleted summary of authority as just discussed to avoid confusion."	

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		The committee's proposed revision omits the "37" for the volume number of the official reporter.	The committee has corrected the citation to include the volume number.
	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsberg, Chair, Sacramento	We believe stating "or" after each item in the series is helpful and does not detract from this instruction. It makes it clear to the jury that the list is disjunctive without having to refer back to the introductory sentence or forward to the penultimate item.	For clarity, the committee has restored the "or" after each factor.
		We believe the term "factors" should be reserved for matters for the jury to consider in making a finding, as stated on page 2 of the User Guide. In the Directions for Use, we would refer to (a) through (e) as items, not factors.	The items listed in CACI No. 420 are factors for the jury to consider in determining an excuse. The committee does not view the use here as inconsistent with the User Guide, and does not see a meaningful improvement in identifying them as items, instead of factors, in the Directions for Use.
	Civil Justice Association of California by Jaime Huff, Vice President and Counsel, Public Policy, Sacramento	"The proposed revisions delete 'or' after three rebuttable presumptions of negligence. CJAC recommends restoring each 'or' to emphasize to the jury that the defendant need only prove one of the five excuses." The additional punctuation and second set of brackets proposed to be added around the fourth "[or]" is confusing and should be removed. When listening to the jury instructions, keeping the "or" after each line makes it clear to jurors that each excuse stands on its own, and if proven, is sufficient to rebut the presumption. Each excuse presents a very different legal theory, so the "or" provides a needed break between each.	For clarity, the committee has restored the "or" after each factor.
	Bruce Greenlee	Revise first sentence of the DforU to read: "The party claiming an excuse for a violation of the law has the burden to prove the excuse."	As proposed, the Directions for Use note the shifting burden of proof. The commenter's suggested language addresses only the burden for establishing an excuse. While the suggestion clearly supports CACI No. 420, the committee favors noting both

Instruction(s)	Commenter	Comment	Committee Response
			parties' burdens in the Directions for Use.
		I'm having trouble coming up with any scenario when the plaintiff would be the one asserting excuse. If it's because it could be on comparative fault, I don't think that CACI usually makes this distinction. I would just include [name of defendant]. And then note as above in the DforU that it's "the party claiming."	The committee chose to place the party name options in brackets because, for example, a defendant might assert a cross-claim for negligence per se.
		Baker-Smith notes that CACI No. 418 also does not include a burden of proof. While I don't think that either instruction is terribly deficient without a burden of proof, as both are obvious, if you are going to add it to 420, why not add "[name of plaintiff] must prove" to 418.	This comment concerning CACI No. 418 is beyond the scope of the invitation to comment. The committee will consider this suggestion in a future release cycle.
440. *Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*	Bruce Greenlee	"I would revise the sentence in the DforU to read: 'For cases involving the use of deadly force, Penal Code section 835a requires a different instruction.' "	Penal Code section 835a applies only to peace officers. (See Pen. Code, §§ 830–831.7.) The Directions for Use, as proposed, states that limitation. CACI No. 440 addresses the use of force by law enforcement officers who may or may not qualify as peace officers under the Penal Code.
		Is such an instruction under consideration for a future release? If not, I suggest that it should be. I don't think that the statutory change from 'reasonable' to 'necessary' can be accomplished by a modification of 440. Suggest 440A and a new 440B.	The committee will continue to monitor developments in this area and will consider revisions and/or new instructions in future release cycles.
	Tony M. Sain, Esq., Partner Manning & Kass, Ellrod, Ramirez, Trester, LLP, Los Angeles	"The proposed 2020 revisions are a step in the right direction. However, some additional revisions are needed to make the instruction consistent with prevailing law."	See responses to each substantive comment, below.
		Add to factor (d): "In evaluating the reasonableness of the [*name of defendant officer's*] use of force, you may only consider the tactical conduct and decisions that the defendant law enforcement officer(s) made before using force on [*name of plaintiff*] if you find that the pre-force tactical conduct or pre-force tactical decisions by the defendant law enforcement officer(s) unreasonably provoked or caused [*name of plaintiff*]	This comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in a future release cycle.

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		to take a specific action that, in turn, the defendant law enforcement officer(s) asserts was one of the reasons the defendant law enforcement officer(s) subsequently used force on [*name of plaintiff*].]" [Legal authority omitted.]	
		Add "only" to last paragraph of the Directions for Use: "Give optional factor (d) only if…"	This comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in a future release cycle.
		Do not delete the case excerpt from *Hayes* from the Sources and Authority; this guiding instruction for use is still legally applicable and helpful.	The committee has retained citations to *Hayes* in the Directions for Use and in the Sources and Authority. Contrary to the commenter's suggestion, however, the committee has elected to delete the final quote from *Hayes* in the Sources and Authority, not because *Hayes* is no longer applicable, but because the relevance of this excerpt to the instruction is unclear considering recent amendments to Penal Code, § 835a.
		Add to the Sources and Authority: "[A] court should not consider this [pre-shooting conduct] in isolation: it must not "divide plaintiff's cause of action artificially into a series of decisional moments." [citing *Hayes* at pp. 632, 637-638] This would wrongly allow a plaintiff "to litigate each decision in isolation, when each is part of a continuum of circumstances surrounding a single use of deadly force." [ibid.] Therefore, [for a preshooting tactical negligence claim] when the preshooting conduct did not independently injure the plaintiff, a court should consider the preshooting conduct only to determine whether deadly force was reasonable…. Here, the officers' preshooting conduct and use of deadly force were both objectively reasonable under California negligence law. First, the officers' preshooting conduct was reasonable. The officers did not provoke Vos; they instead set up outside and waited for him….	The Sources and Authority are direct quotes from cases. This suggested addition is not a direct quote from *Vos* or any of the other cases identified.

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		Second, the officers' use of deadly force was objectively reasonable because Vos threatened them with a deadly weapon. (*Vos v. City of Newport Beach* (9th Cir. 2018) 892 F.3d 1024, 1028-1034, 1037-1038 [other citations omitted].	
	City and County of San Francisco, Office of the City Attorney by Margaret W. Baumgartner, Deputy City Attorney	"Instruction 440 does not accurately reflect the law regarding negligence liability for peace officers for four reasons: (1) it fails to accurately set forth the circumstances when the Legislature has granted law enforcement the privilege to use force; (2) it misapplies the holding in *Hayes v. County of San Diego*, 57 Cal.4th 622 (2013) to the use of non-deadly force; (3) it misstates an officer's privilege to use reasonable rather than just necessary force; and (4) it prevents a jury from understanding the role of comparative negligence."	See responses to each substantive comment by the Office of the City Attorney, below.
		Instruction 440 should include other circumstances when an officer may use force. Instruction 440's introductory paragraph lists only one of the three circumstances in which the Legislature has granted officers the privilege to use force: to effectuate an arrest or detention. California Penal Code § 835a also grants an officer the authority to use force to overcome resistance or to prevent escape. Although Instruction 440 includes resistance and attempts to escape as factors to consider as part of the reasonableness analysis, the instruction does not state that, as a matter of law, an officer has the right to use reasonable force in those circumstances. Instruction 440 should add those circumstances under which an officer has the legislative authority to use force.	This comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in a future release cycle.
		The Instruction should inform a jury that an officer has no duty to retreat, and should limit reference to pre-force tactical conduct to cases involving the use of deadly force. Instruction 440 compounds the potential for a jury to misunderstand an officer's liability for negligence by: (1) including pre-force tactical conduct as a factor for the jury to consider in all cases, not just deadly force cases; and (2) failing to include Section 835a's statement that an officer has no duty to retreat in the face of threatened or actual resistance. Particularly when read	This comment is beyond the scope of the invitation to comment. The committee will consider these suggestions in future release cycles. The committee notes that factor (d), however, encapsulates the Supreme Court's decision in *Hayes*, and is an optional bracketed factor; the Directions for Use note this.

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		together, this combination of errors creates a high likelihood that a jury will find liability when it does not exist. First, in *Hayes v. County of San Diego*, 57 Cal.4th 622 (2013), the California Supreme Court answered only the question of whether pre-force tactical conduct should be considered in deadly force cases. The Supreme Court held that it did. No court has yet applied *Hayes* to a non-deadly force case alleging negligence. See *Mulligan v. Nicols*, 835 F.3d 983 n.7 (9th Cir. 2016) (noting that *Hayes* is limited to use of deadly force). *Hayes*, on its own terms, applies only to deadly force cases. Yet Instruction 440 specifically applies Hayes to non-deadly force cases. This is also inconsistent with the amendments to Penal Code Section 835a, which create different standards for deadly and non-deadly force. Accordingly, the Committee should revise the instruction to include the words "deadly force" in the instruction. Second, instructing a jury to consider pre-force tactical conduct, without instructing the jury that an officer does not have a duty to retreat, misstates an officer's duty of care. A private citizen may be held liable for continuing to act in a manner that causes foreseeable harm. See *Cabral v. Ralphs Grocery Co.*, 51 Cal.4th 764, 771 (2011) (discussing foreseeability of harm as an element in deciding whether a defendant has a duty of care). But an officer does not have a duty to retreat. Penal Code § 835a. Because an officer has no duty to retreat, an officer may lawfully make tactical decisions that foreseeably will result in using force. Instruction 440 fails to state this fact. By focusing the jury on pre-force tactical conduct as a factor in determining reasonableness, the instruction invites a jury to decide that an officer's "tactical decision" to engage the suspect rather than retreat could be negligent. That is not the law. This concern is not trivial. Negligence claims based on an officer's use of force almost always involve claims that a suspect resisted or tried to escape and that the officer knew his decision to take action would create the need to use force. Instructing the jury to consider pre-	

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		force tactical decisions as an element of the analysis, while failing to instruct that an officer lacks a duty to retreat, fails to accurately state the limitations on an officer's duty to avoid foreseeable harm. The instruction should inform the jury that an officer has no duty to retreat, and that an officer cannot be held liable just based on the officer's tactical decision not to retreat.	
		The Instruction should state that an officer may use objectively reasonable force, not just necessary force. Instruction 440 misstates the standard for assessing an officer's negligence liability for using force. It states that an officer may use only "necessary" force instead of objectively reasonable force as set forth in Section 835a. Specifically, Instruction 440 states that an officer "may use that degree of force *necessary* to accomplish the [arrest/detention]" (emphasis added). But the requirement that an office use only "necessary" force, rather than objectively reasonable force, applies to an officer's use of deadly force only. Section 835a(b) sets forth the general standard for use of force: "any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use **objectively reasonable force** to effect the arrest, to prevent escape, or to overcome resistance." (Emphasis added.) As amended in 2019, Section 835a now creates an exception to the general standard of objectively reasonable force for use of deadly force only, stating that "notwithstanding subdivision (b), a peace officer is justified in using deadly force only when the officer reasonably believes that such force is *necessary*" to accomplish certain goals. (Emphasis added.) Moreover, the Legislature stated its intent that "peace officers use deadly force only when *necessary* in defense of human life." (Emphasis added.) Section 835a thus sets different standards for use of deadly and non-deadly force. The instruction should maintain the different standards set by the Legislature for use of deadly force and non-deadly force.	This comment is beyond the scope of the invitation to comment. The recent amendments to Penal Code section 835a principally concern the use of deadly force, which was added to the Directions for Use. The committee will continue to monitor developments in this area and will consider revisions and/or new instructions in future release cycles. With respect to the general standard for use of force, this instruction has existed since 2016, and has been based on section 835a. The committee will consider whether the Legislature's addition of the modifier *objectively* to section 835a(b)'s reasonable force provision warrants further revision in the next release cycle.

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		Amending Instruction 440 to instruct the jury to consider pre-force tactical conduct in its reasonableness analysis, yet requiring the jury to decide whether the force was "necessary," allows a jury to decide the officer should have avoided acting altogether. That is not the law. Instruction 440 should therefore reflect the Legislature's grant of authority to use objectively reasonable, not just necessary, force, except in deadly force situations.	This comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in future release cycles.
		The Ninth Circuit's Model Instruction on Use of Force does not use the phrase "necessary force," rather, consistently with Penal Code § 835a, references objectively reasonable force.	The committee is not persuaded that it should look to the Ninth Circuit's model instructions, which do not cover excessive force under state negligence law.
		Instruction 440 should reference negligence. Instruction 440, except for the title, never references negligence or uses the phrase "due care." The lack of this touchstone legal concept in the instruction may cause jury confusion when a jury must also consider corollary negligence instructions, such as comparative fault or alternative causation instructions, both of which use the term "negligence." Absent parallel language, jurors may not understand that the instructions work together to address the same legal source of liability.	This comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in a future release cycle.
1100. *Dangerous Condition on Public Property—Essential Factual Elements (Gov. Code, § 835)*	American Property Casualty Insurers Association by Denneile Ritter Assistant Vice President, Sacramento	"The revision to this jury instruction, dealing with claims of being harmed by the dangerous conditions on public property, exchanges the word "injury" for the word "incident" in its listing of elements for a successful claim, i.e. "That the property was in a dangerous condition at the time of the incident injury." Using the word "injury" here in the jury instruction unnecessarily (and to the defendant's disadvantage) presupposes that an injury in fact occurred. Keeping the word "incident" avoids that concern."	The statute uses the word "injury." Government Code, § 835. The jury instruction's terminology was changed from incident to injury to reflect the Legislature's word choice.
	California Lawyers Association,	"We agree with the proposed revisions. Although not encompassed in the proposed revisions, we note that the term 'dangerous condition' appears several times in this instruction.	Because the dangerous condition will not always be a jury issue, the Directions for Use cross-reference

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	Litigation Section, Jury Instructions Committee by Reuben A. Ginsberg, Chair, Sacramento	That term is defined by statute. We believe CACI No. 1102, Definition of "Dangerous Condition,' should always be given with this instruction and would modify the Directions for Use accordingly: '~~See also~~ Give this instruction with CACI No. 1102, Definition of "Dangerous Condition,." ~~and~~ See also CACI No. 1103, Notice.' "	CACI No. 1102 without advising that that instruction must be given with CACI No. 1100.
1102. *Definition of "Dangerous Condition" (Gov. Code, § 830(a))*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair, Sacramento	"The first sentence of the Directions for Use essentially repeats the first sentence of the instruction and does not seem helpful. We believe a more helpful direction would be to give this instruction with CACI No. 1100. Accordingly, we would delete the first sentence and replace it with the following: 'Give this instruction if CACI No. 1100, Dangerous Condition on Public Property—Essential Factual Elements, is given.' "	The Directions for Use note that there is this instruction for conditions on public property, and there is CACI No. 1125, for conditions on adjacent property. Because the dangerous condition will not always be a jury issue, the Directions for Use do not instruct to give this instruction if CACI No. 1100 is given.
	Bruce Greenlee	"Good addition to the DforU. BUT get rid of 'where' used as a conditional. First, it's legalese. Second, 'where' designates a place. It's particularly inappropriate here because the instruction involves a physical location (of the dangerous condition), but the use of 'where' has no reference to any location."	"When" has been substituted for "where."
VF-1100. *Dangerous Condition of Public Property*	Civil Justice Association of California by Jaime Huff, Vice President and Counsel, Public Policy, Sacramento	"The proposed revisions replace the word 'incident' with the word 'injury.' CJAC's recommendation is that no change be made to the existing wording. 'Incident' should be retained and 'injury' should be removed: 2. Was the property in a dangerous condition at the time of the incident ~~injury~~? ____ Yes ____ No If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.	The statute uses the word "injury." Government Code, § 835. Like CACI No. 1100, the verdict form's terminology was changed to reflect the Legislature's word choice. That legislative choice is not one for the committee to try to improve on.

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		3. Did the dangerous condition create a reasonably foreseeable risk that this kind of <u>incident</u> ~~injury~~ would occur? ____ Yes ____ No Whether there was an injury or the extent of a claimed injury is often in dispute. Using the word "injury" presupposes that an injury in fact did occur and gives the plaintiff an unfair advantage. 'Incident' is a neutral term that is fair to both sides and should be restored."	
VF-1201. *Strict Products Liability—Design Defect—Affirmative Defense—Misuse or Modification*	Orange County Bar Association by Scott B. Garner, President	There does not appear to be any case law to justify changing the language in element 6. Further, the instruction regarding how the trier of fact should act in response to answering questions 5 and 6 could be made more clear.	It was observed that the question in CACI No. VF-1201 flips the substantive instruction, see CACI No. 1204 ("the defendant has the burden to 'prove[] that the benefits of the [product's] design outweigh the risks of the design"). Question 6 asked if the risks of the product's design outweigh the benefits of the design. Because a 'no' answer could result in a vague verdict, the committee rephrased the question to correspond to the case law. (See, e.g., Sources and Authority for CACI No. 1204.) To the extent the transitional instruction is complex, the commenter has not suggested any improvement, and the committee has not conceived of a better formulation.
1305. *Battery by Police Officer*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A.	We agree with the proposed revisions, but we suggest that a CACI instruction be drafted for cases involving use of deadly force because we believe the modifications needed may be extensive.	The committee will consider revisions and new instructions for cases involving use of deadly force in future release cycles.
		Although not encompassed in the proposed revisions, this instruction states the essential factual elements of the cause of action, so we believe the title should include the words "Essential Factual Elements."	The committee has added the suggested language to the title.

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	Ginsberg, Chair, Sacramento		
	Bruce Greenlee	Same point as for 440.	The committee will consider revisions and new instructions for cases involving use of deadly force in future release cycles.
Right of Privacy series, instructions 1811–1814	Bruce Greenlee	"Suggest start numbering with 1830."	The suggestion has been considered and rejected.
1813. *Definition of "Access" (Pen. Code, § 502(b)(1))*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsberg, Chair, Sacramento	"We suggest the following changes for clarity and consistency with Penal Code section 502, subdivision (b)(1): 'The term "access" means ~~that [*name of defendant*] did something~~ to [[gain entry to], [instruct], [cause input to], [cause output from], [cause data processing with], [~~and/~~or] [communicate with]] the logical, arithmetical, or memory function resources of a computer, computer system, or computer network."	To improve clarity, the committee has made both suggested deletions.
	Bruce Greenlee	The various options in the first paragraph should be separated by front slashes (/) not each in brackets.	The brackets have been eliminated to more closely track the statute.
		The "[and/or]" needs clarification. If the user selects more than one option and puts "and," then both options must be present in order to constitute access. That's probably not what the statute envisions; any one of the options constitutes access. Unless there is something unusual about this statute, the "and" should be removed and only "or" should be presented. Assuming that multiple options are possible (an "all that apply" multiple choice), then the "or" should be in roman and in brackets "[or]". When only one of options should be selected ("one only" multiple choice), which is probably not the situation here, then the "or" is italicized "[*or*]".	See response to the comment from the California Lawyers Association, above.

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	Orange County Bar Association by Scott B. Garner, President	At "Directions for Use," third line, it is suggested "the computer" be replaced with the phrase "a computer, computer system, or computer network" in order to be consistent with the language of the Instruction and the Act.	This suggested change has been made to more closely track the statute.
		At "Sources and Authority," it is suggested that the definitions of "computer system" and "computer network" (Penal Code, sections 502(b)(5) and 502(b)(2), respectively), be referenced here, along with "access," as both these terms are incorporated in the Instruction explaining "access" and in the Act's definition of "access."	Those statutory terms are referenced in the Directions for Use in CACI No. 1812, *Comprehensive Computer Data and Access Fraud Act—Essential Factual Elements (Pen. Code, § 502)*, which this instruction cross-references.
1814. *Damages for Investigating Violations of Comprehensive Computer Data and Access Fraud Act (Pen. Code, § 502(e)(1)*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	"We agree with the proposed new instruction and the Directions for Use. In the Sources and Authority, we would strike the reference to punitive damages and Penal Code section 502, subdivision (e)(4). This instruction is for compensatory damages, and the statutory provision on punitive damages is not authority for the instruction."	The citation has been relocated to the Directions for Use as authority for the note concerning the availability of punitive damages.
	Bruce Greenlee	"Same issue with '[and/or]'. If 'and' is selected, then all that precede and follow must be present. Most likely, only one need be at issue."	The suggested change has been made to track the statute.
	Orange County Bar Association by Scott B. Garner, President	The Act allows a plaintiff to recover compensatory damages for expenditures reasonably and necessarily incurred to investigate and verify that a system, network, program, or data was or was not altered, damaged or deleted by a defendant's access (emphasis added). At the first line of the Instruction, the word "whether" is used in the sense of finding "whether or not" there was alteration, damage, or deletion. It is believed this distinction may not be appreciated by a jury which might understand the Instruction to be saying only if an investigation found alteration, damage, or deletion could the plaintiff recover associated expenses. Accordingly, it is suggested that the word "whether"	The bracketed choices have been expanded to include the negative, i.e. was or was not/were or were not.

Instruction(s)	Commenter	Comment	Committee Response
		be replaced with "that" and the second line of the Instruction include after the bracketed phrase "[was/were]," the additional bracketed phrase "[was not/were not]."	
		"In a number of violations set forth in subdivision (c), 'access' is not required. The civil remedies of subdivision (e)(1), including compensatory damages for the expense of an investigation, are available for violations of any provision of subdivision (c). At the third line of the Instruction, reference is made to defendant's 'access.' While the word 'access' is used within subdivision (e)(1), it is believed its use could confuse the jury. Accordingly, it is suggested that here, though understood to be a departure from the language of the Act, defendant's 'conduct' should be referenced so as to have application to all violations of subdivision (c)."	The statutory language of subdivision (e)(1) uses the term *access*. The committee agrees that not all violations of subdivision (c) involve access, as that term is defined in the statute, but the committee favored hewing to the language of the damages provision in subdivision (e)(1).
		"At 'Directions for Use,' first paragraph, last line, within the parenthetical, examples are given of the technology or data which may be at issue. One example provided is 'the defendant's data files.' It would seem more likely that it would be plaintiff's data files which would be at issue in a case involving allegations of alteration, damage, or deletion and, accordingly, reflected in an instruction."	The Directions for Use have been revised as suggested.
2511. *Adverse Action Made by Decision Maker Without Animus (Cat's Paw)*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We would strike "In this case," at the beginning of the instruction as superfluous and unnecessary.	The prepositional phrase is used here to distinguish the instruction from the instruction on direct disparate treatment, which is likely to be given with the cat's paw instruction.
		The discriminatory actor in *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95 was a supervisor, and *Reeves* stated the cat's paw rule in terms of a discriminatory supervisor (id. at p. 115). But *Reid v. Google* (2010) 50 Cal.4th 512, 542, later stated the cat's paw rule in terms of a discriminatory "employee," stating that there were circumstances in which "discriminatory remarks by a non-decisionmaking employee can influence a decision by a decisionmaker," and, " 'If [the formal decision maker] acted as the conduit of [an employee's]	The committee believes that the instruction accurately reflects the state of the law. The committee, however, will continue to monitor the developments in this area and consider the suggested revisions in future release cycles.

Instruction(s)	Commenter	Comment	Committee Response
		prejudice—his cat's paw—the innocence of [the decision maker] would not spare the company from liability.' " This language and other discussion in *Reid* and the holding in *McGrory v. Applied Signal Tech.* (2013) 212 Cal.App.4th 1510, 1536, suggest that the discriminatory actor influencing the decisionmaker need not be a supervisor to support liability, even if in many cases the discriminatory actor is a supervisor. We therefore suggest changing "supervisor" in the instruction to encompass persons other than a supervisor: ". . . if [name of decision maker] followed a recommendation from or relied on facts provided by a supervisor [or other person] who had [discriminatory/retaliatory] intent." "1. That [name of plaintiff]'s [specify protected activity or attribute] was a substantial motivating reason for [name of supervisor or other person]'s [specify acts of supervisor or other person on which decision maker relied]; and "2. That [name of supervisor or other person]'s [specify acts on which decision maker relief] was a substantial motivating reason for [name of decision maker]'s decision to [discharge/[other adverse employment action]] [name of plaintiff]."	
	Bruce Greenlee	"Good improvement."	No response necessary.
2521C. *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))*	Civil Justice Association of California by Jaime Huff, Vice President and Counsel, Public Policy, Sacramento	In element #2, "actual" should be added immediately before "sexual favoritism" to make the instruction more clear: 2. That there was actual sexual favoritism in the work environment; Without specifying that the sexual favoritism in question had to have in fact occurred, this instruction is vague and could be prejudicial to the defense.	The committee views the suggested change superfluous. Element 2 requires a plaintiff to establish the existence of sexual favoritism in the work environment.
	Bruce Greenlee	Nothing is cited in the DforU or S&A to explain the removal of "widespread." Since a California Supreme Court case, Miller v. Dept of Corrections (2005) 36 Cal.4th 446, 466 requires that the favoritism be widespread (3rd case excerpt in S&A), one would	Government Code section 12923 was added to the instruction's Sources and Authority in July 2019. The substantive change arising from that

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		expect either a new Supreme Court case or a statute that makes this change.	recent legislation was not incorporated into the instruction in the prior release. (See also response to Orange County Bar Association, below.)
	Orange County Bar Association by Scott B. Garner, President	The removal of the element of "widespread sexual favoritism" is not supported by case law or the EEOC. Miller v. Dep't of Corrections (in annotations) provides that "following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish a claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." Miller v. Dep't of Corrections (2005) 36 Cal.4th 446, 466. Removal of the term widespread from the title and instruction as a whole is not in accord with case law and incorrectly removes from juror consideration the concept that widespread sexual favoritism may constitute hostile environment harassment. See EEOC Policy Guidance, N-915.048 at para. C.	Government Code section 12923 provides that "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment."
2522C. *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))*	Civil Justice Association of California by Jaime Huff, Vice President and Counsel, Public Policy, Sacramento	Here also, in element #2, "actual" should be added immediately before "sexual favoritism" for the same reasons stated for 2521C.	See response to CACI No. 2521C, above.
	Bruce Greenlee	[Same comment as 2521C.]	See response to CACI No. 2521C, above.
	Orange County Bar Association by Scott B. Garner, President	[Same comment as 2521C.]	See response to CACI No. 2521C, above.

Instruction(s)	Commenter	Comment	Committee Response
2540. *Disability Discrimination—Disparate Treatment—Essential Factual Elements*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We believe the language "either with or without reasonable accommodation for [his/her/nonbinary pronoun] [e.g. condition]" in element 4 should be made optional (i.e. bracketed) because in cases where reasonable accommodation is not at issue this language may confuse the jury.	The committee has determined that the proposed change is preferable to the existing optional bracket for reasonable accommodation. Adding "either with or without" is consistent with case law. (See *Green v. California* (2007) 42 Cal.4th 254, 262 [64 Cal.Rptr.3d 390, 396, 165 P.3d 118, 123] ["[I]n order to establish that a defendant employer has discriminated on the basis of disability in violation of the FEHA, the plaintiff employee bears the burden of proving he or she was able to do the job, with or without reasonable accommodation."].) The change is also more consistent with how the issue may be considered by a jury. In some cases, the jury will have to decide whether a plaintiff was able to perform essential job duties with the plaintiff's individual capabilities (i.e., without an accommodation) or with a reasonable accommodation.
	Civil Justice Association of California by Jaime Huff, Vice President and Counsel, Public Policy, Sacramento	CJAC recommends deleting history references in four places in this instruction, in the introductory paragraph, in element #3, in element #6, and in the summary paragraph, as shown below: [Name of plaintiff] claims that [name of defendant] wrongfully discriminated against [him/her/nonbinary pronoun] based on [his/her/nonbinary pronoun] ~~[history of [a]]~~ [select term to describe basis of limitations, e.g., physical condition]. To establish this claim, [name of plaintiff] must prove all of the following: ***	This suggestion to delete the optional brackets concerning a claim of discrimination based on an individual's history of disability is beyond the scope of the changes that were circulated for public comment, but the committee notes that both the FEHA and the California Code of Regulations define, respectively, "physical disability" and "disability"

Instruction(s)	Commenter	Comment	Committee Response
		3. That [name of defendant] knew that [name of plaintiff] had ~~[a history of having] [a]]~~ [e.g., physical condition] [that limited [insert major life activity]]; *** 6. That [name of plaintiff]'s ~~[history of [a]]~~ [e.g., physical condition] was a substantial motivating reason for [name of defendant]'s [decision to [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff]/conduct]; *** [Name of plaintiff] does not need to prove that [name of defendant] held any ill will or animosity toward [him/her/nonbinary pronoun] personally because [he/she/nonbinary pronoun] was [perceived to be] disabled. [On the other hand, if you find that [name of defendant] did hold ill will or animosity toward [name of plaintiff] because he/she/nonbinary pronoun] was [perceived to be] disabled, you may consider this fact, along with all the other evidence, in determining whether [name of plaintiff]'s ~~[history of [a]]~~ [e.g., physical condition] was a substantial motivating reason for [name of defendant]'s [decision to [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff]/conduct].] It is enough to prove that the condition existed, and the defendant knew of the condition. Whether there was a history of the condition is not an essential fact and should not be part of the instruction. It is distracting and unnecessary.	as having a record or history of any specified condition that is known to the employer. Government Code § 12926(m)(3) ["Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part."]; 2 CCR § 11065(d)(4) [" 'Disability' shall be broadly construed to mean and include any of the following definitions: * * * A 'record or history of disability' includes previously having, or being misclassified as having, a record or history of a mental or physical disability or special education health impairment of which the employer or other covered entity is aware."].
	Bruce Greenlee	"With or without reasonable accommodation" is the way that the cause of action is often expressed, including in *Sandell v. Taylor* (first case excerpt in the S&A). But it is not necessary to include "without" in the instruction. The default position for 2540 is that a reasonable accommodation will not be needed. If there is none, then it is not necessary to say "without" in the instruction. If there is a need for an accommodation, then "with" needs to be included and 2541 given.	The committee's proposed revision is consistent with case law. (See also response to California Lawyers Association, above.)

Instruction(s)	Commenter	Comment	Committee Response
2545. *Disability Discrimination—Affirmative Defense—Undue Hardship*	Bruce Greenlee	In the DforU, the cross reference to 2561, delete the statute from the 2561 title. CACI does not include the title statutes in cross references. There are other places where statutes have been added to instruction titles. If this is a conscious change of format, I think that it is a bad one. Simplicity is always better.	For consistency with other instructions, the statutory citation in the Directions for Use's cross-reference, which is part of the title of CACI No. 2561, has been deleted from the Directions for Use.
	Orange County Bar Association by Scott B. Garner, President	Agree with changes generally but propose the following modifications in caps: "[Name of defendant] claims that accommodating [name of plaintiff]'s disability would create an undue hardship to the operation of [his/her/nonbinary pronoun/its] business. To succeed on this defense, [name of defendant] must prove that [an/THE] accommodation[s] REQUESTED would create an undue hardship because it would be significantly difficult or expensive	The committee has concluded that the suggestion is not supported by law. As noted in the Directions for Use to CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*, an employee does not need to specifically request reasonable accommodation. (See *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951 ["The employee bears the burden of giving the employer notice of the disability. This notice then triggers the employer's burden to take 'positive steps' to accommodate the employee's limitations."], citations omitted.)
		Propose revising the phrasing of the hardship factors such that they track the statute, Government Code 12926(u): "…, in light of the following factors: (1) The nature and cost of the accommodation needed. (2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility. (3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to	The comment is beyond the scope of the invitation to comment, but the committee notes that the five factors suggested from Government Code 12926 subdivision (u) are encompassed by factors (a)–(g), which are written in plainer terms for jurors.

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		the number of employees, and the number, type, and location of its facilities. (4) The type of operations, including the composition, structure, and functions of the workforce of the entity. (5) The geographic separateness or administrative or fiscal relationship of the facility or facilities."	
		Disagree with adding the reference to *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 733 in the "Directions for Use" section. The *Atkins* case, as cited, does not include a discussion on whether undue hardship is a true affirmative defense or whether the defendant only has the burden of coming forward with evidence of hardship as a way of negating an element of plaintiff's case concerning the reasonableness of an accommodation.	The court in *Atkins* stated, "[Defendant] failed to convince the jury that any hardship was sufficient to make an otherwise reasonable accommodation unreasonable." While this quote does not directly state the issue identified in the Directions for Use, it is support for the unresolved state of the law.
		CACI 2541, following established law, states that one of the elements of an accommodation claim is that the accommodation be "reasonable." This indicates that the reasonableness of an accommodation is separate and distinct from whether an accommodation would create an undue hardship.	The committee agrees that the two concepts—reasonable accommodation and undue hardship— are distinct, but notes that, in the context of disability discrimination claims, they are also related. To the extent the commenter is advocating for adding *reasonable* to CACI No. 2545, the committee does not see value in adding the modifier to the undue hardship instruction.

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2560. *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements (Gov. Code, § 12940(l))*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	Under Government Code section 12940, subdivision (l)(1), it is the employer's burden to show that it has explored reasonable accommodations, rather than the plaintiff's burden to show the opposite. Accordingly, we would delete element 6.	The committee is unclear about how a plaintiff would establish a failure to accommodate claim without element 6. Subdivision (*l*)(1) includes an undue hardship exception to liability, which is defendant's burden, but the committee does not read that provision to eliminate element 6 as an element of a claim. (Cf. *Scotch v. Art Inst. of California* (2009) 173 Cal.App.4th 986, 1009–1010 [stating elements of a failure to accommodate claim in the disability discrimination context].)
	Civil Justice Association of California by Jaime Huff, Vice President and Counsel, Public Policy, Sacramento	In element #6, CJAC recommends deleting "or by another person": 6. [That [name of defendant] did not [explore available reasonable alternatives of accommodating [name of plaintiff], including excusing [name of plaintiff] from duties that conflict with [name of plaintiff]'s religious [belief/observance] or permitting those duties to be performed at another time ~~or by another person~~, or otherwise reasonably accommodate] [name of plaintiff]'s religious [belief/observance];]	The inclusion of the phrase *or by another person* in the instruction is support by law. Government Code section 12940(*l*)(1) says, ". . . or permitting those duties to be performed at another time *or by another person*, . . ."

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		While there are a variety of reasonable workplace accommodations that may be available for an employee's religious beliefs, it is unnecessary to specify that one of these be the provision of another person. Doing so can create the expectation that the employer should have provided a substitute employee as an accommodation. There is no case law cited in favor of this proposed change that would support the notion that a workplace religious accommodation requires the employer to keep another employee or contractor on standby. The instruction as written is sufficiently broad without the inclusion of "or by another person."	
2561. *Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship (Gov. Code, §§ 12940(l)(1), 12926(u))*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	Government Code section 12940, subdivision (l)(1) specifies two reasonable accommodations that the employer must consider: (1) excusing the person from the duties that conflict with the person's religious belief or observance and (2) permitting those duties to be performed at by another person at another time. We believe the instruction should state that the defendant must prove that the defendant considered both (1) and (2), and should not state that it is sufficient if the defendant considered (1), (2), or (3): "To succeed on this defense, [name of defendant] must prove that [he/she/nonbinary pronoun/it] considered reasonable alternative options for accommodating the [religious belief/religious observance], including (1) excusing [name of plaintiff] from duties that conflict with [his/her/nonbinary pronoun] religious belief/religious observance]~~,~~ or (2) permitting those duties to be performed at another time or by another person~~, or (3) [specify other reasonable accommodation]~~."	Government Code section 12940, subdivision (*l*)(1) provides that a defendant must "demonstrate[] that it has explored *any* available reasonable alternative means of accommodating the religious belief or observance, *including* [two specific alternative reasonable accommodations]." Removing option (3), the possibility other reasonable accommodations, would not give effect to all the words in the statute, namely the words *any* and *including*, which indicates that the statute's list is illustrative, not exclusive.
		We would delete the language, "If there is evidence of another reasonable alternative accommodation, include it as a third means of accommodating the plaintiff." in the Directions for Use for the same reasons.	Same as above.

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	Civil Justice Association of California by Jaime Huff, Vice President and Counsel, Public Policy, Sacramento	CJAC recommends striking the phrase "or by another person" in the second paragraph of the instruction and in Directions for Use: * * * "Again, as noted above with respect to CACI 2560, excusing the employee from duties that conflict with her/his beliefs, allowing the duties to be completed at another time, or specifying another type of reasonable accommodation that is acceptable is sufficient."	See response to Civil Justice Association of California's comment on CACI No. 2560, above.
	Orange County Bar Association by Scott B. Garner, President	Agree with changes generally but propose the following underlined revisions such that the phrasing of the hardship factors track the statute, Government Code 12926 (u): "If you decide that [name of defendant] considered but did not adopt [a] reasonable accommodation[s], you must then decide if the accommodation[s] would have created an undue hardship because it would be significantly difficult or expensive, in light of the following factors: (1) The nature and cost of the accommodation needed. (2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility. (3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities. (4) The type of operations, including the composition, structure, and functions of the workforce of the entity. (5) The geographic separateness or administrative or fiscal relationship of the facility or facilities."	The five factors suggested from Government Code 12926 subdivision (u) are encompassed by factors (a)–(g), which are written in plainer terms for jurors.
VF-2506C. *Work Environment Harassment—Sexual Favoritism-*	Orange County Bar Association	"The removal of the element of 'widespread sexual favoritism' is not supported by case law or the EEOC. Miller v. Dep't of Corrections (in annotations) provides that 'following the guidance of the EEOC, and also employing standards adopted in	See response to CACI No. 2521C, above.

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-Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))	by Scott B. Garner, President	our prior cases, we believe that an employee may establish a claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment.' Miller v. Dep't of Corrections (2005) 36 Cal.4th 446, 466. Removal of the term widespread from the title and instruction as a whole is not in accord with case law and incorrectly removes from juror consideration the concept that widespread sexual favoritism may constitute hostile environment harassment. See EEOC Policy Guidance, N-915.048 at para. C."	
VF-2507B. *Work Environment Harassment—Conduct Directed at Others—Individual Defendant (Gov. Code, §§ 12923, 12940(j))*	Orange County Bar Association by Scott B. Garner, President	"Leave term 'widespread' in Directions for use in accordance with Miller v. Dep't of Corrections (2005) 36 Cal.4th 446, 466."	See response to CACI No. 2521C, above.
VF-2507C. *Work Environment Harassment—Sexual Favoritism—Individual Defendant (Gov. Code, §§ 12923, 12940(j))*	Orange County Bar Association by Scott B. Garner, President	"Leave term 'widespread' in title and directions for use in accordance with Miller v. Dep't of Corrections (2005) 36 Cal.4th 446, 466."	See response to CACI No. 2521C, above.
VF-2508. *Disability Discrimination—Disparate Treatment*	Bruce Greenlee	For the same reason as CACI No. 2540, the proposed changes to VF-2508 are unnecessary.	To clarify VF-2508, the committee favored bifurcating the question concerning a plaintiff's ability to perform essential job functions, instead of *with reasonable accommodation* bracketed for addition

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			in only certain cases. This formulation avoids asking about a reasonable accommodation if one was not even necessary. Even in cases involving an accommodation, a jury could still find that the plaintiff could perform the work *without* an accommodation. The proposed change permits the jury to make that determination, rather than only asking about ability to perform with accommodation when an accommodation is at issue.
2705. *Affirmative Defense to Labor Code, Unemployment Insurance Code, and Wage Order Violations—Plaintiff Was Not Defendant's Employee (Lab. Code, § 2750.3)*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair, Sacramento	"We question whether there is a right to jury trial in actions under the Unemployment Insurance Code. If not, we suggest deleting "Unemployment Insurance Code" from the title, instruction, and Directions for Use."	Labor Code section 2750.3 expressly includes claims under the Unemployment Insurance Code. CACI No. 2705's inclusion of the Unemployment Insurance Code is not meant to decide the issue of whether such claims are for a jury.
		"This instruction pertains only to issues relating to independent contractor status and not to any other 'dispute as to whether the defendant was the plaintiff's employer.' Those disputes can arise in other contexts, such as joint employers. We suggest modifying the Directions for Use to clarify this point and to note the statutory presumption of employment status: 'This instruction may be needed if ~~there is a dispute as to whether~~ the defendant claims that the plaintiff is an independent contractor and not the defendant's employee. Under ~~was the plaintiff's employer for purposes of a claim covered by~~ the Labor Code, the Unemployment Insurance Code, ~~or a~~ and the California wage orders, any person providing services or labor for remuneration is presumptively an employee. . . .' "	The committee believes that the Directions for Use fairly states the context for this instruction. The sentence following the suggested changes advises users that, "The defendant has the burden to prove independent contractor status."
		"Because Labor Code section 2750.3 lists numerous exceptions and potential exceptions to the "ABC" test, we believe the Directions for Use should note that the instruction may not	The committee has added a statement to the Directions for Use in line with the commenter's suggestion and a

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		always be appropriate when the independent contractor issue is raised. We suggest adding the following as a second paragraph: 'This instruction may not be appropriate in cases where the defendant claims independent contractor status based on one of the exceptions listed in Labor Code section 2750.3, subdivisions (b) through (h).' "	cross-reference to the instruction on employment status under the *Borello* test, CACI No. 3704.
		Although not encompassed in the proposed revisions, we would modify the following language in the Directions for Use for greater clarity: "~~The rule on employment status has been that if there are disputed facts, it's for the jury to decide whether one is an employee or an independent contractor.~~ The trial court's determination of employee or independent contractor status is one of fact if it depends upon the resolution of disputed evidence or inferences . . . . *(S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349 [256 Cal.Rptr. 543, 769 P.2d 399] (*Borello*); *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 16-17 [64 Cal.Rptr.3d 327] (*Estrada*).) The question is one of law only if the evidence is undisputed. (*Borello*, at p. 341.)" (*Espejo v. The Copley Press* (2017) 13 Cal.App.5th 329, 342-343 [221 Cal.Rptr.3d 1].) ~~However, on disputed facts, the court may decide that the relationship is employment as a matter of law. (*Dynamex*, *supra*, 4 Cal.5th at p. 963.)~~"	The suggestion relates more to CACI No. 3704, the instruction based on the *Borello* test, which is beyond the scope of the invitation to comment. The committee will continue to monitor developments in this area and consider revisions in future release cycles.
	Orange County Bar Association by Scott B. Garner, President	Generally agree with changes. However, citation in "Sources and Authority" to *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289, 314 should remain as review was denied by the CA Supreme Court on July 11, 2018.	As stated in the User Guide, the purpose of the Sources and Authority is to provide a launching point for further legal research. They are not intended to provide a comprehensive analysis. The committee elected to delete *Curry v. Equilon Enterprises, LLC* from the Sources and Authority, not because it is no longer good law, but because its relevance to the

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			instruction has been diminished by the enactment of Labor Code, § 2750.3.
		Disagree with the proposed deletion of *Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558, 570 as this decision has not been reversed and remains good law.	See response to Orange County Bar Association's similar comment, above.
3020. *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements (42 U.S.C. § 1983)*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	Although not encompassed in the proposed revisions, we believe the language preceding factors (a) through (d) should be written in terms of what the plaintiff has to prove (i.e. excessive force) consistent with the burden of proof stated at the beginning of the instruction and element 2, rather than explain the issue from the perspective of the defendant's position (i.e. when force is not excessive): "Force is not excessive if it is not reasonably necessary under the circumstances."	This comment is beyond the scope of the invitation to comment. The committee will consider these suggestions in a future release cycle.
		In the Sources and Authority, the third and fourth bullet points on page 101 discuss summary judgment, not trial. Those cases provide no authority for this instruction, so we would delete them.	As stated in the User Guide, the purpose of the Sources and Authority is to provide a launching point for further legal research on the subject. The standard for inclusion of case excerpts is that they would be of interest and relevant to CACI users.
	City and County of San Francisco, Office of the City Attorney by Margaret W. Baumgartner, Deputy City Attorney	(1) Instruction 3020 fails to inform the jury that the claim arises under the Fourth Amendment of the Federal Constitution. The instruction never identifies the Fourth Amendment as the source of the plaintiff's claim. If a court gives this instruction and also gives an instruction on, for example, negligence, it will create jury confusion regarding the two different bases of liability. Ensuring clear differentiation on the legal basis of the claim addressed by the instruction will also allow the parties to craft a verdict form that tracks the claims, which may be critical for issues such as attorney fee liability and comparative fault. The instruction should include the federal constitutional basis of liability so as not to create jury confusion when it is given in conjunction with other instructions.	This comment is beyond the scope of the invitation to comment. The committee will consider these suggestions in a future release cycle.
		(2) As with Instruction 440, Instruction 3020 fails to inform the jury of all of the circumstances in which an officer may lawfully	This comment is beyond the scope of the invitation to comment. The

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		use force. Unlike the Ninth Circuit's model jury instruction on use of force liability under 42 U.S.C. §1983, Instruction 3020 does not address all of the reasons an officer may lawfully use force. As set forth above in the comment to Instruction 440, those situations include overcoming resistance, preventing escape, and defense of oneself or others. See 9th Cir. Model Instruction 9.25. Therefore, in addition to the federal constitutional source of liability, the instruction should include all the purposes for which an officer may use force.	committee will consider these suggestions in a future release cycle.
3050. *Retaliation—Essential Factual Elements (42 U.S.C. § 1983)*	City and County of San Francisco, Office of the City Attorney by Margaret W. Baumgartner, Deputy City Attorney	Instruction 3050 applies to a claim of retaliation. A claim of retaliation frequently arises when a plaintiff alleges that an officer arrested the plaintiff in retaliation for the plaintiff's exercise of the plaintiff's First Amendment rights. In 2019, the United States Supreme Court held that a lack of probable cause is an essential element to a retaliatory arrest claim. *Nieves v. Bartlett*, 139 S.Ct. 1715 (2019). We recommend that the Committee include a note to Instruction 3050, stating that if the plaintiff alleges retaliatory arrest, the parties must modify Instruction 3040 to add lack of probable cause as an element of the claim.	This comment is beyond the scope of the invitation to comment. The committee will consider these suggestions in a future release cycle. To alert users to this recent Supreme Court decision, however, the committee has added an excerpt from *Nieves v. Bartlett* to the Sources and Authority.
VF-3511. *Fair Market Value Plus Severance Damages*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	"We support the proposed revisions in concept but believe the verdict form should incorporate the different timing scenarios rather than require modification: '3. What [would have been/will be] the fair market value of the remaining property ~~have been~~ on [*date of valuation*] if the [*name of public entity*]'s proposed project [were/is] completed as planned?' "	The committee considered and rejected several alternative ways of framing Question 3. The committee concluded that the proposed version accurately states the law, and that modification of the model verdict form may be necessary on different facts.
		We would delete the proposed new language in the second paragraph of the Directions for Use for the same reasons.	See response to comment, above.
3704. *Existence of "Employee" Status Disputed*	California Lawyers Association, Litigation	We agree with this proposed new instruction. We would modify the Directions for Use to state that if the plaintiff seeks a penalty the instruction should be modified to require an intentional or reckless violation or willful misconduct.	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle.

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	Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento		
3904A. *Present Cash Value*	American Property Casualty Insurers Association by Denneile Ritter Assistant Vice President, Sacramento	This jury instruction deals with the reduction of future economic damages to their present cash value. Proposed new language in the instruction's second paragraph reads "[defendant] must prove, through expert testimony, the present cash value." The specific reference to proof through expert testimony ignores stipulations agreed to by parties to an action in determining present cash values. Stipulations are mentioned later in the jury instruction but as a mandate on what the jury must consider, not what defendants' may use in meeting their burden. Perhaps unintended, this disjunction in the text brings some confusion to the reading of the jury instruction. Although the instruction's Directions for Use provides some explanation, we believe that the jury instruction itself could be improved by removing the phrase "through expert testimony."	The second and third paragraphs are bracketed. If a stipulation exists, the third paragraph should be given.
		We note that the 2019 Court of Appeal case, *Lewis v. Ukran*, cited as authority for the change in the jury instruction, focused on who bears what burden in reducing future economic damages to present cash values. We respectfully submit that in only a summary fashion does the holding refer to the presentation of expert evidence.	The committee believes that the instruction accurately reflects the state of the law. The committee, however, will continue to monitor the developments in this area and consider revision in future release cycles.
	Association of Southern California Defense Counsel by Steven S. Fleischman, Horvitz &	The proposed changes to the first two paragraphs of CACI No. 3904A appear to be designed to incorporate the holding of *Lewis v. Ukran* (2019) 36 Cal.App.5th 886, 896 (Lewis). *Lewis* appears inconsistent with existing law and is likely to generate further litigation because it fails to take into account controlling authority from the California Supreme Court holding that a plaintiff has the burden of proof to prove damages. (Cassim v. Allstate Ins. Co. (2004) 33 Cal.4th 780, 813 (Cassim) ["as in	The committee is not persuaded that *Lewis* is inconsistent with case law requiring plaintiffs to prove their damages. *Lewis* holds that defendants have the burden to show how to reduce plaintiff's established future damages to present cash value. The committee will continue to monitor the

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	Levy LLP, Burbank	any tort case, the plaintiff bears the burden of proving by a preponderance of the evidence both the existence and the amount of damages proximately caused by the defendant's tortious acts or omissions" (emphasis added)]; accord, Gorman v. Tassajara Development Corp. (2009) 178 Cal.App.4th 44, 83 (Gorman) [" 'The rule is established that the plaintiff has the burden of proving, with reasonable certainty, the damages actually sustained by him as a result of the defendant's wrongful act, and the extent of such damages must be proved as a fact' "].) Indeed, numerous other CACI instructions squarely place the burden of proving damages on the plaintiff. See, e.g., CACI Nos. 3900, 3901, 3903A, 3903B, 3903C, 3903D, 3903E, 3903F, 3903G, 3903K, 3903L, 3903M, 3903N and 3903O. Cases outside California confirm our belief that Lewis will prove to be controversial. In other jurisdictions that follow the same general rule as California—requiring plaintiffs to prove all aspects of their own damages— numerous cases have placed the burden on plaintiffs to prove the present cash value of future damages. [citations omitted] Under the circumstances, ASCDC suggests that the Committee not make the proposed changes to CACI No. 3904A at this time. In the alternative, the Committee should add citations to Cassim and Gorman to the Sources and Authority to provide a more complete presentation of existing California authority. In addition, we suggest that, if the Committee incorporates the part of *Lewis* that imposes on defendants the burden of presenting evidence on the discount rate for purposes of the jury's present value analysis, the instruction should also reflect plaintiffs' burden of proof under *Lewis* to present evidence on the inflation rate for purposes of present value calculations. (See Lewis, supra, 36 Cal.App.5th at pp. 895-896.)	developments in this area and consider revisions in future release cycles.
3906. *Lost Earnings and Lost Earning Capacity—Jurors*	Bruce Greenlee	In the DforU, change the term "in cases where" to "if."	The committee has made this change.
		The word "lost" should precede "ability to earn money."	For clarity, the committee has added *lost* before "ability to earn money" in both the instruction and the Directions

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Not to Consider Race, Ethnicity, or Gender (Economic Damage)			for Use, which is consistent with Civil Code section 3361.
4106. *Breach of Fiduciary Duty by Attorney—Essential Factual Elements*	Association of Southern California Defense Counsel by David P. Pruett, Carroll, Kelly, Trotter, Franzen & McBride, Long Beach	The California Supreme Court has recognized just one standard for the determination of causation in tort actions, whether the actions may address claims of negligent, intentional, or fraudulent conduct. The Directions for Use put undue emphasis on outlier language from a Court of Appeal decision, *Knutson v. Foster* (2018) 25 Cal.App.5th 1075, that arises out of unique facts and should not be cited for generally applicable propositions – propositions that are inconsistent with Supreme Court authority. Only one appellate decision, *Knutson v. Foster*, supra, 25 Cal.App.5th 1075, has suggested that a different standard for causation applies to theories of liability asserting intentional or fraudulent conduct as opposed to theories of negligence.	The Supreme Court denied the petition for review on November 27, 2018 (G054247). *Knutson* is, therefore, authority for the proposition that claims for fraud and intentional breach of fiduciary duty, but not professional negligence, against an attorney are governed by the substantial factor test.
		The Directions for Use now propose to add a citation to the Court of Appeal decision in *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, a case that was cited by *Knutson*, but which says nothing about a different standard of causation to be applied in actions alleging intentional misconduct or breach of fiduciary duty in contrast to negligence. The Directions for Use should not cite to *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070 as a case supporting the proposition that a different standard of causation is to be applied in actions alleging intentional misconduct or breach of fiduciary duty in contrast to negligence. *Stanley* does not stand for that proposition. Moreover, that proposition is inconsistent with Supreme Court authority, such that the reference to Knutson v. Foster (2018) 25 CalApp.5th 1075 should be reconsidered, and removed from the Directions for Use.	The committee has deleted the citation to *Stanley v. Richmond*. See comment and response, below, to the California Lawyers Association.

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	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We would modify the Directions for Use for greater clarity and to make it clear that CACI No. 430 should be given with this instruction: "Give CACI No. 430, *Causation: Substantial Factor*, with this instruction. "The existence of a fiduciary relationship. . . . ~~"Substantial factor causation is the causation standard for an intentional breach of fiduciary duty. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1095 [41 Cal.Rptr.2d 768].) Do not include the optional last sentence of CACI No. 430, *Causation: Substantial Factor*, in a case involving an attorney's intentional or fraudulent breach of duty. If the attorney's breach of duty is negligent, however rather than intentional or fraudulent, the 'but for' ("would have happened anyway") causation standard applicable to legal malpractice (see *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046]) applies. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1093–1094 [236 Cal.Rptr.3d 473].) If so, the optional last sentence of CACI No. 430, *Causation: Substantial Factor*, should be given: "Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct."~~ "The causation standard for an attorney's intentional breach of fiduciary duty differs from that for a negligent breach. If the plaintiff alleges an attorney's intentional breach of duty, do not include the optional last sentence of CACI No. 430, *Causation: Substantial Factor* on 'but for' causation. The 'but for' causation standard does not apply to an intentional breach of fiduciary duty. If the plaintiff alleges an attorney's negligent breach of duty, the 'but for' ('would have happened anyway') causation standard applies. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1093–1094 [236 Cal.Rptr.3d 473]; see *Viner*	To improve clarity, the committee has revised the Directions for Use as suggested.

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		v. Sweet (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046].) If the plaintiff alleges a negligent breach of duty, give the optional last sentence of CACI No. 430: 'Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.' " "If the plaintiff alleges both negligent breach and intentional or fraudulent breach, the jury must be instructed on both causation standards and it should be made clear which causation standard applies to which claim. "If the harm allegedly caused by the defendant's conduct involves the outcome of a legal claim, the jury should be instructed with CACI No. 601, *Damages for Negligent Handling of Legal Matter*, for the but for standard. (See *Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 928, 933–937 [125 Cal.Rptr.3d 210] [discussing circumstances when a client need not show that they objectively would have obtained a better result in the underlying case in the absence of the attorney's breach (the trial-within-a-trial method)].)" ~~"If both negligent breach and intentional or fraudulent breach are to be presented to the jury in the alternative, the jury must be instructed on both causation standards and it should be made clear which causation standard applies to which claim."~~	
4300. *Introductory Instruction*	Bruce Greenlee	I'm not sure why this one was posted given only change is to add new statute to S&A.	Noted.
	Richard L. Spix, Lake Forest	Add to Paragraph 1: no longer has the right to occupy the property [by subleasing to [*name of subtenant*]] because (*insert claims at issue*). This addition parallels the description of defenses claimed by defendant and without inclusion infers that the plaintiff has nothing to prove.	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle, but notes that this is an introductory instruction in the unlawful detainer series.
4301. *Expiration of Fixed-Term*	Bruce Greenlee	"Revise addition to DforU as follows: For a tenancy of a year or more, the Tenant Protection Act of 2019 requires ;just cause'	Because there are exceptions to and limitations on the applicability of the

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Tenancy—Essential Factual Elements		before the landlord may terminate the tenancy. (Civ, Code, 1946,2(a); see Civ.Code, 1946.2(b) "just cause" defined.) Therefore, this instruction now may only be used for tenancies of less than a year."	Tenant Protection Act of 2019 and because of its recent enactment, the committee chose to note only the existence of the legislation in the Directions for Use. The committee, however, will continue to monitor the developments in this area and consider revisions in future release cycles.
		And then draft a new instruction for "just cause" termination; maybe two: one for fault and one for no-fault.	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle.
4302. *Termination for Failure to Pay Rent—Essential Factual Elements*	Bruce Greenlee	"Not sure why you didn't note the Act in the DforU here as you did for 4304 and 4308. I would note that 1946.2(b)(1)(A) makes a default in payment of rent just cause."	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle.
4303. *Sufficiency and Service of Notice of Termination for Failure to Pay Rent*	Bruce Greenlee	The citation in the DforU should be to subsections (a), and (b)(1)(A); and maybe then to (c), (d) and (f) for other possible notices.	Because of the breadth of the Tenant Protection Act of 2019 and its recent enactment, the committee decided in favor of citing the new legislation more broadly, rather than directing users to a list of subdivisions. The committee was concerned that specifying subdivisions might suggest an exhaustive list of the applicable subdivisions for a claim.
	Richard L. Spix, Lake Forest	Re: last paragraph: [A notice stating a reasonable estimate of the amount of rent due that is within 20 percent of the amount actually due is reasonable unless [*name of defendant*] proves that it was not reasonable. In determining the reasonableness of the estimate, you may consider whether calculating the amount of rent required information primarily within the knowledge of [*name of defendant*] and whether [*name of defendant*] accurately furnished that information to [*name of plaintiff*].]	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle.

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		"ARGUMENT: The quoted language is not indented (sic) as applicable only to commercial tenancies. The Judicial Council takes away the factual determination of reasonable estimate by a wholy inappropriate 20% amount. This is a question of fact for the trier of facts. The reasonable estimate available to a commercial landlord only applies where the tenant has the facts needed by an unknowing landlord to calculate the precise amount of rents due. Otherwise, and in a residential setting, the notice to pay rent must state the precise amount of rents due. [citations omitted]."	
4304. *Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements*	Bruce Greenlee	I would note that (b)(1)(B) makes violation of the lease just cause.	The Directions for Use cite to subdivision (b). Because there are exceptions to and limitations on the applicability of the Tenant Protection Act of 2019, the committee chose to note only the existence of the new legislation in the Directions for Use.
4305. *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement*	Bruce Greenlee	The citation in the DforU should be to subsections (a) and (b)(1)(B); and maybe then to (c), (d) and (f) for other possible notices.	Because of the breadth of the Tenant Protection Act of 2019 and its recent enactment, the committee decided in favor of citing the new legislation more broadly, rather than directing users to a list of subdivisions. The committee was concerned that specifying subdivisions might suggest an exhaustive list of the applicable subdivisions for a claim.
4306. *Termination of Month-to-Month Tenancy—Essential Factual Elements*	Bruce Greenlee	"Revise addition to DforU as follows: For a tenancy of a year or more, the Tenant Protection Act of 2019 requires "just cause" before the landlord may termination the tenancy. (Civ, Code, 1946,2(a); see Civ.Code, 1946.2(b) "just cause" defined.) Therefore, this instruction now may only be used for tenancies of less than a year."	Because there are exceptions to and limitations on the applicability of the Tenant Protection Act of 2019 and because of its recent enactment, the committee chose to note only the existence of the new legislation in the Directions for Use.

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4307. *Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy*	Bruce Greenlee	Revise addition to DforU as follows: For a tenancy of a year or more, the Tenant Protection Act of 2019 requires "just cause" before the landlord may termination the tenancy. (Civ, Code, 1946,2(a); see Civ.Code, 1946.2(b) "just cause" defined.) The grounds for just cause must be stated in the notice of termination. (Civ.Code, 1946,2(a); see also Civ.Code, 1946.2(c), (d), (f).)	Because there are exceptions to and limitations on the applicability of the Tenant Protection Act of 2019, the committee chose to note only the existence of the new legislation in the Directions for Use.
		Then add the just-cause statement as number 4.	See response to comment above.
4308. *Termination for Nuisance or Unlawful Use—Essential Factual Elements*	Bruce Greenlee	I would note that (b)(1)(C) makes nuisance just cause and (b)(1)(I) makes unlawful purpose just cause.	The committee has added references to these subdivisions in the Directions for Use.
4309. *Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use*	Bruce Greenlee	The citation in the DforU should be to subsections (a) and (b)(1)(C), (I); and then maybe to (c), (d) and (f) for other possible notices.	Because of the breadth of the Tenant Protection Act of 2019 and its recent enactment, the committee decided in favor of citing the new legislation more broadly, rather than directing users to a list of subdivisions. The committee was concerned that specifying subdivisions might suggest an exhaustive list of the applicable subdivisions for a claim.
Unlawful Detainer series instructions, 4303–4309.	Richard L. Spix, Lake Forest	The Tenant Protection Act applies to tenancies in California since 1/1/2020. Trial courts are in need of immediate guidance on these important issues for defendants. Rather than an "if applicable" footnote, the proposal should include a full discussion of the landlord's burden of proof in order to prevail. The legislature imposed additional limitations on a landlord's statutory cause of action. They should be implemented forthwith.	Because there are exceptions to and limitations on the applicability of the Tenant Protection Act of 2019, the committee chose to note only the existence of the new legislation in the Directions for Use. The committee will continue to monitor the developments in this area and consider revisions in future release cycles.
4325. *Affirmative Defense—Failure to Comply With*	Bruce Greenlee	A bit more explanation of how a violation of the Tenant Protection Act might be an affirmative defense would be helpful. I would think that lack of just cause is not an	Because there are exceptions to and limitations on the applicability of the Tenant Protection Act of 2019, the

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Rent Control Ordinance/Tenant Protection Act		affirmative defense; the landlord would have to prove the existence of just cause. (The landlord has to prove rent default, violation of lease, nuisance, or unlawful use.) So what violation of the Act might be an affirmative defense?	committee chose to note only the existence of the new legislation in the Directions for Use. The committee will continue to monitor the developments in this area and consider revisions in future release cycles.
	Richard L. Spix, Lake Forest	The instruction should be expanded to include the state-wide provisions for guidance of the trial courts.	The committee will continue to monitor the developments in this area and consider revisions in future release cycles.
VF-4602. *Whistleblower Protection—Affirmative Defense of Same Decision (Lab. Code, §§1102.5, 1102.6)*	Orange County Bar Association by Scott B. Garner, President	"At 'Directions for Use,' third paragraph, third line, new language indicates that Question 3 is to be omitted if the plaintiff allegedly refused to participate in an activity that would result in violation or noncompliance with a statute, rule, or regulation. This is consistent with the authority cited. It is believed, however, that were it appropriate to omit Question 3, some modification to the directions to the jury following Question 2 would be necessary, as would some guidance to counsel as to how to proceed with the balance of the verdict form."	As noted in the Directions for Use, CACI special verdict forms are intended only as models. They may need to be modified, including renumbering the questions and the then updating the transitional instructions. If a question needs to be omitted, users must make the necessary modifications to the transitional instructions. For additional clarity, however, one modification to Question 5 arising from the omission of Question 3 has been explained in the Directions for Use.
4603. *Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5)*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	We agree with the proposed revisions to the instruction. We agree with the proposed revisions to the Directions for Use, but would add a reference to CACI No. 2705 after the first paragraph so as to ensure that the jury is instructed on the presumption of employment status if the defendant claims that the plaintiff was an independent contractor: "If the plaintiff's employment status is at issue because the defendant claims the plaintiff was an independent contractor, give CACI No. 2705, *Affirmative Defense to Labor Code, Unemployment Insurance Code, and Wage Order Violations—Plaintiff Was Not Defendant's Employee (Lab. Code, § 2750.3)*."	This suggested revision to the Directions for Use is beyond the scope of the invitation to comment. The committee will consider this suggestion in a future release cycle.

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4920. *Wrongful Foreclosure—Essential Factual Elements*	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	Element 1 refers to a foreclosure sale of the plaintiff's "home," but the foreclosed property need not be the plaintiff's home. We would change "home" to "real property."	Most wrongful foreclosure claims involve a plaintiff's home, but to reflect the reality that other real property can be foreclosed on, the committee has added a bracketed choice: [home/*specify other real property*].
		Two cases include element 4 as an element of the tort with little discussion, while several other cases listing the essential elements do not include element 4. We believe element 4 should be made optional. We believe the Directions for Use should note the discrepancy in the cases and state that the trial court should decide whether to give element 4.	The committee has revised the instruction and Directions for Use to note the split in authority.
		The final sentence in the instruction reiterates two of the six (or five) elements, stating that the plaintiff must prove those two elements. But the plaintiff must prove all six (or five) elements. We believe that emphasizing two of the six (or five) elements would not be helpful and would be confusing to the jury.	To eliminate the redundancy, the committee has deleted the final sentence of the instruction, which did repeat two of the claim's essential elements.
		We would change "see CACI No. 4921" to "give CACI No. 4921" for clarity and consistency with other instructions stating "give" when the intention is that the instruction be given.	For clarity and consistency, the Directions for Use have been revised to reflect that CACI No. 4921 should be given if the plaintiff claims that tender is excused.
User Guide	Association of Southern California Defense Counsel by Lisa Perrochet, Burbank	"The new language in the User Guide aptly reflects the need to keep up with evolving linguistic conventions."	No response required.
All except as noted above	California Lawyers Association, Litigation	Agree (User Guide, 113, 118, 440, VF-1100, VF-1201, 1812, 2521C, 2522C, 2545, VF-2506A, VF-2506B, VF-2506C, VF-2507A, VF-2507B, VF-2507C, VF-2508, 3050, 3053, VF-3012,	No response required.

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	Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair, Sacramento	3903C, 3903D, 3904A, 3906, 4300, 4301, 4303-4309 & 4325, 4575, VF-4602)	
All except as noted above	Orange County Bar Association by Scott B. Garner, President	Agree (User Guide-Personal Pronouns, 113, 118, 420, 440, 1100, 1102, 1199 VF-1100, 1305, 1812, 2511, 2540, 2560, 2599 VF-2506A, 2599 VF-2506B, 2599 VF-2507A, 2599 VF-2508, 3020, 3050, 3053, 3099 VF-3012, 3599 VF-3501, 3704, 3903C, 3903D, 3904A, 3906, 4106, 4300, 4301, 4303, 4304, 4305, 4306, 4307, 4308, 4309, 4325, 4575, 4603, 4920, 4921)	No response required.