JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on November 16–17, 2017

Title
Jury Instructions: New, Revised, Renumbered, and Revoked Civil Jury Instructions and Verdict Forms

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

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

Agenda Item Type
Action Required

Effective Date
November 17, 2017

Date of Report
October 5, 2017

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Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approving for publication the new, revised, renumbered, and revoked civil jury instructions and verdict forms prepared by the committee. These revisions bring the instructions up to date with developments in the law over the previous six months.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective November 17, 2017, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court the civil jury instructions and verdict forms prepared by the committee. On Judicial Council approval, the instructions will be published in the official 2018 edition of the *Judicial Council of California Civil Jury Instructions* (*CACI*).

A table of contents and the proposed new, revised, and renumbered civil jury instructions and verdict forms are attached at pages 10–74.

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.*

This is the 31st release of *CACI*. The council approved *CACI* release 30 at its May 19, 2017 meeting.

Rationale for Recommendation

The committee recommends proposed revisions to the following seven instructions and verdict forms: CACI Nos. 556, 1010, 1802, 1803, VF-1803, 2031, and 4207. The committee further recommends renumbering four instructions—CACI Nos. 1709 (to be renumbered from 1722), 1722 (renumbered from 1724), 3724 (renumbered from 3726), and 3726 (renumbered from 3724) [2]—as explained below. The committee further recommends the addition of six new instructions: CACI Nos. 117, 1724, 2805, 3053, 3727, and 4111; and a new series on the California Consumers Legal Remedies Act (CACI Nos. 4700, 4701, 4702, and 4710). Finally, the committee recommends revoking CACI No. 4606.

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 71 additional instructions under a delegation of authority from the council to RUPRO.[3]

The instructions were revised or 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.

New series: Consumers Legal Remedies Act (CLRA)

Over time, the committee has received several requests for instructions on the California Consumers Legal Remedies Act (the Act), which makes actionable certain unfair methods of

[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] CACI No. 3726 also has additions to the Directions for Use and Sources and Authority.

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

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

competition and unfair or deceptive acts or practices in a transaction that is intended to result or that results in the sale or lease of consumer goods or services.[4] On initial consideration, there were some barriers encountered to developing a CLRA series. First, the Act prohibits 27 different acts or practices, most of which are expressed in a single clause, but several of which involve multiple subdivisions. It did not seem advisable to draft 27 different instructions in which only one element would be different. Yet it was impossible to create a comprehensible element with 27 different options, some of which would be quite complex. Second, apart from the prohibited acts or practices, the Act does not present many issues of fact for which instructions would be needed. The committee's decision at that time was essentially to table the proposal to see what future developments might bring.

But in an August 2016 unpublished case,[5] the court held that the plaintiffs forfeited their right to a jury trial on their CLRA claim when they failed to propose correct instructions on that claim. While the committee does not cite unpublished cases of course, it does consider situations in an unpublished case in which a jury instructions issue has arisen in a trial. This was one of those situations.

The committee decided to reconsider the request for CLRA instructions. The committee decided that the complexity of addressing 27 different prohibited acts or practices could be solved by just leaving the statutory violation open for the user to insert the act(s) or practice(s) at issue in the case.[6] And the committee decided that it could glean three other possible instructions from the Act to supplement the essential factual elements instruction.

Thus the committee now proposes this new series consisting of four instructions:
- CACI No. 4700, *Consumers Legal Remedies Act—Essential Factual Elements*
- CACI No. 4701, *Consumers Legal Remedies Act—Notice Requirement for Damages*
- CACI No. 4702, *Consumers Legal Remedies Act—Statutory Damages—Senior or Disabled Plaintiff*
- CACI No. 4710, *Consumers Legal Remedies Act—Affirmative Defense—Bona Fide Error and Correction*

New instructions

CACI No. 117*, Wealth of Parties.* A trial judge committee member suggested a new instruction that would expressly advise the jury that it was not to consider the financial impact of any judgment on any party. The committee liked the suggestion and now proposes this new instruction. In the next release cycle, the committee may consider whether to expand this

[4] Civ. Code, § 1770(a).

[5] *David v. Winn Auto., Inc.* 2016 Cal. App. Unpub. LEXIS 6433.

[6] See element 2 of CACI No. 4700, *Consumers Legal Remedies Act—Essential Factual Elements*.

instruction, or perhaps propose a new instruction, to warn against considering the impact of other nonevidentiary matters.

CACI No. 1724, *Fair and True Reporting Privilege.* In the recent case of *Argentieri v. Zuckerberg*[7] the court considered the privilege to potentially defamatory statements of Civil Code section 47(d) for "a fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued." Proposed new CACI No. 1724 presents this privilege.[8]

CACI No. 1723 presents the common interest privilege of Civil Code section 47(c). The committee would like this new instruction to be next in order after 1724 to group the two privilege instructions together. To achieve this end, current CACI No. 1722, *Retraction: News Publication or Broadcast,* would be renumbered to CACI No. 1709, and current CACI No. 1724, *Affirmative Defense—Statute of Limitations—Defamation,* would be renumbered to CACI No. 1722. Numbers 1725–1729 would be available for additional privileges should the committee elect to add them in the future.

CACI No. 2805, *Employee Not Within Course of Employment—Employer Conduct Unrelated to Employment.* In another recent case, *Lee v. West Kern Water Dist.*,[9] the trial court gave an instruction on the so-called *Fermino*[10] exception to the exclusive remedy of workers' compensation for injury to an employee. Under this exception, the focus on the scope of employment is switched from what the employee was doing to what the employer was doing that caused the injury. Workers' compensation does not bar a civil suit if the employer caused the injury by engaging in conduct that was unrelated to the employment. The Court of Appeal approved the *Fermino* instruction given by the trial court. The committee proposes adding this *Fermino* instruction to CACI.

CACI No. 3053, *Retaliation for Exercise of Free Speech Rights—Essential Factual Elements.* There have been a number of recent civil rights cases involving a public employee's claim of employer retaliation for speech that is alleged to be protected by the First Amendment.[11] The

[7] (2017) 8 Cal.App.5th 768.

[8] Cases hold that the defendant bears the burden of proving that the privilege applies. (See, e.g., *Burrill v. Nair* (2013) 217 Cal.App.4th 357, 396.) However, an element of a defamation claim is that the plaintiff must prove that the statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118.) Therefore, despite the cases to the contrary, there is an argument that the plaintiff must disprove that the privilege applies. For this reason the committee has elected not to call this instruction an affirmative defense.

[9] (2016) 5 Cal.App.5th 606, 625.

[10] *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701.

[11] See, e.g., *Brandon v. Maricopa County* (9th Cir. 2017) 849 F.3d 837; *Moonin v. Tice* (9th Cir. 2017) 868 F.3d 853.

claim arises from the landmark U.S. Supreme Court decision in *Pickering v. Board of Education,*[12] as later refined and limited in *Garcetti v. Ceballos.*[13] The committee now proposes this new federal civil rights instruction for use for such a claim.

CACI No. 3727*, Going-and-Coming Rule—Compensated Travel Time Exception.* The "going-and-coming" rule makes an employee's commute time generally outside of the scope of employment.[14] There are, however, a number of exceptions, including one if the employee is paid for his or her time traveling to the workplace.[15] This exception was previously mentioned only in the Sources and Authority to CACI No. 3725, *Going-and-Coming Rule—Vehicle-Use Exception*. The committee now proposes this new separate instruction on this exception.

The committee would like to group all of the going-and-coming exception instructions together. To achieve this end, current CACI No. 3724, *Going-and-Coming Rule—Business-Errand Exception*, and CACI No. 3726, *Social or Recreational Activities*, would exchange numbers, allowing the three going-and-coming instructions to be grouped together as numbers 3725, 3726, and 3727. Number 3728 et seq. would then be available for additional going-and-coming exceptions should the committee elect to add them in the future.

CACI No. 4111, *Constructive Fraud.* Another subject that has been on the committee's agenda before is the species of breach of fiduciary duty that is labeled "constructive fraud." The committee has considered on several occasions whether an instruction on constructive fraud should be added to CACI's Breach of Fiduciary Duty series. The committee has hesitated because of a perceived lack of clarity in the law as to what the elements of the claim should be, particularly any intent element.

Civil Code section 1573 defines constructive fraud in part as "any breach of duty which, *without an actually fraudulent intent*, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him." Hence, under this statute, no intent to deceive need be shown; only the result that the plaintiff has been misled by some incorrect, incomplete, or undisclosed information.

Nevertheless, there are cases that set forth the elements of constructive fraud as "(1) a fiduciary or confidential relationship; (2) nondisclosure (breach of fiduciary duty); (3) *intent to deceive,* and (4) reliance and resulting injury (causation)."[16] It would seem that the statute and the cases cannot be harmonized over whether an intent to deceive is required.

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[12] (1968) 391 U.S. 563.

[13] (2006) 547 U.S. 410; see also *Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1070–1072.

[14] *Jeewarat v. Warner Bros. Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435.

[15] *Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 962

[16] See, e.g., *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1131 (italics added); see also *Younan v. Equifax Inc.* (1980) 111 Cal.App.3d 498, 516, fn. 14.

The committee has now elected to propose this instruction based on the statute, while noting the conflicting case law in the Directions for Use. In support of its preference for the statute, the committee finds little to differentiate constructive fraud from actual fraud if an intent to deceive is required.[17]

Revised Instructions

CACI No. 556, ***Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit.*** In the recent case of *Drexler v. Petersen*,[18] the court addressed the statute of limitations with regard to a medical malpractice plaintiff's claim of misdiagnosis or failure to diagnose. The court held that the cause of action accrues when the plaintiff first experiences "appreciable harm" as a result of the defendant's diagnosis error. Appreciable harm occurs when the plaintiff first becomes aware, or reasonably should have become aware, that a preexisting disease or condition has developed into a more serious one.[19]

The committee elected not to attempt to draft an instruction based on *Drexler* for diagnosis errors and appreciable harm. However, the committee felt that it was important to point out an important aspect of the *Drexler* holding. Appreciable harm is not a matter of delayed discovery; rather it is the trigger for when the cause of action accrues. As such, the three-year limitations period of Code of Civil Procedure section 340.5 does not begin to run until appreciable harm occurs. This point has now been made in the Directions for Use to CACI No. 556.

CACI No. 1010, ***Affirmative Defense—Recreation Immunity—Exceptions.*** Civil Code section 846 provides immunity to a property owner who permits others to enter or use the property for any recreational purpose, subject to certain exceptions as presented in CACI No. 1010. One exception is if the injured person paid a fee for permission to enter and use the property. Previously, CACI No. 1010 required that the fee be paid to the defendant.

A court recently held that if the property owner loses immunity because a fee was charged for entry, the loss of immunity extends to a nonowner who has created a dangerous condition on the property.[20] In the case, injury was caused by a fallen tree on the property that was maintained by a public utility. The utility received no fee or other consideration from the plaintiff, but the court held that this fact was irrelevant. Because the plaintiff had paid a fee to the owner for permission to enter and use the property, the utility had no immunity either.

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[17] In addition to the conflict over intent, there would appear to be a second conflict between the statute and the elements as set forth in the cases. The cases require nondisclosure, while the statute is not limited to nondisclosure; it extends to information that is disclosed, but misleading.

[18] (2016) 4 Cal.App.5th 1181.

[19] *Id.* at pp. 1183–1184, 1194.

[20] *Pacific Gas & Electric Co. v. Superior Court* (2017) 10 Cal.App.5th 563, 566.

The committee proposes changes to the instruction to indicate that a charge or fee need not be paid to the defendant. If the fee was paid to the owner, there is no immunity for any party that causes injury.

As pointed out by a commenter, the instruction currently equates loss of immunity with liability. This, of course, is not correct. If there is no immunity, the jury must still evaluate liability under the elements of the underlying claim. This error has been addressed by changing "is still responsible" to "may still be responsible" in the opening paragraph.

CACI No. 2031, *Damages for Annoyance and Discomfort—Trespass or Nuisance.* The Directions for Use to CACI No. 2031 currently suggest that the damages for annoyance and discomfort due to trespass or nuisance are distinct from the general tort measure of general damages for mental or emotional distress.[21] A recent case cited a long line of California authority to the contrary, including holdings of the California Supreme Court, that damages for annoyance and discomfort do include general damages for emotional distress or mental anguish.[22] The committee finds the authority cited in the case to be dispositive. The committee proposes revising the instruction to clarify that damages for emotional distress and mental anguish are included in the damages for annoyance and discomfort that are recoverable for trespass or nuisance.

CACI No. 4207, *Affirmative Defense—Good Faith.* Under the Uniform Voidable Transactions Act,[23] there is an affirmative defense to voiding the transaction if the transferee received the property in good faith and for reasonably equivalent value.[24] "Good faith" means essentially that the transferee did not know about, nor participate in, the transferor's fraudulent scheme.[25]

In the recent case of *Nautilus, Inc. v. Yang (Nautilus),*[26] the court held that inquiry notice was not sufficient to defeat good faith. The transferee must know actual facts showing the transferor's fraudulent intent.[27] That the transferee perhaps should have known about it from available information was not sufficient. The committee proposes revisions to the instruction to make this clear.

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[21] See *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 456.

[22] See *Hensley v. San Diego Gas & Electric Co.* (2017) 7 Cal.App.5th 1337, 1348–1349; see also *Vieira Enterprises, Inc. v. McCoy* (2017) 8 Cal.App.5th 1057, 1094 [workability of distinction between damages for annoyance and discomfort and general damages "may be questioned"].

[23] Civ. Code, § 3439 et seq.

[24] Civ. Code, § 3439.08(a), (f)(1).

[25] *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299.

[26] (2017) 11 Cal.App.5th 33.

[27] *Id.* at p. 37.

The Legislative Committee Comments—Assembly to Civil Code section 3439.08(a) provide that the transferee's knowledge of the transferor's fraudulent intent may, *in combination with other facts*, be relevant on the issue of the transferee's good faith. However, the court in *Nautilus* held that if the transferee knew facts showing that the transferor had a fraudulent intent, there cannot be a finding of good faith regardless of any combination of facts.[28] It did not consider whether there might be any other facts against which to balance knowledge of fraudulent intent. Whether or not the court should have addressed this apparent conflict with the legislative history, the committee believes that *Nautilus* presents the better rule.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from July 31 through September 1, 2017. Comments were received from 10 different commenters.[29] No particular instruction garnered any unusual attention or opposition.

The committee evaluated all comments and, as a result, revised some of the instructions. A chart summarizing the comments received and the committee's responses is attached at pages 75–105.

Rule 2.1050 of the California Rules of Court requires the committee to update, amend, and add topics to *CACI* on a regular basis and to submit its recommendations to the council for approval. Proposed new and revised instructions are presented semiannually to ensure that the instructions remain clear, accurate, current, and complete; therefore, the advisory committee did not consider any alternative actions. There are no policy implications.

Implementation Requirements, Costs, 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 2018 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.

[28] *Id.* at p. 46.

[29] One of the ten, the Association of Southern California Defense Counsel, sent in separate comments in separate letters signed by different members.

Attachments

1. Full text of *CACI* instructions, at pages 10–74
2. Summary of responses to public comments, at pages 75–105

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Release 31: November 2017

117. Wealth of Parties

In reaching a verdict, you may not consider the wealth or poverty of any party. The parties' wealth or poverty is not relevant to any of the issues that you must decide.

New November 2017

Directions for Use

This instruction may be given unless liability and punitive damages are to be decided in a nonbifurcated trial. The defendant's wealth is relevant to punitive damages. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 108 [284 Cal.Rptr. 318, 813 P.2d 1348].) Otherwise, the wealth or lack of it is not relevant. (*Hoffman v. Brandt* (1966) 65 Cal.2d 549, 552–553 [55 Cal.Rptr. 417, 421 P.2d 425].) If this instruction is given in a nonbifurcated trial, it should be modified to clarify that the prohibition on considering wealth applies only to liability and compensatory damages, and not to punitive damages. For discussion of the role of a defendant's financial condition with regard to punitive damages, see the punitive damages instructions in the Damages series, CACI Nos. 3940–3949.

Sources and Authority

- "Justice is to be accorded to rich and poor alike, and a deliberate attempt by counsel to appeal to social or economic prejudices of the jury, including the wealth or poverty of the litigants, is misconduct where the asserted wealth or poverty is not relevant to the issues of the case. The possibility, even if true, that a judgment for plaintiffs would mean that defendant would have to go to the Laguna Honda Home, had no relevance to the issues of the case, and the argument of defense counsel was clearly a transparent attempt to appeal to the sympathies of the jury on the basis of the claimed lack of wealth of the defendant. As such, it was clearly misconduct." (*Hoffman, supra*, 65 Cal.2d at pp. 552–553, internal citations omitted.)

- "[W]here liability and punitive damages are tried in a single proceeding, evidence of wealth is admissible. '[W]hile in the ordinary action for damages information regarding the adversary's financial status is *inadmissible*, this is not so in an action for punitive damages. In such a case evidence of defendant's financial condition is admissible at the trial for the purpose of determining the amount that it is proper to award [citations]. The relevancy of such evidence lies in the fact that punitive damages are not awarded for the purpose of rewarding the plaintiff but to punish the defendant. Obviously, the trier of fact cannot measure the 'punishment' without knowledge of defendant's ability to respond to a given award.' " (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1243 [1 Cal.Rptr.2d 301], original italics.)

- "In an action for damages, a showing of poverty of the plaintiff is highly prejudicial; if such evidence is deliberately introduced, it may constitute reversible error." (*Hart v. Wielt* (1970) 4 Cal.App.3d 224, 234 [84 Cal.Rptr. 220].)

Secondary Sources

Witkin, California Procedure (5th ed. 2008) Trial, §§ 215, 216

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.24 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51[14] (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.141 et seq. (Matthew Bender)

556. Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit (Code Civ. Proc., § 340.5)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***]'s alleged injury occurred before [***insert date three years before date of filing***].**

[If, however, [*name of plaintiff***] proves**

[*Choose one or more of the following options:***]**

[that [he/she/it] did not discover the alleged wrongful act or omission because [*name of defendant***] acted fraudulently[,/; or]]**

[that [*name of defendant***] intentionally concealed facts constituting the wrongful act or omission[,/; or]]**

[that the alleged wrongful act or omission involved the presence of an object that had no therapeutic or diagnostic purpose or effect in [*name of plaintiff***]'s body[,/;]]**

the period within which [*name of plaintiff***] had to file the lawsuit is extended for the amount of time that [***insert tolling provision, e.g., [name of defendant] intentionally concealed the facts***].]**

New April 2009, Revised November 2017

Directions for Use

Use CACI No. 555, *Affirmative Defense—Statute of Limitations—Medical Malpractice—One-Year Limit*, if the one-year limitation provision is at issue.

If no tolling provision from Code of Civil Procedure section 340.5 is at issue, read only the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the date on which the alleged injury occurred; (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the date of injury and determine whether the action is timely.

If the notice of intent to sue required by Code of Civil Procedure section 364 is served within 90 days of the date on which the statute of limitations will run, the statute of limitations is tolled for 90 days beyond the end of the limitation period. (See Code Civ. Proc., § 364; *Russell v. Stanford Univ. Hosp.* (1997) 15 Cal.4th 783, 789–790 [64 Cal.Rptr.2d 97, 937 P.2d 640].) If there is an issue of fact with regard to compliance with the requirements of section 364, the instruction may need to be modified accordingly.

If the claim involves a diagnosis error, the cause of action accrues when the plaintiff first experiences "appreciable harm" as a result of the defendant's diagnosis error. Appreciable harm occurs when the plaintiff first becomes aware, or reasonably should have become aware, that a preexisting disease or

condition has developed into a more serious one. (*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1183–1184, 1194 [209 Cal.Rptr.3d 332].) When this has occurred is a question of fact for the jury unless the facts are undisputed. (*Id.* at p. 1197.) Appreciable harm determines when the injury occurred to complete the cause of action; it is not a question of delayed discovery. Therefore, appreciable harm is required to trigger the three-year limitation period of Code of Civil Procedure section 340.5. (*Steingart v. White* (1988) 198 Cal.App.3d 406, 414–417 [243 Cal.Rptr. 678].)

Sources and Authority

- Three-Year Limitation Period for Medical Malpractice. Code of Civil Procedure section 340.5.

- "No tolling provision outside of MICRA can extend the three-year maximum time period that section 340.5 establishes." (*Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 931 [86 Cal.Rptr.2d 107, 978 P.2d 591]; see also *Fogarty v. Superior Court* (1981) 117 Cal.App.3d 316, 319–321 [172 Cal.Rptr. 594] [Code Civ. Proc., § 352 does not toll statute for insanity].)

- "The three-year limitations period of section 340.5 provides an outer limit which terminates all malpractice liability and it commences to run when the patient is aware of the physical manifestation of her injury without regard to awareness of the negligent cause." (*Hills v. Aronsohn* (1984) 152 Cal.App.3d 753, 760 [199 Cal.Rptr. 816].)

- "[W]hen the plaintiff in a medical malpractice action alleges the defendant health care provider misdiagnosed or failed to diagnose a preexisting disease or condition, there is no injury for purposes of section 340.5 until the plaintiff first experiences appreciable harm as a result of the misdiagnosis, which is when the plaintiff first becomes aware that a preexisting disease or condition has developed into a more serious one." (*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1183–1184 [209 Cal.Rtpr.3d 332].)

- "The fact that [plaintiff] contemplated suing [defendants] is strong evidence that [plaintiff] suspected the doctors had not properly diagnosed or treated his headaches. Even with the presence of such suspicions, however, the one-year and three-year limitations periods did not begin to run until [plaintiff] discovered his injury—that is, became aware of additional, appreciable harm from his preexisting condition—and, with respect to the one-year limitations period, also had reason to believe that injury was caused by the wrongdoing of [defendants]." (*Drexler, supra,* 4 Cal.App.5th at p. 1190, internal citation omitted.)

- "Section 340.5 creates two separate statutes of limitations, both of which must be satisfied if a plaintiff is to timely file a medical malpractice action. First, the plaintiff must file within one year after she first 'discovers' the injury *and the negligent cause* of that injury. Secondly, she must file within three years after she first experiences harm from the injury. This means that if a plaintiff does not 'discover' the negligent cause of her injury until more than three years after she first experiences harm from the injury, she will not be able to bring a malpractice action against the medical practitioner or hospital whose malpractice caused her injury." (*Ashworth v. Mem'l Hosp.* (1988) 206 Cal.App.3d 1046, 1054 [254 Cal.Rptr. 104], original italics.)

- "The same considerations of legislative intent that compelled us, in [*Woods v. Young* (1991) 53 Cal.3d 315, 325–326 [279 Cal.Rptr. 613, 807 P.2d 455]], to construe Code of Civil Procedure section 364, subdivision (d), as 'tolling' the one-year limitations period also apply to the three-year limitation. Unless the limitations period is so construed, the legislative purpose of reducing the cost and increasing the efficiency of medical malpractice litigation by, among other things, encouraging negotiated resolution of disputes will be frustrated. Moreover, a plaintiff's attorney who gives notice within the last 90 days of the 3-year limitations period will confront the dilemma we addressed in *Woods,* i.e., a choice between preserving the plaintiff's cause of action by violating the 90-day notice period under Code of Civil Procedure section 364, subdivision (d)--thereby invoking potential disciplinary proceedings by the State Bar--and forfeiting the client's cause of action. In the absence of tolling, the practical effect of the statute would be to shorten the statutory limitations period from three years to two years and nine months. As in the case of the one-year limitation, we discern no legislative intent to do so." (*Russell, supra,* 15 Cal.4th at pp. 789–790.)

- "[T]he 'no therapeutic or diagnostic purpose or effect' qualification in section 340.5 means the foreign body exception does not apply to objects and substances intended to be permanently implanted, but items temporarily placed in the body as part of a procedure and meant to be removed at a later time do come within it." (*Maher v. County of Alameda* (2014) 223 Cal.App.4th 1340, 1352 [168 Cal.Rptr.3d 56].)

- "[I]f the act or omission that led to the plaintiff's injuries was negligence in the maintenance of equipment that, under the prevailing standard of care, was reasonably required to treat or accommodate a physical or mental condition of the patient, the plaintiff's claim is one of professional negligence under section 340.5. But section 340.5 does not extend to negligence in the maintenance of equipment and premises that are merely convenient for, or incidental to, the provision of medical care to a patient." (*Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, 88 [201 Cal.Rptr.3d 449, 369 P.3d 229].)

- "[W]hile MICRA is not limited to suits by patients, it 'applies only to actions alleging injury suffered as a result of negligence in … the provision of medical care to patients.' Driving to an accident victim is not the same as providing medical care to the victim. A paramedic's exercise of due care while driving is not 'necessary or otherwise integrally related to the medical treatment and diagnosis of the patient", at least when the patient is not in the vehicle.…' " (*Aldana v. Stillwagon* (2016) 2 Cal.App.5th 1, 8 [205 Cal.Rptr.3d 719], internal citations omitted.)

- "[W]hen the plaintiff in a medical malpractice action alleges the defendant health care provider misdiagnosed or failed to diagnose a preexisting disease or condition, there is no injury for purposes of section 340.5 until the plaintiff first experiences appreciable harm as a result of the misdiagnosis, which is when the plaintiff first becomes aware that a preexisting disease or condition has developed into a more serious one." (*Drexler*, *supra*, 4 Cal.App.5th 1181, 1183–1184 [209 Cal.Rptr.3d 332].)

- "Applying the well-settled definition of injury set forth in the cases cited *ante* to the facts here, it must be concluded [plaintiff] suffered no damaging affect or appreciable harm from [defendant]'s asserted neglect until [doctor] discovered her cancer in April 1985. Her complaint was therefore timely with respect to the three-year limit." (*Steingart*, *supra*, 198 Cal.App.3d at p. 414.)

Secondary Sources

Haning et al., California Practice Guide: Personal Injury, Ch. 1-B, *First Steps in Handling a Personal Injury Case—Initial Evaluation of Case: Decision to Accept or Reject Employment or Undertake Further Evaluation of Claim,* ¶ 1:67.1 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.26, 9.67–9.72

4 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Professionals,* § 31.60 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice,* § 415.47 (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice,* § 175.45 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions,* 4.27

McDonald, California Medical Malpractice: Law and Practice, §§ 7:1–7:7 (Thomson Reuters)

1010. Affirmative Defense—Recreation Immunity—Exceptions (Civ. Code, § 846)

[*Name of defendant***] is not responsible for [***name of plaintiff***]'s harm if [***name of defendant***] proves that [***name of plaintiff***]'s harm resulted from [his/her/***name of person causing injury's***] entry on or use of [***name of defendant***]'s property for a recreational purpose. However, [***name of defendant***] ~~is~~ may be still responsible for [***name of plaintiff***]'s harm if [***name of plaintiff***] proves that**

[*Choose one or more of the following three options*:]

[[*name of defendant***] willfully or maliciously failed to protect others from or warn others about a dangerous [condition/use/structure/activity] on the property.]**

[**or**]

[a charge or fee was paid to [*name of defendant*/the owner**] for permission to enter~~to use~~ the property for a recreational purpose.]**

[**or**]

[[*name of defendant***] expressly invited [***name of plaintiff***] to enter the property for the recreational purpose.]**

If you find that [*name of plaintiff***] has proven one or more of these three exceptions to immunity, then you must still decide whether [***name of defendant***] is liable in light of the other instructions that I will give you.**

New September 2003; Revised October 2008, December 2014, May 2017, November 2017

Directions for Use

This instruction sets forth the statutory exceptions to recreational immunity. (See Civ. Code, § 846.) In the opening paragraph, if the plaintiff was not the recreational user of the property, insert the name of the person whose conduct on the property is alleged to have caused plaintiff's injury. Immunity extends to injuries to persons who are neither on the property nor engaged in a recreational purpose if the injury was caused by a recreational user of the property. (See *Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 17 [208 Cal.Rptr.3d 461].)

Choose one or more of the optional exceptions according to the facts. Depending on the facts, the court could instruct that the activity involved was a "recreational purpose" as a matter of law. For a comprehensive list of "recreational purposes," refer to Civil Code section 846.

Whether the term "willful or malicious failure" has a unique meaning under this statute is not entirely clear. One court construing this statute has said that three elements must be present to raise a negligent act to the level of willful misconduct: (1) actual or constructive knowledge of the peril to be apprehended,

(2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril. (See *New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689−690 [217 Cal.Rptr. 522].)

For the second exception involving payment of a fee, insert the name of the defendant if the defendant is the landowner. If the defendant is someone who is alleged to have created a dangerous condition on the property other than the landowner, select "the owner." (See *Pacific Gas & Electric Co. v. Superior Court* (2017) 10 Cal.App.5th 563, 566 [216 Cal.Rptr.3d 426].)

Federal courts interpreting California law have addressed whether the "express invitation" must be personal to the user. The Ninth Circuit has held that invitations to the general public do not qualify as "express invitations" within the meaning of section 846. In *Ravell v. United States* (9th Cir. 1994) 22 F.3d 960, 963, the Ninth Circuit held that California law requires a personal invitation for a section 846 invitation, citing *Johnson v. Unocal Corp*. (1993) 21 Cal.App.4th 310, 317 [26 Cal.Rptr.2d 148]. However, the issue has not been definitively resolved by the California Supreme Court.

Sources and Authority

- Recreational Immunity. Civil Code section 846.

- "[A]n owner of ... real property owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give recreational users warning of hazards on the property, unless: (1) the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity; (2) permission to enter for a recreational purpose is granted for a consideration; or (3) the landowner expressly invites rather than merely permits the user to come upon the premises." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1099-1100 [17 Cal.Rptr.2d 594, 847 P.2d 560].)

- "Generally, whether one has entered property for a recreational purpose within the meaning of the statute is a question of fact, to be determined through a consideration of the 'totality of the facts and circumstances, including ... the prior use of the land. While the plaintiff's subjective intent will not be controlling, it is relevant to show purpose.' " (*Ornelas, supra,* 4 Cal.4th at p. 1102, internal citation omitted.)

- "The phrase 'interest in real property' should not be given a narrow or technical interpretation that would frustrate the Legislature's intention in passing and amending section 846." (*Hubbard v. Brown* (1990) 50 Cal.3d 189, 196 [266 Cal.Rptr. 491, 785 P.2d 1183].)

- "[D]efendants' status as business invitees of the landowner does not satisfy the prerequisite that the party seeking to invoke the immunity provisions of section 846 be '[a]n owner of any estate or any other interest in real property, whether possessory or nonpossessory.' Although such invitee may be entitled to be present on the property during such time as the work is being performed, such presence does not convey any estate or interest in the property." (*Jenson v. Kenneth I. Mullen, Consulting Engineers, Inc.* (1989) 211 Cal.App.3d 653, 658 [259 Cal.Rptr. 552].)

- "Subpart (c) of the third paragraph of section 846 is not limited to injuries to persons on the premises

and therefore on its face encompasses persons off-premises such as [plaintiff] and her husband. It is not limited to injuries to recreational participants. Had the Legislature wanted to narrow the third paragraph's immunity to injured recreational users, it could have done so, as it did in the first paragraph." (*Wang, supra,* 4 Cal.App.5th at p. 17.)

- "The concept of willful misconduct has a well-established, well-defined meaning in California law. 'Willful or wanton misconduct is intentional wrongful conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results.' " (*New, supra,* 171 Cal.App.3d at p. 689, internal citations omitted.)

- "Clearly, consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities. There are many amusement facilities in government-owned parks that charge admission fees and a consideration in this or a similar context was intended." (*Moore v. City of Torrance* (1979) 101 Cal.App.3d 66, 72 [166 Cal.Rptr. 192], disapproved of on other grounds in *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 707 [190 Cal.Rptr. 494, 660 P.2d 1168].)

- "We conclude that the consideration exception to recreational use immunity does apply to [defendant] even though [plaintiff]'s fee for recreational access to the campground was not paid to it … . We hold that the payment of consideration in exchange for permission to enter a premises for a recreational purpose abrogates the section 846 immunity of any nonpossessory interest holder who is potentially responsible for the plaintiff's injuries, including a licensee or easement holder who possesses only a limited right to enter and use a premises on specified terms but no right to control third party access to the premises. The contrary interpretation urged by [defendant], making immunity contingent not on payment of consideration but its receipt, is supported neither by the statutory text nor the Legislature's purpose in enacting section 846, which was to encourage free public access to property for recreational use. It also would lead to troubling, anomalous results we do not think the Legislature intended. At bottom, construing this exception as applying only to defendants who receive or benefit from the consideration paid loses sight of the fact that recreational immunity is merely a tool. It is the Legislature's chosen means, not an end unto itself." (*Pacific Gas & Electric Co., supra*, 10 Cal.App.5th at p. 566.)

- "A landowner must gain some immediate and reasonably direct advantage, usually in the form of an entrance fee, before the exception to immunity for consideration under section 846 comes into play." (*Johnson, supra,* 21 Cal.App.4th at p. 317.)

- "The purpose of section 846 is to encourage landowners to permit people to use their property for recreational use without fear of reprisal in the form of lawsuits. The trial court should therefore construe the exceptions for consideration and express invitees narrowly. (*Johnson, supra,* 21 Cal.App.4th at p. 315.)

- "Civil Code section 846's liability shield does not extend to acts of vehicular negligence by a landowner or by the landowner's employee while acting within the course of the employment. We base this conclusion on section 846's plain language. The statutory phrase 'keep the premises safe' is an apt description of the property-based duties underlying premises liability, a liability category that does not include vehicular negligence. Furthermore, a broad construction of that statutory phrase

would render superfluous another provision of section 846 shielding landowners from liability for failure to warn recreational users about hazardous conditions or activities on the land." (*Klein v. United States of America* (2010) 50 Cal.4th 68, 72 [112 Cal.Rptr.3d 722, 235 P.3d 42].)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~1103~~1245 ~~1111~~1253

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.22 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.30 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.21 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.130 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 16:34 (Thomson Reuters)

~~1722~~1709. Retraction: News Publication or Broadcast (Civ. Code, § 48a)

Because [*name of defendant***] is a [[daily/weekly] news publication/broadcaster], [***name of plaintiff***] may recover only the following:**

(a) Damages to property, business, trade, profession, or occupation; and

(b) Damages for money spent as a result of the defamation.

However, this limitation does not apply if [*name of plaintiff***] proves both of the following:**

1. That [*name of plaintiff***] demanded a correction of the statement within 20 days of discovering the statement; and**

2. That [*name of defendant***] did not publish an adequate correction;**

[or]

That [*name of defendant***]'s correction was not substantially as conspicuous as the original [publication/broadcast];**

[or]

That [*name of defendant***]'s correction was not [published/broadcast] within three weeks of [***name of plaintiff***]'s demand.**

New September 2003; Revised June 2016, May 2017; Renumbered from CACI No. 1722 November 2017

Directions for Use

The judge should decide whether the demand for a retraction was served in compliance with the statute. (*O'Hara v. Storer Communications, Inc.* (1991) 231 Cal.App.3d 1101, 1110 [282 Cal.Rptr. 712].)

The statute is limited to actions "for damages for the publication of a libel in a daily or weekly news publication, or of a slander by radio broadcast." (Civ. Code, § 48a(a).) However a "radio broadcast" includes television. (Civ. Code, § 48.5(4) [the terms "radio," "radio broadcast," and "broadcast," are defined to include both visual and sound radio broadcasting]; *Kalpoe v. Superior Court* (2013) 222 Cal.App.4th 206, 210, 166 Cal.Rptr.3d 80].)

Sources and Authority

- Demand for Correction. Civil Code section 48a.
- "Under California law, a newspaper gains immunity from liability for all but 'special damages' when

it prints a retraction satisfying the requirements of section 48a." (*Pierce v. San Jose Mercury News* (1989) 214 Cal.App.3d 1626, 1631 [263 Cal.Rptr. 410]; see also *Twin Coast Newspapers, Inc. v. Superior Court* (1989) 208 Cal.App.3d 656, 660-661 [256 Cal.Rptr. 310].)

- "An equivocal or incomplete retraction obviously serves no purpose even if it is published in 'substantially as conspicuous a manner ... as were the statements claimed to be libelous.' " (*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1011 [283 Cal.Rptr. 644].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 629–639

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.24 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.53 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.37 (Matthew Bender)

1 California Civil Practice: Torts §§ 21:55–21:57 (Thomson Reuters)

~~1724~~1722. Affirmative Defense—Statute of Limitations—Defamation

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [he/she/it] first communicated the alleged defamatory statement to a person other than [***name of plaintiff***] before [***insert date one year before date of filing***]. [For statements made in a publication, the claimed harm occurred when the publication was first generally distributed to the public.]**

[If, however, [*name of plaintiff***] proves that on [***insert date one year before date of filing***] [he/she/it] had not discovered the facts constituting the defamation, and with reasonable diligence could not have discovered those facts, the lawsuit was filed on time.]**

New April 2009; Renumbered from CACI No. 1724 November 2017

Directions for Use

This instruction is for use if the defendant claims that the plaintiff's action was not filed within the applicable one-year limitation period for defamation. (See Code Civ. Proc., § 340(c).)

If the defamation was published in a publication such as a book, newspaper, or magazine, include the last sentence of the first paragraph, and do not include the second paragraph. The delayed-discovery rule does not apply to these statements. (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1250–1251 [7 Cal.Rptr.3d 576, 80 P.3d 676].) Otherwise, include the second paragraph if the plaintiff alleges that the delayed-discovery rule avoids the limitation defense.

The plaintiff bears the burden of pleading and proving delayed discovery. (See *McKelvey v. Boeing North Am. Inc.* (1999) 74 Cal.App.4th 151, 160 [86 Cal.Rptr.2d 645].) See also the Sources and Authority to CACI No. 455, *Statute of Limitations—Delayed Discovery*.

The delayed discovery rule can apply to matters published in an inherently secretive manner. (*Hebrew Academy of San Francisco v. Goldman* (2007) 42 Cal.4th 883, 894 [70 Cal.Rptr.3d 178, 173 P.3d 1004]. Modify the instruction if inherent secrecy is at issue and depends on disputed facts. It is not clear whether the plaintiff has the burden of proving inherent secrecy or the defendant has the burden of proving its absence.

Sources and Authority

- One-Year Statute of Limitations. Code of Civil Procedure section 340.
- "In a claim for defamation, as with other tort claims, the period of limitations commences when the cause of action accrues. … [A] cause of action for defamation accrues at the time the defamatory statement is 'published' (using the term 'published' in its technical sense). [¶] [I]n defamation actions the general rule is that publication occurs when the defendant communicates the defamatory statement to a person other than the person being defamed. As also has been noted, with respect to books and newspapers, publication occurs (and the cause of action accrues)

when the book or newspaper is first generally distributed to the public." (*Shively, supra,* 31 Cal.4th at pp. 1246–1247, internal citations omitted.)

- "This court and other courts in California and elsewhere have recognized that in certain circumstances it may be appropriate to apply the discovery rule to delay the accrual of a cause of action for defamation or to impose an equitable estoppel against defendants who assert the defense after the limitations period has expired." (*Shively, supra,* 31 Cal.4th at pp. 1248–1249.)

- "[A]pplication of the discovery rule to statements contained in books and newspapers would undermine the single-publication rule and reinstate the indefinite tolling of the statute of limitations intended to be cured by the adoption of the single-publication rule. If we were to recognize delayed accrual of a cause of action based upon the allegedly defamatory statement contained in the book … on the basis that plaintiff did not happen to come across the statement until some time after the book was first generally distributed to the public, we would be adopting a rule subjecting publishers and authors to potential liability during the entire period in which a single copy of the book or newspaper might exist and fall into the hands of the subject of a defamatory remark. Inquiry into whether delay in discovering the publication was reasonable has not been permitted for publications governed by the single-publication rule. Nor is adoption of the rule proposed by plaintiff appropriate simply because the originator of a privately communicated defamatory statement may, together with the author and the publisher of a book, be liable for the defamation contained in the book. Under the rationale for the single-publication rule, the originator, who is jointly responsible along with the author and the publisher, should not be liable for millions of causes of action for a single edition of the book. Similarly, consistent with that rationale, the originator, like the author or the publisher, should not be subject to suit many years after the edition is published." (*Shively, supra,* 31 Cal.4th at p. 1251.)

- "The single-publication rule as described in our opinion in *Shively* and as codified in Civil Code section 3425.3 applies without limitation to all publications." (*Hebrew Academy of San Francisco, supra,* 42 Cal.4th at p. 893.)

- "[T]he single-publication rule applies not only to books and newspapers that are published with general circulation (as we addressed in *Shively*), but also to publications like that in the present case that are given only limited circulation and, thus, are not generally distributed to the public. Further, the discovery rule, which we held in *Shively* does not apply when a book or newspaper is generally distributed to the public, does not apply even when, as in the present case, a publication is given only limited distribution." (*Hebrew Academy of San Francisco, supra,* 42 Cal.4th at p. 890.)

- " '… [C]ourts uniformly have *rejected* the application of the discovery rule to libels published in books, magazines, and newspapers,' stating that 'although application of the discovery rule may be justified when the defamation was communicated in confidence, that is, "in an inherently secretive manner," the justification does not apply when the defamation occurred by means of a book, magazine, or newspaper that was distributed to the public. [Citation.]' " (*Hebrew Academy of San Francisco, supra,* 42 Cal.4th at p. 894, original italics, internal citations omitted.)

Secondary Sources

Haning et al., California Practice Guide: Personal Injury (The Rutter Group) ¶ 5:176.10

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.21 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.290 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.56 (Matthew Bender)

1724. Fair and True Reporting Privilege (Civ. Code, § 47(d))

[*Name of plaintiff***] cannot recover damages from [***name of defendant***] if [***name of defendant***] proves all of the following:**

1. That [*name of defendant***]'s statement(s) [was/were] [reported in/communicated to] [***specify public journal in which statement(s) appeared***];**

2. The [report/communication] was of [*select the applicable statutory context***]**

[a judicial, legislative, or other public official proceeding;]

[something said in the course of a judicial, legislative, or other public official proceeding;]

[a verified charge or complaint made by any person to a public official on which a warrant was issued;]

and

3. The [report/communication] was both fair and true.

New November 2017

Directions for Use

This instruction involves what is referred to as the "fair and true reporting privilege" of Civil Code section 47(d). This statute grants an absolute privilege against defamation for a fair and true report in, or a communication to, a public journal, of a judicial, legislative, or other public official proceeding; or for anything said in the course of the proceeding; or for a verified charge or complaint made by any person to a public official, on which complaint a warrant has been issued.

An element of defamation is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) That would seem to suggest that the plaintiff must prove that a privilege does not apply. Nevertheless, courts have held that it is the defendant's burden to prove that the statement is within the scope of the privilege, including that it was fair and true. (*Burrill v. Nair* (2013), 217 Cal.App.4th 357, 396 [158 Cal.Rptr.3d 332], disapproved on another ground in *Baral v. Schnitt* (2016) 1 Cal.5th 376, 396, fn. 11 [205 Cal.Rptr.3d 475, 376 P.3d 604].)

Sources and Authority

- Fair and True Reporting Privilege. Civil Code section 47(d).
- "Under section 47, subdivision (d), the fair and true reporting privilege protects a 'fair and true report in, or a communication to, a public journal, of … a judicial … proceeding, or … anything

said in the course thereof.' It too is an absolute privilege—that is, it applies regardless of the defendants' motive for making the report—and forecloses a plaintiff from showing a probability of prevailing on the merits." (*Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 787 [214 Cal.Rptr.3d 358].)

- "The purpose of this privilege is to ensure the public interest is served by the dissemination of information about events occurring in official proceedings and with respect to verified charges or complaints resulting in the issuance of a warrant." (*Burrill, supra,* 217 Cal.App.4th at p. 397.)

- "Prior to 1997 subdivision (d) applied only to a fair and true report *in a* public journal. Senate Bill No. 1540 (1995–1996 Reg. Sess.), sponsored by the California Newspapers Publishers Association, amended the provision, effective January 1, 1997, to add 'or a communication to,' so the privilege would extend, as it does now, to both a fair and true report in and a communication to a public journal concerning judicial, legislative or other public proceedings." (*J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 97 [201 Cal.Rptr.3d 782], original italics.)

- "The privilege applies if the substance of the publication or broadcast captures the gist or sting of the statements made in the official proceedings." (*Burrill, supra,* 217 Cal.App.4th at p. 397.)

- "The defendant is entitled to a certain degree of ' "flexibility/literary license" ' in this regard, such that the privilege will apply even if there is a slight inaccuracy in details—one that does not lead the reader to be affected differently by the report than he or she would be by the actual truth." (*Argentieri, supra,* 8 Cal.App.5th at pp. 787–788.)

- "[Plaintiff] further contends it was for a jury, not the trial court, to decide whether [defendant]'s Statement was a fair and true report. Courts have stated that the fairness and truth of a report is an issue of fact for the jury, *if* there is any material factual dispute on the issue." (*Argentieri, supra,* 8 Cal.App.5th at p. 791, original italics.)

- " '[W]hether or not a privileged occasion exists is for the court to decide, while the effect produced by the particular words used in an article [or broadcast] and the fairness of the report is a question of fact for the jury [citation].' '[T]he publication is to be measured by the natural and probable effect it would have on the mind of the average reader [citations]. The standard of interpretation to be used in testing alleged defamatory language is how those in the community where the matter was published would reasonably understand it [citation]. In determining whether the report was fair and true, the article [or broadcast] must be regarded from the standpoint of persons whose function is to give the public a fair report of what has taken place. The report is not to be judged by the standard of accuracy that would be adopted if it were the report of a professional law reporter or a trained lawyer [citation].' " (*Burrill, supra,* 217 Cal.App.4th at p. 398, internal citation omitted.)

- "At the very least, the difference between these accusations presents a question of fact with respect to whether the average listener would understand the broadcast to capture the gist or sting of the citizen's complaint, or whether the charge made in the broadcast would affect the listener differently than that made in the citizen's complaint." (*Burrill, supra,* 217 Cal.App.4th at p. 398.)

- "In evaluating the effect a publication has on the average reader, the challenged language must be viewed in context to determine whether, applying a 'totality of the circumstances' test, it is reasonably susceptible to the defamatory meaning alleged by the plaintiff: ' "[A] defamatory meaning must be found, if at all, in a reading of the publication as a whole." [Citation.] "This is a rule of reason. Defamation actions cannot be based on snippets taken out of context." ' (*J-M Manufacturing Co., Inc., supra,* 247 Cal.App.4th at p. 97, internal citations omitted.)

- "[Defendant] bears the burden of proving the privilege applies." (*Burrill, supra,* 217 Cal.App.4th at p. 396.)

- " 'A report of a judicial proceeding implies that some official action has been taken by the officer or body whose proceedings are thus reported. The publication, therefore, of the contents of preliminary pleadings such as a complaint or petition, before any judicial action has been taken is not within the rule stated in this Section. An important reason for this position has been to prevent implementation of a scheme to file a complaint for the purpose of establishing a privilege to publicize its content and then dropping the action. (See Comment c). It is not necessary, however, that a final disposition be made of the matter in question; it is enough that some judicial action has been taken so that, in the normal progress of the proceeding, a final decision will be rendered.' " (*Burrill, supra,* at p. 397, quoting Restatement 2d of Torts, § 611, comment e.)

Secondary Sources

9 Witkin, Summary of California Law (10th ed. 2005) Torts, § 586

4 Levy et al., California Torts, Ch. 45, *Intentional Torts and Other Theories of Recovery*, § 45.11 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.64 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander*, § 142.51 (Matthew Bender)

1802. False Light

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her] right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] publicized information or material that showed [***name of plaintiff***] in a false light;**

2. **That the false light created by the publication would be highly offensive to a reasonable person in [***name of plaintiff***]'s position;**

3. **[That there is clear and convincing evidence that [***name of defendant***] knew the publication would create a false impression about [***name of plaintiff***] or acted with reckless disregard for the truth;]**

   [*or*]

   [That [*name of defendant***] was negligent in determining the truth of the information or whether a false impression would be created by its publication;]**

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

   [*or*]

   [That [*name of plaintiff***] sustained harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and]**

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

[In deciding whether [*name of defendant***] publicized the information or material, you should determine whether it was made public either by communicating it to the public at large or to so many people that the information or material was substantially certain to become public knowledge.]**

New September 2003; Revised November 2017

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

~~The bracketed options for element 3 should be used in the alternative, depending on whether the conduct~~

~~involves a matter of public concern.~~

~~Comment (a) to Restatement Second of Torts, section 652D states that "publicity" "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." This point has been placed in brackets because it may not be an issue in every case.~~

~~As reflected in the citations below, f~~False light claims are subject to the same constitutional protections that apply to defamation claims. (*Briscoe v. Reader's Digest Assn.* (1971) 4 Cal.3d 529, 543 [93 Cal.Rptr. 866, 483 P.2d 34] [false light claim should meet the same requirements of a libel claim, including proof of malice when required].) Thus, a knowing violation of or reckless disregard for the plaintiff's rights is required ~~where~~ if the plaintiff is a public figure or the subject matter of the communication is a matter of public concern. Give the first option for element 3 if the publication involves a public figure or a matter of public concern. Otherwise, give the second option. ~~If a false light claim is combined with a defamation or libel claim, the standard applied in the instructions should be equivalent.~~

If the jury will also be instructed on defamation, the~~If plaintiff has combined a false light claim with a claim of defamation or libel, the~~ court should consider whether an instruction on false light would be superfluous and therefore need not be given.~~separate instructions on each claim should be given in light of~~ (See *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1385, fn. 13 [88 Cal.Rptr.2d 802] ; see also~~and~~ *Briscoe*, *supra*, 4 Cal.3d at p. 543.)~~*Briscoe v. Reader's Digest Assn.* (1971) 4 Cal.3d 529, 543 [93 Cal.Rptr. 866, 483 P.2d 34].~~

Comment (a) to Restatement Second of Torts, section 652D states that "publicity" "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." The final paragraph addressing this point has been placed in brackets because it may not be an issue in every case.

Sources and Authority

- " 'False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed." (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1264 [217 Cal.Rptr.3d 234].)
- ~~Restatement Second of Torts, section 652E provides:~~

> ~~One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if~~
>
> ~~(a) the false light in which the other was placed would be highly offensive to a reasonable person, and~~
>
> ~~(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.~~

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633], internal citation omitted.)

- "In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person. Although it is not necessary that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well." (*Fellows v. National Enquirer* (1986) 42 Cal.3d 234, 238-239 [228 Cal.Rptr. 215, 721 P.2d 97], internal citation omitted.)

- "When a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action." (*Eisenberg, supra,* 74 Cal.App.4th at p. 1385, fn. 13, internal citations omitted.)

- "[A] 'false light' cause of action 'is in substance equivalent to ... [a] libel claim, and should meet the same requirements of the libel claim ... including proof of malice and fulfillment of the requirements of [the retraction statute] section 48a [of the Civil Code]".' " (*Briscoe, supra,* 4 Cal.3d at p. 543, internal citation omitted.)

- "The *New York Times* decision defined a zone of constitutional protection within which one could publish concerning a public figure without fear of liability. That constitutional protection does not depend on the label given the stated cause of action; it bars not only actions for defamation, but also claims for invasion of privacy." (*Reader's Digest Assn., Inc. v. Superior Court* (1984) 37 Cal.3d 244, 265 [208 Cal.Rptr. 137, 690 P.2d 610], internal citations omitted.)

- In *Time, Inc. v. Hill* (1967) 385 U.S. 374 [87 S.Ct. 534, 17 L.Ed.2d 456], the Court held that the *New York Times v. Sullivan* malice standard applied to a privacy action that was based on a "false light" statute where the matter involved a public figure. Given the similarities between defamation and false light actions, it appears likely that the negligence standard for private figure defamation plaintiffs announced in *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323 [94 S.Ct. 2997, 41 L.Ed.2d 789] should apply to private figure false light plaintiffs.

- ~~Plaintiffs must comply with the retraction statute (Civ. Code, § 48a) to recover more than special damages in a false light cause of action. (*Briscoe, supra,* 4 Cal.3d at p. 543.)~~

- "We hold that whenever a claim for false light invasion of privacy is based on language that is defamatory within the meaning of section 45a, pleading and proof of special damages are required." (*Fellows, supra,* 42 Cal.3d at p. 251.)

Secondary Sources

5 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~673~~784 – ~~675~~786

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.04 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.33 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.21 (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson West)~~ §§ 20:12–20:15 (Thomson Reuters)

1803. Appropriation of Name or Likeness—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her] right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] used [***name of plaintiff***]'s name, likeness, or identity ~~without [his/her] permission~~;**

2. **That [***name of plaintiff***] did not consent to this use;**

~~2~~3. **That [***name of defendant***] gained a commercial benefit [or some other advantage] by using [***name of plaintiff***]'s name, likeness, or identity;**

~~3~~4. **That [***name of plaintiff***] was harmed; and**

~~4~~5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2014, November 2017

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

If the alleged "benefit" is not commercial, the judge will need to determine whether the advantage gained by the defendant qualifies as "some other advantage."

If suing under both the common law and Civil Code section 3344, the judge may need to explain that a person's voice, for example, may qualify as "identity" if the voice is sufficient to cause listeners to identify the plaintiff. The two causes of action overlap, and the same conduct should be covered by both.

Even if the elements are established, the First Amendment may require that the right to be protected from unauthorized publicity be balanced against the public interest in the dissemination of news and information. (See *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409 [114 Cal.Rptr.2d 307].) In a closely related right-of-publicity claim, the California Supreme Court has held that an artist who is faced with a challenge to his or her work may raise as affirmative defense that the work is protected by the First Amendment because it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame. (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797]; see CACI No. 1805, *Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (Comedy III)*.) Therefore, if there is an issue of fact regarding a First Amendment balancing test, it most probably should be considered to be an affirmative defense. (Cf. *Gionfriddo, supra* ["Given the significant public interest

in this sport, plaintiffs can only prevail if they demonstrate a substantial competing interest."].)

Sources and Authority

- "A common law misappropriation claim is pleaded by 'alleging: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury. [Citations.]" [Citation.]' " (*Maxwell v. Dolezal* (2014) 231 Cal.App.4th 93, 97 [179 Cal.Rptr.3d 807].)

- " '[T]he right of publicity has come to be recognized as distinct from the right of privacy'. 'What may have originated as a concern for the right to be left alone has become a tool to control the commercial use and, thus, protect the economic value of one's name, voice, signature, photograph, or likeness.' 'What the right of publicity holder possesses is … a right to prevent others from misappropriating the economic value generated … through the merchandising of the 'name, voice, signature, photograph, or likeness' of the [holder].' " (*Timed Out, LLC v. Youabian, Inc.* (2014) 229 Cal.App.4th 1001, 1006 [177 Cal.Rptr.3d 773], internal citations omitted.)

- "The common law cause of action may be stated by pleading the defendant's unauthorized use of the plaintiff's identity; the appropriation of the plaintiff's name, voice, likeness, signature, or photograph to the defendant's advantage, commercially or otherwise; and resulting injury." (*Ross v. Roberts* (2013) 222 Cal.App.4th 677, 684−685 [166 Cal.Rptr.3d 359].)

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633], internal citation omitted.)

- "Consent to the use of a name or likeness is determined by traditional principles of contract interpretation." (*Local TV, LLC v. Superior Court* (2016) 3 Cal.App.5th 1, 8 [206 Cal.Rptr.3d 884].)

- "[T]he appearance of an 'endorsement' is not the *sine qua non* of a claim for commercial appropriation." (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 419 [198 Cal.Rptr. 342].)

- "[N]o cause of action will lie for the '[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citation omitted.)

- "The difficulty in defining the boundaries of the right, as applied in the publication field, is inherent in the necessity of balancing the public interest in the dissemination of news, information and education against the individuals' interest in peace of mind and freedom from emotional disturbances. When words relating to or actual pictures of a person or his name are published, the circumstances may indicate that public interest is predominant. Factors deserving consideration may include the medium of publication, the extent of the use, the public interest served by the publication, and the seriousness of the interference with the person's privacy." (*Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278-279 [239 P.2d 630].)

- "Even if each of these elements is established, however, the common law right does not provide relief

for every publication of a person's name or likeness. The First Amendment requires that the right to be protected from unauthorized publicity 'be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.' " (*Gionfriddo, supra,* 94 Cal.App.4th at pp. 409-410, internal citations and footnote omitted.)

- "Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542 [18 Cal.Rptr.2d 790], internal citation omitted.)

- "[T]he fourth category of invasion of privacy, namely, appropriation, 'has been *complemented* legislatively by Civil Code section 3344, adopted in 1971.' " (*Eastwood, supra,* 149 Cal.App.3d at pp. 416–417.)

Secondary Sources

5 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~676~~784 ~~678~~786

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.05 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, §§ 429.35, 429.36 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.21 (Matthew Bender)

1 California Civil Practice: Torts § 20:16 (Thomson Reuters)

VF-1803. Privacy—Appropriation of Name or Likeness

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] use [***name of plaintiff***]'s name, likeness, or identity ~~without [*name of plaintiff*]'s permission~~?**
____ 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***] consent to the use of [his/her] name, likeness, or identity?**

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

~~2~~3. **Did [***name of defendant***] gain a commercial benefit [or some other advantage] by using [***name of plaintiff***]'s name, likeness, or identity?**
____ Yes ____ No

If your answer to question ~~2~~ 3 is yes, then answer question ~~3~~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 defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

If your answer to question ~~3~~ 4 is yes, then answer question ~~4~~5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~4~~5. **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, November 2017

Directions for Use

This verdict form is based on CACI No. 1803, *Appropriation of Name or Likeness.*

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~~ 5 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.

2031. Damages for Annoyance and Discomfort—Trespass or Nuisance

If you decide that [*name of plaintiff*] has proved that [*name of defendant*] committed a [trespass/nuisance], [*name of plaintiff*] may recover damages that would reasonably compensate [him/her] for the annoyance and discomfort, including emotional distress or mental anguish, caused by the injury to [his/her] peaceful enjoyment of the property that [he/she] occupied.

New December 2010; Revised November 2017

Directions for Use

Give this instruction if the plaintiff claims damages for annoyance and discomfort resulting from a trespass or nuisance, including emotional distress or mental anguish proximately caused by the trespass or nuisance. (*Hensley v. San Diego Gas & Electric Co.* (2017) 7 Cal.App.5th 1337, 1348-1349 [213 Cal.Rptr.3d 803]; but see ~~. These damages are distinct from general damages for mental or emotional distress. (~~*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 456 [102 Cal.Rptr.3d 32] [damages for annoyance and discomfort are distinct from general damages for mental or emotional distress]; see also *Vieira Enterprises, Inc. v. McCoy* (2017) 8 Cal.App.5th 1057, 1094 [214 Cal.Rptr.3d 193 [workability of distinction between damages for annoyance and discomfort and general damages "may be questioned"].)

There may also be a split of authority as to whether the plaintiff must have been in immediate possession of the property in order to recover for annoyance and discomfort. (Compare *Hensley, supra,* 7 Cal.App.5th at pp. 1352–1355 [no limitation] with *Kelly, supra*, 179 Cal.App.4th at p. 458 [plaintiff must be in immediate possession of the property]; see also *Vieira Enterprises, Inc., supra*, 8 Cal.App.5th at p. 1094 [not necessary that the plaintiff be present at the moment of a tortious invasion of the property].)

Sources and Authority

- "Once a cause of action for trespass or nuisance is established, an occupant of land may recover damages for annoyance and discomfort that would naturally ensue therefrom." (*Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 272 [288 P.2d 507].)

- "[T]he restrictions on emotional distress damages involved in breach of contract or negligence cases do not apply when a plaintiff's emotional distress is the result of the defendant's commission of a tort arising from an invasion of a property interest." (*Hensley, supra,* 7 Cal.App.5th at pp. 1356–1357.)

- "[O]nce a cause of action for trespass or nuisance is established, a landowner may recover for annoyance and discomfort, *including emotional distress or mental anguish*, proximately caused by the trespass or nuisance. … [¶] This is so even where the trespass or nuisance involves solely property damage." (*Hensley, supra*, 7 Cal.App.5th at pp. 1348–1349, original italics.)

- "[Plaintiff]'s fear, stress and anxiety suffered as a direct and proximate result of the fire and its attendant damage, loss of use and enjoyment are compensable as damages for annoyance and

discomfort." (*Hensley, supra*, 7 Cal.App.5th at p. 1351.)

- "We reject [defendant]'s contention that in order for emotional distress damages to 'naturally ensue' from a trespass or nuisance, the owner or occupant must be personally or physically present on the invaded property during the trespass or nuisance." (*Hensley, supra,* 7 Cal.App.5th at p. 1352.)

- "We do not question that a nonresident property owner may suffer mental or emotional distress from damage to his or her property. But annoyance and discomfort damages are distinct from general damages for mental and emotional distress. Annoyance and discomfort damages are intended to compensate a plaintiff for the loss of his or her peaceful occupation and enjoyment of the property. … 'We recognize that annoyance and discomfort by their very nature include a mental or emotional component, and that some dictionary definitions of these terms include the concept of distress. Nevertheless, the "annoyance and discomfort" for which damages may be recovered on nuisance and trespass claims generally refers to distress arising out of physical discomfort, irritation, or inconvenience caused by odors, pests, noise, and the like. Our cases have permitted recovery for annoyance and discomfort damages on nuisance and trespass claims while at the same time precluding recovery for "pure" emotional distress.' " (*Kelly, supra,* 179 Cal.App.4th at p. 456, internal citations omitted.)

- "California cases upholding an award of annoyance and discomfort damages have involved a plaintiff who was in immediate possession of the property as a resident or commercial tenant. We are aware of no California case upholding an award of annoyance and discomfort damages to a plaintiff who was not personally in immediate possession of the property." (*Kelly, supra,* 179 Cal.App.4th at p. 458, internal citations omitted.)

- "*Kelly* stands only for the proposition that legal occupancy is required to recover damages for annoyance and discomfort in a trespass case, and that standard requires immediate and personal possession, as a resident or commercial tenant would have. Here, there is no dispute the [plaintiffs] both owned and resided on their property, and they meet the legal standard of occupancy necessary to claim damages for annoyance, discomfort, inconvenience or mental anguish proximately caused by the trespass, as the jury was instructed without controversy in *Kelly. Kelly* does not hold that an occupant must be personally or physically present *at the time of the harmful invasion* to deem emotional distress damages "naturally ensuing" therefrom." (*Hensley, supra*, 7 Cal.App.5th at p. 1354, original italics, internal citation omitted.)

- "[I]t is not necessary that the plaintiff be present at the moment of a tortious invasion of the property. But it is necessary that the annoyance and discomfort arise from and relate to some personal effect of the *interference with use and enjoyment* which lies at the heart of the tort of trespass." (*Vieira Enterprises, Inc., supra*, 8 Cal.App.5th at p. 1094, original italics.)

- "[A] plaintiff may recover damages for annoyance and discomfort proximately caused by tortious injuries to trees on her property if she was in immediate and personal possession of the property at the time of the trespass." *(Fulle v. Kanani* (2017) 7 Cal.App.5th 1305, 1313 [212 Cal.Rptr.3d 920], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § ~~1730~~1915

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.23 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass*, § 550.21 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.145 (Matthew Bender)

2805. Employee Not Within Course of Employment—Employer Conduct Unrelated to Employment

A claim is not barred by workers' compensation if the employer engages in conduct unrelated to the employment or steps outside of its proper role.

New November 2017

Directions for Use

This instruction presents the so-called *Fermino* exception to the exclusivity of workers' compensation. (See *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701 [30 Cal.Rptr.2d 18, 872 P.2d 559].) Its purpose is to rebut element 3 of CACI No. 2800, *Employer's Affirmative Defense—Injury Covered by Workers' Compensation.* Per element 3, the injury falls within the exclusive remedy of workers' compensation if it occurred while the employee was performing the work that he or she was required to do. The *Fermino* exception changes the focus from what the employee was doing when injured to what the employer was doing that may have caused the injury. The exclusive remedy does not apply if the employer caused the injury through conduct unrelated to the work. (*Id.* 7 Cal.4th at p. 717.)

Sources and Authority

- "[N]ormal employer actions causing injury would not fall outside the scope of the exclusivity rule merely by attributing to the employer a sinister intention. Conversely, … actions by employers that have no proper place in the employment relationship may not be made into a 'normal' part of the employment relationship merely by means of artful terminology. Indeed, virtually any action by an employer can be characterized as a 'normal part of employment' if raised to the proper level of abstraction." (*Fermino, supra,* 7 Cal.4th at p. 717. [30 Cal.Rptr.2d 18, 872 P.2d 559].)

- "[C]ertain types of injurious employer misconduct remain outside this bargain. There are some instances in which, although the injury arose in the course of employment, the employer engaging in that conduct ' "stepped out of [its] proper role[]" ' or engaged in conduct of ' "questionable relationship to the employment." ' " (*Fermino, supra,* 7 Cal.App.4th at p. 708.)

- "[CACI No. 2800] was correctly given, however, because the evidence was able to support a finding that the work was not a contributing cause of the injury. [¶] The jury could properly make this finding by applying special instruction No. 5, the instruction stating that an employer's conduct falls outside the workers' compensation scheme when an employer steps outside of its proper role or engages in conduct unrelated to the employment. This instruction stated the doctrine of *Fermino* correctly. If the jury found that carrying out the mock robbery was not within the employer's proper role, it could also find that unwittingly participating in the mock robbery as a victim was not part of the employee's work." (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 628–629 [210 Cal.Rptr.3d 362].)

- "The jury could properly find the injury did not arise out of the employee's work because it was caused by such employer action and therefore the conditions of compensation did not exist. To

> hold that the jury must first find the injury to be within the conditions of compensation and then find it also to be within the *Fermino* exception, instead of simply finding that the conditions of compensation were not met in the first place in light of *Fermino,* would be elevating form over substance." (*Lee, supra,* 5 Cal.App.5th at p. 629.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, § 56

Chin, et al., California Practice Guide: Employment Litigation, Ch. 15-F, *Preemption Defenses*, ¶ 15:526 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 20, Workers' Compensation, § 20.13 (Matthew Bender)

Hanna, California Law of Employee Injuries and Workers Compensation, Ch. 11, Actions Against the Employer Under State Law and Third-Party Tort Actions, § 11.05 (Matthew Bender)

California Workers' Compensation Law and Practice, Ch. 2, Jurisdiction, § 2:122 (James Publishing)

52 California Forms of Pleading and Practice, Ch. 577, Workers' Compensation, § 577.315 (Matthew Bender)

20 California Points and Authorities, Ch. 239, Workers' Compensation Exclusive Remedy Doctrine, § 239.39 (Matthew Bender)

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

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] because [he/she] exercised [his/her] 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] [***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/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/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] [***e.g., speech***] was within [his/her] 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

Directions for Use

This instruction is for use in a claim by a public employee who alleges that he or she suffered an adverse employment action in retaliation for his or her private speech on an issue of public concern. 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].)

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) -- F.3d --, --, internal citations omitted.) 2017 U.S. App. LEXIS 15956

- "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) -- F.3d --, --, internal citations omitted.) 2017 U.S. App. LEXIS 16106

  "*Pickering* [*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.)

- "The public concern inquiry is purely a question of law … ." (*Eng, supra,* 552 F.3d at p. 1071.)

- "While 'the question of the scope and content of a plaintiff's job responsibilities is a question of fact,' the 'ultimate constitutional significance of the facts as found' is a question of law." (*Eng, supra,* 552 F.3d at p. 1071.)

- "[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.)

- "[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 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,* -- F.3d at p. --, internal citations omitted.)

Secondary Sources

7 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)

~~3726~~3724. Social or Recreational Activities

Social or recreational activities that occur after work hours are within the scope of employment if:

(a) They are carried out with the employer's stated or implied permission; and

(b) They either provide a benefit to the employer or have become customary.

New September 2003; Renumbered From CACI No. 3726 November 2017

Sources and Authority

- This aspect of the scope-of-employment analysis was expressly adopted for use in respondeat superior cases in *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 620 [124 Cal.Rptr. 143], and reiterated in *Childers v. Shasta Livestock Auction Yard, Inc.* (1987) 190 Cal.App.3d 792, 804 [235 Cal.Rptr. 641]. It is derived from the workers' compensation case of *McCarty v. Workmen's Compensation Appeals Bd.* (1974) 12 Cal.3d 677, 681-683 [117 Cal.Rptr. 65, 527 P.2d 617].)

- "[W]here social or recreational pursuits on the employer's premises after hours are endorsed by the express or implied permission of the employer and are 'conceivably' of some benefit to the employer or, even in the absence of proof of benefit, if such activities have become 'a customary incident of the employment relationship,' an employee engaged in such pursuits after hours is still acting within the scope of his employment." (*Rodgers, supra*, 50 Cal.App.3d at 620.)

- *McCarty* has been overruled by statute in the context of workers' compensation (see Lab. Code, § 3600(a)(9)). However, courts have acknowledged that "it has been adopted as a test in establishing liability under respondeat superior." (*West American Insurance Co. v. California Mutual Insurance Co.* (1987) 195 Cal.App.3d 314, 322 [240 Cal.Rptr. 540].)

Secondary Sources

3 Witkin, Summary of California Law (~~10th ed. 2005~~11th ed. 2017) Agency and Employment, §§ ~~182~~193, ~~185~~196, ~~190~~ 201

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[3][c] (Matthew Bender)

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

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

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

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

~~3724~~3726. Going-and-Coming Rule—Business-Errand Exception

In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if the employee, while commuting, is on an errand for the employer, then the employee's conduct is within the scope of his or her employment from the time the employee starts on the errand until he or she returns from the errand or until he or she completely abandons the errand for personal reasons.

In determining whether an employee has completely abandoned a business errand for personal reasons, you may consider the following:

a. The intent of the employee;

b. The nature, time, and place of the employee's conduct;

c. The work the employee was hired to do;

d. The incidental acts the employer should reasonably have expected the employee to do;

e. The amount of freedom allowed the employee in performing [his/her] duties; and

f. The amount of time consumed in the personal activity;

g. [*specify other factors, if any***].**

New September 2003; Revised June 2014, June 2017, Revised and Renumbered from CACI No. 3724 November 2017

Directions for Use

This instruction sets forth the business errand exception to the going-and-coming rule, sometimes called the "special errand" or "special mission" exception. (*Sumrall v. Modern Alloys, Inc.* (2017) 10 Cal.App.5th. 961, 968, fn. 1 [216 Cal.Rptr.3d 848]; s~~S~~ee *Pierson v. Helmerich & Payne Internat. Drilling Co.* (2016) 4 Cal.App.5th 608, 632–633, fn.6 [209 Cal.Rptr.3d 222] [citing this instruction].) It may be given with CACI No. 3720, *Scope of Employment*.

Under the going-and-coming rule, commute time is not within the scope of employment. However, if the employee is engaged in a "special errand" or a "special mission" for the employer while commuting, it will negate the going-and-coming rule and put the employee within the scope of employment. (*Jeewarat v. Warner Brothers Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435−436 [98 Cal.Rptr.3d 837].)

Scope of employment ends once the employee abandons or substantially deviates from the special errand. The second paragraph sets forth factors that the jury may consider in determining whether there has been abandonment of a business errand. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 907

[162 Cal.Rptr.3d 280] [opinion may be read to suggest that for the business-errand exception, CACI No. 3723, *Substantial Deviation,* should not be given].)

Sources and Authority

- " 'An offshoot of the doctrine of respondeat superior is the so-called "going and coming rule." Under this rule, an employee is not regarded as acting within the scope of employment while going to or coming from the workplace. … This is based on the concept that the employment relationship is suspended from the time the employee leaves work until he or she returns, since the employee is not ordinarily rendering services to the employer while traveling. …' " (*Jeewarat, supra,* 177 Cal.App.4th at p. 435.)

- " 'The *special-errand* exception to the going-and-coming rule is stated as follows: "If the employee is not simply on his way from his home to his normal place of work or returning from said place to his home for his own purpose, but is coming from his home or returning to it on a *special errand* either as part of his regular duties or at a specific order or request of his employer, the employee is considered to be in the scope of his employment from the time that he starts on the errand until he has returned or until he deviates therefrom for personal reasons." ' " (*Moradi, supra,* 219 Cal.App.4th at p. 906, original italics.)

- "When an employee is engaged in a 'special errand' or a 'special mission' for the employer it will negate the 'going and coming rule.' … The employer is 'liable for torts committed by its employee while traveling to accomplish a special errand because the errand benefits the employer. … ' " (*Jeewarat, supra,* 177 Cal.App.4th at p. 436, internal citations omitted.)

- "The term 'special errand' is something of a misnomer because it implies that the employer must make a specific request for a particular errand. However, the 'special errand' can also be part of the employee's regular duties. Thus, we have chosen to use the term 'business errand' throughout this opinion, as it is more precise and descriptive." (*Sumrall, supra,* 10 Cal.App.5th at p. 968, internal citation omitted.)

- "[T]he jury's instruction on the business errand exception explains it concisely: … ." (*Sumrall, supra,* 10 Cal.App.5th at p. 969, quoting this instruction.)

- "[I]n determining whether an employee has completely abandoned pursuit of a *business errand* for pursuit of a personal objective, a variety of relevant circumstances should be considered and weighed. Such factors may include [(1)] the intent of the employee, [(2)] the nature, time and place of the employee's conduct, [(3)] the work the employee was hired to do, [(4)] the incidental acts the employer should reasonably have expected the employee to do, [(5)] the amount of freedom allowed the employee in performing his duties, and [(6)] the amount of time consumed in the personal activity. … While the question of whether an employee has departed from his *special errand* is normally one of fact for the jury, where the evidence clearly shows a complete abandonment, the court may make the determination that the employee is outside the scope of his employment as a matter of law." (*Moradi, supra,* 219 Cal.App.4th at p. 907, original italics.)

- "Several general examples of the special-errand exception appear in the cases. One would be where

an employee goes on a business errand for his employer leaving from his workplace and returning to his workplace. Generally, the employee is acting within the scope of his employment while traveling to the location of the errand and returning to his place of work. The exception also may be applicable to the employee who is called to work to perform a special task for the employer at an irregular time. The employee is within the scope of his employment during the entire trip from his home to work and back to his home. The exception is further applicable where the employer asks an employee to perform a special errand after the employee leaves work but before going home. In this case, as in the other examples, the employee is normally within the scope of his employment while traveling to the special errand and while traveling home from the special errand." (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 931–932 [237 Cal.Rptr. 718], internal citations omitted.)

- "Plaintiffs contend an employee's attendance at an out-of-town business conference authorized and paid for by the employer may be a special errand for the benefit of the employer under the special errand doctrine. [Defendant] asserts that the special errand doctrine does not apply to commercial travel. We conclude that a special errand may include commercial travel such as the business trip in this case." (*Jeewarat, supra,* 177 Cal.App.4th at p. 436.)

- "An employee who has gone upon a special errand does not cease to be acting in the course of his employment upon his accomplishment of the task for which he was sent. He is in the course of his employment during the entire trip." (*Trejo v. Maciel* (1966) 239 Cal.App.2d 487, 495 [48 Cal.Rptr. 765].)

Secondary Sources

3 Witkin, Summary of California Law (~~10th ed. 2005~~11th ed. 2017) Agency ~~and Employment~~, §§ ~~181~~192–~~184~~195

Finley, California Summary Judgment and Related Termination Motions § 1:1 et seq. (The Rutter Group)

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

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

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts,* §§ 248.11, 248.16 (Matthew Bender)

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

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior,* § 100A.28 et seq. (Matthew Bender)

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

3727. Going-and-Coming Rule—Compensated Travel Time Exception

If an employer has agreed to compensate an employee for his or her commuting time, then the employee's conduct is within the scope of his or her employment as long as the employee is going to the workplace or returning home.

New November 2017

Directions for Use

This instruction sets forth the compensated travel time exception to the going-and-coming rule. It may be given with CACI No. 3720, *Scope of Employment.* CACI No. 3723, *Substantial Deviation,* may also be given if the employee did not go directly from home to work or work to home.

Under the going-and-coming rule, commute time is generally not within the scope of employment. (*Jeewarat v. Warner Bros. Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435 [98 Cal.Rptr.3d 837].) However, commute time is within the scope of employment if the employer compensates the employee for the time spent commuting. (*Lynn v. Tatitlek Support Services, Inc.* (2017) 8 Cal.App.5th 1096, 1111 [214 Cal.Rptr.3d 449].)

Sources and Authority

- "[T]he employer may agree, either expressly or impliedly, that the relationship shall continue during the period of 'going and coming,' in which case the employee is entitled to the protection of the act during that period. Such an agreement may be inferred from the fact that the employer furnishes transportation to and from work as an incident of the employment. It seems equally clear that such an agreement may also be inferred from the fact that the employer compensates the employee for the time consumed in traveling to and from work." (*Kobe v. Industrial Acci. Com.* (1950) 35 Cal.2d 33, 35 [215 P.2d 736], internal citations omitted.)

- "There is a substantial benefit to an employer in one area to be permitted to reach out to a labor market in another area or to enlarge the available labor market by providing travel expenses and payment for travel time. It cannot be denied that the employer's reaching out to the distant or larger labor market increases the risk of injury in transportation. In other words, the employer, having found it desirable in the interests of his enterprise to pay for travel time and for travel expenses and to go beyond the normal labor market or to have located his enterprise at a place remote from the labor market, should be required to pay for the risks inherent in his decision." (*Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, 962 [88 Cal.Rptr. 188, 471 P.2d 988].)

- "We are satisfied that, where, as here, the employer and employee have made the travel time part of the working day by their contract, the [employee] should be treated as such during the travel time, and it follows that so long as the employee is using the time for the designated purpose, to return home, the doctrine of *respondeat superior* is applicable." (*Hinman, supra,* 2 Cal.3d at pp. 962–963.)

- "[C]ourts have excepted from the going and coming rule those cases in which the employer and

employee have entered into an employment contract in which the employer agrees to pay the employee for travel time and expenses associated with commuting, thus making 'the travel time part of the working day by their contract.' " (*Lynn, supra,* 8 Cal.App.5th at p. 1111.)

- "[T]he mere payment of a travel allowance as shown in the present case does not reflect a sufficient benefit to defendant so that it should bear responsibility for plaintiff's injuries." (*Caldwell v. A.R.B., Inc.* (1986) 176 Cal.App.3d 1028, 1042 [222 Cal.Rptr. 494].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency, § 194

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

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

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liablity for Employee's Torts*, § 248.16[4] (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.28 et seq. (Matthew Bender)

4111. Constructive Fraud (Civ. Code, § 1573)

[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] misled [him/her] by failing to provide [***name of plaintiff***] with complete and accurate information. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]];**

2. **That [***name of defendant***] acted on [***name of plaintiff***]'s behalf for purposes of [***insert description of transaction, e.g., purchasing a residential property***];**

3. **That [***name of defendant***] knew, or should have known, that [***specify information at issue***];**

4. **That [***name of defendant***] misled [***name of plaintiff***] by [failing to disclose this information/providing [***name of plaintiff***] with information that was inaccurate or incomplete];**

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

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

New November 2017

Directions for Use

Give this instruction for a claim of constructive fraud under Civil Code section 1573. Under the statute, constructive fraud is a particular kind of breach of fiduciary duty in which the defendant has misled the plaintiff to the plaintiff's prejudice or detriment. Constructive fraud differs from actual fraud (see CACI Nos. 1900−1903 on different claims involving actual fraud) in that no fraudulent intent is required. (Civ. Code, § 1573(1).) Thus, if one who is under a fiduciary duty to provide complete and accurate information to the plaintiff fails to do so and the plaintiff is misled to his or her prejudice, there is a claim for constructive fraud despite the lack of any intent to mislead or deceive.

In element 4, choose the first option if it was the defendant's failure to disclose information that misled the plaintiff. Choose the second option if the defendant provided information to the plaintiff, but the plaintiff was misled because the information was inaccurate or incomplete.

In a fiduciary relationship, there is a rebuttable presumption of reasonable reliance. The defendant bears the burden of rebutting the presumption by proving by substantial evidence that the plaintiff could not have reasonably relied on the misleading information or omission. (*Edmunds v. Valley Circle Estates* (1993) 16 Cal.App.4th 1290, 1301–1302 [20 Cal.Rptr.2d 701].)

There are cases that set forth the elements of constructive fraud as "(1) a fiduciary or confidential relationship; (2) nondisclosure (breach of fiduciary duty); (3) intent to deceive, and (4) reliance and resulting injury (causation)." (See, e.g., *Younan v. Equifax Inc.* (1980) 111 Cal. App. 3d 498, 516 fn. 14 [169 Cal.Rptr. 478]; see also *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1131 [167 Cal.Rptr.3d 832].) However, these elements conflict with the statute in at least two ways. First, the statute clearly states that no fraudulent intent (or intent to deceive) is required. Second, the statute is not limited to nondisclosure; it extends to information that is disclosed, but misleading.

For discussion of the statute of limitations for constructive fraud, see CACI No. 4120, *Affirmative Defense—Statute of Limitations*.

Sources and Authority

- Constructive Fraud. Civil Code section 1573.

- "A fiduciary must tell its principal of all information it possesses that is material to the principal's interests. A fiduciary's failure to share material information with the principal is constructive fraud, a term of art obviating actual fraudulent intent." (*Michel v. Moore & Associates, Inc.* (2007) 156 Cal.App.4th 756, 762 [67 Cal.Rptr.3d 797], internal citations omitted.)

- "In its generic sense, constructive fraud comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust, or confidence, and resulting in damages to another. [Citations.] Constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be so treated—that is, in which such conduct is a constructive or quasi fraud, having all the actual consequences and all the legal effects of actual fraud." (*Prakashpalan, supra,* 223 Cal.App.4th at p. 1131.)

- "The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud. Also, a careless misstatement may constitute constructive fraud even though there is no fraudulent intent." (*Assilzadeh v. Cal. Fed. Bank* (2000) 82 Cal.App.4th 399, 415 [98 Cal.Rptr.2d 176].)

- "[A] representation in the context of a trust or fiduciary relationship creates a rebuttable presumption of reasonable reliance subject to being overcome by substantial evidence to the contrary." (*Edmunds, supra,* 16 Cal.App.4th at p. 1302.)

- "This rebuttable presumption implements the long recognized public policy of imposing fiduciary duties upon partners in their relationship to one another. Indeed, this policy is lodged in the statutory and case law of this state. It is more than the simple shifting of the burden of proof to facilitate the determination of a particular action. Consequently, [defendant] had the burden of proving by substantial evidence that [plaintiff] did not rely on the alleged false statement." (*Edmunds, supra,* 16 Cal.App.4th at p. 1302.)

- "Confidential and fiduciary relations are in law, synonymous and may be said to exist whenever trust and confidence is reposed by one person in another." (*Barrett v. Bank of Am.* (1986) 183

Cal.App.3d 1362, 1369 [229 Cal.Rptr. 16].)

Secondary Sources

5 Witkin, California Procedure (5th ed. 2008) Pleading § 717

1 Witkin, Summary of California Law (11th ed. 2017) Contracts § 295

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Businesss Torts*, § 40.01 (Matthew Bender)

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Fraud, Menace, Undue Influence, and Mistake*, § 215.130 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.101 et seq. (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Fraud, Menace, Undue Influence, and Mistake*, § 92.44 et seq. (Matthew Bender)

27 California Legal Forms—Transaction Guide, Ch. 77, *Discharge of Obligations*, § 77.125 (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 17, *Attacking or Defending Existence of Contract—Fraud, Duress, Menace, and Undue Influence*, 17.19

4207. Affirmative Defense—Good Faith (Civ. Code, § 3439.08(a), (f)(1))

[*Name of defendant***] is not liable to [***name of plaintiff***] [on the claim for actual fraud] if [***name of defendant***] proves both of the following:**

[*Use one of the following two sets of elements:***]**

[1. That [*name of defendant***] took the property from [***name of debtor***] in good faith; and**

2. That [he/she/it] took the property for a reasonably equivalent value.]

[*or***]**

[1. That [*name of defendant***] received the property from [***name of third party***], who had taken the property from [***name of debtor***] in good faith; and**

2. That [*name of third party***] had taken the property for a reasonably equivalent value.]**

"Good faith" means that [*name of defendant/third party***] acted without actual fraudulent intent and that [he/she/it] did not ~~conspire~~ collude with [***name of debtor***] or otherwise actively participate in any fraudulent scheme. If you decide that ~~[***name of debtor***] had fraudulent intent and that~~ [***name of defendant/third party***] knew facts showing that [***name of debtor***] had a fraudulent intent, ~~knew it, then you may consider [his/her/its] knowledge in combination with other facts in deciding the question of~~ [***name of defendant/third party***]~~'s~~ cannot have taken the property in good faith.**

New June 2006; Revised June 2016, November 2017

Directions for Use

This instruction presents a defense that is available to a good-faith transferee for value in cases involving allegations of actual fraud under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act). (See Civ. Code, § 3439.08(a), (f)(1).) Include the bracketed language in the first sentence if the plaintiff is bringing claims for both actual fraud and constructive fraud.

The Legislative Committee Comments—Assembly to Civil Code section 3439.08(a) provides that the transferee's knowledge of the transferor's fraudulent intent may, *in combination with other facts*, be relevant on the issue of the transferee's good faith. (See *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299 [123 Cal.Rptr.2d 924], emphasis added.) However, another sentence of the same comment provides "knowledge of facts rendering the transfer voidable would be inconsistent with the good faith that is required of a protected transferee." This language indicates that if the transferee knew facts showing that the transferor had a fraudulent intent, there cannot be a finding of good faith regardless of any combination of facts; and one court has so held. (See *Nautilus, Inc. v. Yang* (2017) 11 Cal.App.5th 33, 46 [217 Cal.Rptr.3d 458].) The committee believes that *Nautilus* presents the better rule.

Sources and Authority

- Transaction Not Voidable as to Good-Faith Transferee for Reasonable Value. Civil Code section 3439.08(a).

- Transferee's Burden of Proving Good Faith and Reasonable Value. Civil Code section 3439.08(f)(1).

- When Value is Given. Civil Code section 3439.03.

- "If a transferee or obligee took in good faith and for a reasonably equivalent value, however, the transfer or obligation is not voidable. Whether a transfer is made with fraudulent intent and whether a transferee acted in good faith and gave reasonably equivalent value within the meaning of section 3439.08, subdivision (a), are questions of fact." *(Nautilus Inc., supra*, 11 Cal.App.5th at p. 40, internal citation and footnote omitted.)

- "The Legislative Committee comment to Civil Code section 3439.08, subdivision (a), provides that 'good faith,' within the meaning of the provision, 'means that the transferee acted without actual fraudulent intent and that he or she did not collude with the debtor or otherwise actively participate in the fraudulent scheme of the debtor. The transferee's knowledge of the transferor's fraudulent intent may, in combination with other facts, be relevant on the issue of the transferee's good faith … .' " (*Annod Corp.*, *supra*, ~~*v. Hamilton & Samuels* (2002)~~ 100 Cal.App.4th at p.~~1286,~~ 1299 ~~[123 Cal.Rptr.2d 924]~~, internal citations omitted.)

- " 'Fraudulent intent,' 'collusion,' 'active participation,' 'fraudulent scheme'--this is the language of *deliberate wrongful conduct*. It belies any notion that one can become a fraudulent transferee by accident, or even negligently. It certainly belies the notion that guilty knowledge can be created by the fiction of constructive notice." (*Lewis v. Superior Court* (1994) 30 Cal.App.4th 1850, 1859 [37 Cal.Rptr.2d 63], original italics.)

- "We read *Brincko* [*v. Rio Props.* (D.Nev., Jan. 14, 2013, No. 2:10-CV-00930-PMP-PAL) 2013 U.S.Dist. Lexis 5986, pp. *51–*52] as requiring actual knowledge by the transferee of a fraudulent intent on the part of the transferor—not merely *constructive* knowledge or inquiry notice. To that extent, we agree with *Brincko's* construction of the proper test for application of the good faith defense. However, our formulation of the test (1) does not use the words 'suggest to a reasonable person' because that phrase might imply inquiry notice—a concept rejected in *Lewis* and *Brincko*—and (2) avoids use of the words 'voidable' and 'fraudulent transfer' because those concepts are inconsistent with the Legislative Committee comment to section 3439.08. Accordingly, we hold that a transferee does not take in good faith if the transferee had actual knowledge of facts showing the transferor had fraudulent intent." (*Nautilus, Inc., supra*, 11 Cal.App.5th at p. 46, original italics.)

- "[T]he trial court erred in placing the burden of proof on [plaintiff] to prove the good faith defense did not apply." (*Nautilus, Inc., supra*, 11 Cal.App.5th at p. 41.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection*—

Prelawsuit Considerations, ¶ 3:324. (The Rutter Group)

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 5(III)-C, *Fraud--Fraudulent Transfers—Particular Defenses*, ¶ 5:580 et seq. (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.35[2], 270.44[1], 270.47[2], [3] (Matthew Bender)

4606. Whistleblower Protection—Unsafe Patient Care and Conditions—Essential Factual Elements (Health & Saf. Code, § 1278.5)

Revoked November 2017

See *Shaw v. Superior Court* (2017) 2 Cal.5th 983 [216 Cal.Rptr.3d 643, 393 P.3d 98].

[*Name of plaintiff*] claims that [*name of defendant*] discriminated against [him/her] in retaliation for [his/her] [*briefly specify protected conduct*] regarding unsafe patient care, services, or conditions at [*specify hospital or other health care facility*], [*name of defendant*]'s health care facility. In order to establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of plaintiff*] was [a/an] [patient/employee/member of the medical staff/*specify other health care worker*] of [*name of defendant*];

2. That [*name of plaintiff*] [*select one or both of the following options:*]

[a. presented a grievance, complaint, or report to [[*name of defendant*]/an entity or agency responsible for accrediting or evaluating [*name of defendant*]/[*name of defendant*]'s medical staff/[or] a governmental entity] related to, the quality of care, services, or conditions at [*name of defendant*]'s health care facility;]

[or]

[b. initiated, participated, or cooperated in an [investigation [or] administrative proceeding] related to, the quality of care, services, or conditions at [*name of defendant*]'s health care facility that was carried out by [an entity or agency responsible for accrediting or evaluating the facility/its medical staff/a governmental entity];]

3. That [*name of defendant*] [mistreated/discharged/[*other adverse action*]] [*name of plaintiff*];

4. That [*name of plaintiff*]'s [*specify*] was a substantial motivating reason for [*name of defendant*]'s [mistreatment/discharge/[*other adverse action*]] of [*name of plaintiff*];

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

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

New June 2016

Directions for Use

A patient, employee, member of the medical staff, or any other health care worker of a health facility is

protected from discrimination or retaliation if he or she, or his or her family member, takes specified acts regarding suspected unsafe patient care and conditions at a health care facility. (Health & Saf. Code, § 1278.5.) A person alleging discrimination or retaliation by the facility has a private right of action against the facility. (*Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 676 [168 Cal.Rptr.3d 165, 318 P.3d 833].)

For elements 3 and 4, choose "mistreated" and "mistreatment" if the plaintiff was a patient. Choose "discharge" or specify another adverse action if the plaintiff is or was an employee, member of the medical staff, or other health care worker of the defendant's facility. Other adverse actions include, but are not limited to, demotion, suspension, or any unfavorable changes in, or breach of, the terms or conditions of the plaintiff's contract, employment, or privileges, or the threat of any of these actions. (Health & Saf. Code, § 1278.5(d)(2).)

There are rebuttable presumptions of retaliation and discrimination if acts are taken within a certain time after the filing of a grievance. (See Health & Saf. Code, § 1278.5(c), (d).) However, these presumptions affect only the burden of producing evidence. (Health & Saf. Code, § 1278.5(e).) A presumption affecting only the burden of producing evidence drops out if evidence is introduced that would support a finding of its nonexistence. (Evid. Code, § 604.) Therefore, unless there is no such evidence, the jury should not be instructed on the presumptions.

Sources and Authority

- Whistleblower Protection for Patients and Health Care Personnel. Health and Safety Code section 1278.5.

- "Section 1278.5 declares a policy of encouraging workers in a health care facility, including members of a hospital's medical staff, to report unsafe patient care. The statute implements this policy by forbidding a health care facility to retaliate or discriminate 'in any manner' against such a worker 'because' he or she engaged in such whistleblower action. It entitles the worker to prove a statutory violation, and to obtain appropriate relief, in a civil suit before a judicial fact finder." (*Fahlen*, *supra*, 58 Cal.4th at pp. 660–661; internal citation omitted.)

- "A medical staff member who has suffered retaliatory discrimination 'shall be entitled' to redress, including, as appropriate, reinstatement and reimbursement of resulting lost income. Section 1278.5 does not affirmatively state that these remedies may be pursued by means of a civil action, but it necessarily assumes as much when it explains certain procedures that may apply when 'the member of the medical staff … has filed *an action pursuant to this section* … ' ." (*Fahlen*, *supra*, 58 Cal.4th at p. 676, original italics, internal citation omitted.)

- "[Defendant] also appears to contend that it was entitled to judgment as a matter of law on [plaintiff]'s claim for violation of Health and Safety Code section 1278.5 because the undisputed evidence established that [defendant] terminated [plaintiff] for *refusing to perform* nurse-led stress testing, rather than for making complaints concerning [defendant]'s nurse-led stress testing. We are not persuaded. In light of the evidence of [plaintiff]'s complaints pertaining to the legality of nurse-led stress testing and the disciplinary actions discussed above, a jury could reasonably find that [defendant] retaliated against her for making these complaints. This is particularly so given that many of the

~~complaints and disciplinary actions occurred within 120 days of each other, thereby triggering the rebuttable presumption of discrimination established in Health and Safety Code section 1278.5, subdivision (d)(1).” (*Nosal-Tabor v. Sharp Chula Vista Medical Center* (2015) 239 Cal.App.4th 1224, 1246 [191 Cal.Rptr.3d 651], original italics.)~~

~~Secondary Sources~~

~~1 Witkin & Epstein, California Criminal Law (4th ed. 2014) Crimes Against Public Peace and Welfare, § 393~~

~~4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03 (Matthew Bender)~~

~~25 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, § 295.13[14] (Matthew Bender)~~

4700. Consumers Legal Remedies Act—Essential Factual Elements (Civ. Code, § 1770)

[*Name of plaintiff***] claims that [***name of defendant***] engaged in unfair methods of competition and unfair or deceptive acts or practices in a transaction that resulted, or was intended to result, in the sale or lease of goods or services to a consumer, and that [***name of plaintiff***] was harmed by [***name of defendant***]'s violation. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] acquired, or sought to acquire, by purchase or lease, [***specify product or service***] for personal, family, or household purposes;**

2. **That [***name of defendant***] [***specify one or more prohibited practices from Civ. Code, § 1770(a), e.g., represented that [product or service] had characteristics, uses, or benefits that it did not have***];**

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

4. **That [***name of plaintiff***]'s harm resulted from [***name of defendant***]'s conduct.**

[[*Name of plaintiff***]'s harm resulted from [***name of defendant***]'s conduct if [***name of plaintiff***] relied on [***name of defendant***]'s representation. To prove reliance, [***name of plaintiff***] need only prove that the representation was a substantial factor in [his/her] decision. [He/She] does not need to prove that it was the primary factor or the only factor in the decision.**

If [*name of defendant***]'s representation of fact was material, reliance may be inferred. A fact is material if a reasonable consumer would consider it important in deciding whether to buy or lease the [goods/services.]**

New November 2017

Directions for Use

Give this instruction for a claim under the Consumers Legal Remedies Act (CLRA).

The CLRA prohibits 27 distinct unfair methods of competition and unfair or deceptive acts or practices with regard to consumer transactions. (See Civ. Code, § 1770(a).) In element 2, insert the prohibited practice or practices at issue in the case.

The last two optional paragraphs address the plaintiff's reliance on the defendant's conduct. Give these paragraphs in a case sounding in fraud. CLRA claims not sounding in fraud do not require reliance. (See, e.g., Civ. Code, § 1770(a)(19) [inserting an unconscionable provision in a contract].)

Many of the prohibited practices involve a misrepresentation made by the defendant. (See, e.g., Civ. Code, § 1770(a)(4) [using deceptive representations or designations of geographic origin in connection with goods or services].) In a misrepresentation claim, the plaintiff must have relied on the information given. (*Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1022 [112 Cal.Rptr.3d 607],

disapproved of on other grounds in *Raceway Ford Cases* (2016) 2 Cal.5th 161, 180 [211 Cal.Rptr.3d 244, 385 P.3d 397].) An element of reliance is that the information must have been material (or important). (*Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 256 [134 Cal.Rptr.3d 588].)

Other prohibited practices involve a failure to disclose information. (See, e.g., Civ. Code, § 1770(a)(9) [advertising goods or services with intent not to sell them as advertised]; see *Jones v. Credit Auto Center, Inc.* (2015) 237 Cal.App.4th Supp. 1, 11 [188 Cal.Rptr.3d 578].) Reliance in concealment cases is best expressed in terms that the plaintiff would have behaved differently had the true facts been known. (See *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093 [23 Cal.Rptr.2d 101, 858 P.2d 568].) The next-to-last paragraph may be modified to express reliance in this manner. (See CACI No. 1907, *Reliance*.)

The CLRA provides for class actions. (See Civ. Code, § 1781.) In a class action, this instruction should be modified to state that only the named plaintiff's reliance on the defendant's representation must be proved. Class-wide reliance does not require a showing of actual reliance on the part of every class member. Rather, if all class members have been exposed to the same material misrepresentations, class-wide reliance will be inferred, unless rebutted by the defendant. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814–815 [94 Cal.Rptr. 796, 484 P.2d 964]; *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 362–363 [134 Cal.Rptr. 388, 556 P.2d 750]; *Massachusetts Mut. Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1293 [119 Cal.Rptr. 2d 190].) In class cases then, exposure and materiality are the only facts that need to be established to justify class-wide relief. Those determinations are a part of the class certification analysis and will, therefore, be within the purview of the court.

Sources and Authority

- Consumers Legal Remedies Act: Prohibited Practices. Civil Code section 1770(a).

- Consumers Legal Remedies Act: Private Cause of Action. Civil Code section 1780(a).

- "The CLRA is set forth in Civil Code section 1750 et seq. … [U]nder the CLRA a consumer may recover actual damages, punitive damages and attorney fees. However, relief under the CLRA is limited to '[a]ny consumer who suffers any damage *as a result* of the use or employment by any person of a method, act, or practice' unlawful under the act. As [defendant] argues, this limitation on relief requires that plaintiffs in a CLRA action show not only that a defendant's conduct was deceptive but that the deception caused them harm." (*Massachusetts Mutual Life Ins. Co., supra*, 97 Cal.App.4th at p. 1292, original italics, internal citations omitted.)

- "[T]he CLRA does not require lost injury or property, but does require damage and causation. 'Under Civil Code section 1780, subdivision (a), CLRA actions may be brought "only by a consumer 'who suffers any damage as a result of the use or employment' of a proscribed method, act, or practice. … Accordingly, 'plaintiffs in a CLRA action [must] show not only that a defendant's conduct was deceptive but that the deception caused them harm." ' " (*Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 916, fn. 3 [211 Cal.Rptr.3d 769].)

- "This language does not create an automatic award of statutory damages upon proof of an unlawful act." (*Moran v. Prime Healthcare Management, Inc.* (2016) 3 Cal.App.5th 1131, 1152

[208 Cal.Rptr.3d 303].)

- "[Civil Code section 1761(e)] provides a broad definition of 'transaction' as 'an agreement between a consumer and any other person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement.' " (*Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856, 869 [118 Cal.Rptr.2d 770].)

- " 'While a plaintiff must show that the misrepresentation was an immediate cause of the injury-producing conduct, the plaintiff need not demonstrate it was the only cause. " 'It is not … necessary that [the plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct. … It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.' [Citation.]" ' In other words, it is enough if a plaintiff shows that ' "in [the] absence [of the misrepresentation] the plaintiff 'in all reasonable probability' would not have engaged in the injury-producing conduct.' [Citation.]' " (*Veera, supra,* 6 Cal.App.5th at p. 919, internal citations omitted.)

- "Under the CLRA, plaintiffs must show actual reliance on the misrepresentation and harm." (*Nelson, supra,* 186 Cal.App.4th at p. 1022.)

- "A ' "misrepresentation is material for a plaintiff only if there is reliance—that is, ' " 'without the misrepresentation, the plaintiff would not have acted as he did' " ' … ." [Citation.]' " (*Moran, supra,* 3 Cal.App.5th at p. 1152.)

- "In the CLRA context, a fact is deemed 'material,' and obligates an exclusively knowledgeable defendant to disclose it, if a ' "reasonable [consumer]" ' would deem it important in determining how to act in the transaction at issue." (*Collins, supra,* 202 Cal.App.4th at p. 256.)

- "If the undisclosed assessment was material, an inference of reliance as to the entire class would arise, subject to any rebuttal evidence [defendant] might offer." (*Massachusetts Mutual Life Ins. Co., supra,* 97 Cal.App.4th at p. 1295.)

- "[U]nless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer." (*Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1360 [8 Cal.Rptr.3d 22].)

- "[A]lthough a claim may be stated under the CLRA in terms constituting fraudulent omissions, to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose." (*Daugherty v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 824, 835 [51 Cal.Rptr.3d 118].)

- "Under the CLRA, even if representations and advertisements are true, they may still be deceptive because ' "[a] perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable." [Citation.]' " (*Jones, supra,* 237 Cal.App.4th Supp. at p. 11.)

- "Defendants next allege that plaintiffs cannot sue them for violating the CLRA because their debt collection efforts do not involve 'goods or services.' The CLRA prohibits 'unfair methods of competition and unfair or deceptive acts or practices.' This includes the inaccurate 'represent[ation] that a transaction confers or involves rights, remedies, or obligations which it does not have or involve … .' However, this proscription only applies with respect to 'transaction[s] intended to result or which result[] in the sale or lease of goods or services to [a] consumer … .' The CLRA defines 'goods' as 'tangible chattels bought or leased for use primarily for personal, family, or household purposes', and 'services' as 'work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods.' " (*Alborzian v. JPMorgan Chase Bank, N.A.* (2015) 235 Cal.App.4th 29, 39−40 [185 Cal.Rptr.3d 84], internal citations omitted [mortgage loan is neither a good nor a service].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales § 298 et seq.

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch.1 4(II)-B, *Consumers Legal Remedies Act—Elements of Claim*, ¶ 14:315 et seq. (The Rutter Group)

Cabraser, California Class Actions and Coordinated Proceedings, Ch. 4, California's Consumer Legal Remedies Act, § 4.01 et seq. (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act*, § 504.12 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 1, *Determining the Applicable Law*, 1.33

4701. Consumers Legal Remedies Act—Notice Requirement for Damages (Civ. Code, § 1782)

To recover actual damages in this case, [*name of plaintiff***] must prove that, 30 days or more before filing a claim for damages, [he/she] gave notice to [***name of defendant***] that did all of the following:**

1. **Informed [***name of defendant***] of the particular violations for which the lawsuit was brought;**

2. **Demanded that [***name of defendant***] correct, repair, replace, or otherwise fix the problem with [***specify product or service***]; and**

3. **Provided the notice to the defendants in writing and by certified or registered mail, return receipt requested, to the place where the transaction occurred or to [***name of defendant***]'s principal place of business within California.**

[*Name of plaintiff***] must have complied exactly with these notice requirements and procedures.**

New November 2017

Directions for Use

Give this instruction if it is disputed whether the plaintiff gave the defendant the prefiling notice required by Civil Code section 1782(a).

Sources and Authority

- Consumers Legal Remedies Act: Notice Requirement. Civil Code section 1782.

- "[T]he CLRA includes a prefiling notice requirement on actions seeking damages. At least 30 days before filing a claim for damages under the CLRA, 'the consumer must notify the prospective defendant of the alleged violations of [the CLRA] and "[d]emand that such person correct, repair, replace or otherwise rectify the goods or services alleged to be in violation' thereof. If, within this 30-day period, the prospective defendant corrects the alleged wrongs, or indicates that it will make such corrections within a reasonable time, no cause of action for damages will lie.' " (*Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal. App. 4th 1235, 1259−1260 [99 Cal.Rptr.3d 768], internal citations omitted.)

- "The purpose of the notice requirement of section 1782 is to give the manufacturer or vendor sufficient notice of alleged defects to permit appropriate corrections or replacements. The notice requirement commences the running of certain time constraints upon the manufacturer or vendor within which to comply with the corrective provisions. The clear intent of the act is to provide and facilitate precomplaint settlements of consumer actions wherever possible and to establish a limited period during which such settlement may be accomplished. This clear purpose may only be accomplished by a literal application of the notice provisions." (*Outboard Marine Corp. v. Superior Court* (1975) 52 Cal.App.3d 30, 40−41 [124 Cal.Rptr. 852], footnote omitted.)

- "Once a prospective defendant has received notice of alleged violations of section 1770, the extent of its ameliorative responsibilities differs considerably depending on whether the notification sets forth an individual or class grievance. Section 1782, subdivision (b) provides that "[except] as provided in subdivision (c)," an individual consumer cannot maintain an action for damages under section 1780 if, within 30 days after receipt of such notice, an appropriate remedy is given, or agreed to be given within a reasonable time, to the individual consumer. In contrast, subdivision (c) of section 1782 provides that a class action for damages may be maintained under section 1781 unless the prospective defendant shows that it has satisfied all of the following requirements: (1) identified or made a reasonable effort to identify all similarly situated consumers; (2) notified such consumers that upon their request it will provide them with an appropriate remedy; (3) provided, or within a reasonable time will provide, such relief; and (4) demonstrated that it has ceased, or within a reasonable time will cease, from engaging in the challenged conduct. [¶] Thus, unlike the relatively simple resolution of individual grievances under section 1782, subdivision (b), subdivision (c) places extensive affirmative obligations on prospective defendants to identify and make whole the entire class of similarly situated consumers." (*Kagan v. Gibraltar Sav. & Loan Assn.* (1984) 35 Cal.3d 582, 590−591 [200 Cal. Rptr. 38; 676 P.2d 1060], disapproved on other grounds in *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 643 fn. 3 [88 Cal. Rptr. 3d 859, 200 P.3d 295].)

- "[Plaintiff] argues that substantial compliance only is required by section 1782, that petitioners had actual notice of the defects, and that a technicality of form should not be a bar to the action. He asserts that inasmuch as the act mandates a liberal construction, substantial compliance with notification procedures should suffice. In the face of the clear, unambiguous, and unequivocal language of the statute, his contention must fail." (*Outboard Marine Corp., supra,* 52 Cal.App.3d at p. 40 [however, defendant may waive strict compliance].)

- "Filing a complaint *before* the response period expired was [plaintiff]'s (really his lawyers') decision. Instituting the lawsuit could easily have waited until after [defendant] made its correction offer. The fact that the lawsuit was filed before [plaintiff] heard back from [defendant] strongly suggests that the correction offer, unless it was truly extravagant, would have had no effect on [plaintiff]'s (really his lawyers') plan to sue." (*Benson v. Southern California Auto Sales, Inc.* (2015) 239 Cal.App.4th 1198, 1209 [192 Cal.Rptr.3d 67], original italics.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales § 298 et seq.

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch.1 4(II)-B, *Consumers Legal Remedies Act—Elements of Claim*, ¶ 14:321 to 14:325 (The Rutter Group)

Cabraser, California Class Actions and Coordinated Proceedings, Ch. 4, California's Consumer Legal Remedies Act, § 4.01 et seq. (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act*, § 504.13 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 1, *Determining the Applicable*

Law, 1.33

4702. Consumers Legal Remedies Act—Statutory Damages—Senior or Disabled Plaintiff (Civ. Code, § 1780(b)

If you decide that [*name of plaintiff***] has proven [his/her] claim against [***name of defendant***], in addition to any actual damages that you award, you may award [***name of plaintiff***] additional damages up to $5,000 if you find all of the following:**

1. That [*name of plaintiff***] has suffered substantial physical, emotional, or economic damage because of [***name of defendant***]'s conduct;**

2. One or more of the following factors:

(a) [*Name of defendant***] knew or should have known that [his/her/its] conduct was directed to one or more senior citizens or disabled persons;**

(b) [*Name of defendant***]'s conduct caused one or more senior citizens or disabled persons to suffer:**

(1) loss or encumbrance of a primary residence, principal employment, or source of income;

(2) substantial loss of property set aside for retirement, or for personal or family care and maintenance; or

(3) substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or disabled person;

or

(c) One or more senior citizens or disabled persons are substantially more vulnerable than other members of the public to [*name of defendant***]'s conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct;**

and

3. That an additional award is appropriate.

New November 2017

Directions for Use

Give this instruction if the plaintiff is a senior citizen or disabled person seeking to obtain $5,000 in statutory damages. (See Civ. Code, § 1780(b).)

Sources and Authority

- Consumers Legal Remedies Act: Additional Remedy for Senior Citizens and Disabled Persons. Civil Code section 1780(b).

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales § 298 et seq.

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch.1 4(II)-B, *Consumers Legal Remedies Act—Elements of Claim*, ¶ 14:435 (The Rutter Group)

Cabraser, California Class Actions and Coordinated Proceedings, Ch. 4, California's Consumer Legal Remedies Act, § 4.02 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act*, § 504.13 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 1, *Determining the Applicable Law*, 1.33

4710. Consumers Legal Remedies Act—Affirmative Defense—Bona Fide Error and Correction (Civ. Code, § 1784)

[*Name of defendant***] is not responsible for damages to [***name of plaintiff***] if [***name of defendant***] proves both of the following:**

1. **The violation[s] alleged by [***name of plaintiff***] [was/were] not intentional and resulted from a bona fide error even though [***name of defendant***] used reasonable procedures adopted to avoid any such error; and**

2. **Within 30 days of receiving [***name of plaintiff***]'s notice of violation, [***name of defendant***] made, or agreed to make within a reasonable time, an appropriate correction, repair, replacement, or other remedy of the [***specify product or service***].**

New November 2017

Directions for Use

Different correction requirements apply to class actions. (See Civ. Code, § 1782(c).)

Sources and Authority

- Consumers Legal Remedies Act: Defenses. Civil Code section 1784.
- "Damages are not awardable under the CLRA if the defendant proves its violation was not intentional and resulted from a bona fide error despite reasonable procedures to avoid such an error, and remedies the violating goods or services." (*Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 471 [178 Cal.Rptr.3d 784].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales § 298 et seq.

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch.1 4(II)-C, *Consumers Legal Remedies Act—Particular Defenses*, ¶ 14:321 to 14:505 (The Rutter Group)

44 California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act*, § 504.40 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.37 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 10, *Seeking or Opposing Statutory Remedies in Contract Actions*, 10.05

Instruction	Commentator	Comment	Committee Response
117, *Wealth of Parties*	Association of Southern California Defense Counsel, by Steven S. Fleischman Co-Chair, Amicus Committee	ASCDC urges that the Judicial Council adopt proposed CACI No. 117. Cases should be decided on their merits regardless of parties' respective wealth. Indeed, cases have held that that it is attorney misconduct to base arguments on the purported wealth of the parties. (See, e.g., *Stone v. Foster* (1980) 106 Cal.App.3d 334, 335 [misconduct to appeal to the defendant's perceived ability to pay any judgment with ease]; *Hart v. Wielt* (1970) 4 Cal.App.3d 224, 234 [plaintiff's counsel's argument plaintiff would be a "a burden on the taxpayers" lest jury find in her favor was attorney misconduct].) Proposed CACI No. 117, if adopted, would properly instruct the jury that these matters should not be considered.	The committee appreciates the commentator's support for this new instruction.
		[I]nclude *Stone* and *Hart* in the Sources and Authority to provide attorneys and courts with readily available authority on this point. In addition, the Committee may wish to consider citation to the following authority: "The Constitution protects everyone, the poor, the wealthy, the weak, the powerful, the guilty and the innocent." (*Manufactured Home Communities, Inc. v. County of San Luis Obispo* (2008) 167 Cal.App.4th 705, 708.) While the decision does not bear directly on the language to be used in jury instructions, the sentiment expressed in this case certainly supports the impetus behind the proposed instruction.	There is an excerpt from *Hart* that is appropriate for the Sources and Authority, and the committee has added it. But there is no similarly appropriate excerpt from *Stone,* which has no real discussion of the wealth of the parties. The proposed quote from *Manufactured Home Communities* is too remotely connected to the instruction.
		We propose that that Directions for Use be modified to state: In a trial that is bifurcated under Code of Civil Procedure section 3294, courts should give CACI No. 117 only in the	The first paragraph is unnecessarily long to make the point that the instruction may not apply if punitive damages are sought and the trial is not bifurcated.

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		first phase of trial, because the defendant's wealth is relevant to the second phase in which the amount of punitive damages is assessed. (See *Adams v. Murakami* (1991) 54 Cal.3d 105, 111 [purpose of requirement of defendant's financial net worth is to determine excessiveness of award relative to the defendant's ability to pay]; cf. *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 427 ["The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award"].)" "Where liability and punitive damages are to be decided in a non-bifurcated trial, courts should give modified version of this instruction: "In reaching a verdict on questions of liability and compensatory damages, you may not consider the wealth or poverty of any party. The parties' wealth or poverty is not relevant to those issues. You may consider a party's financial condition only in determining the amount of punitive damages, if any, that is reasonably necessary to punish and deter the conduct that harmed the plaintiff."	The second paragraph makes a valid point in that in a nonbifurcated trial, some modification of the instruction will be needed. The committee has added a sentence to the Directions for Use to make this point. But the committee does not believe that any language on the point should be placed in the instruction itself. To do so would make the instruction more about punitive damages than about the wealth of the parties.
	Hon. Elizabeth A Baron, Associate Justice, California Court of Appeal (Ret.)	I think the proposed CACI 117 is needed. It was a huge issue in one of the cases in our 2017-2018 CACI Companion Handbook which will be published in September. The issue led to a lengthy Attorney's Comment about the manner in which the judge handled (or refused to handle) the issue.	The committee appreciates the commentator's support for this new instruction.
		However, I do not think it should be placed in the Pretrial Section of the CACI. It refers to damages and I think it makes sense to place it in the Damages Series. One of the problems I see when reviewing courts' files across the State is that the Pretrial Instructions frequently are not scanned into the courts' online files.	The committee disagrees. This instruction is similar to CACI No. 105, Insurance, which advises the jury not to consider whether any of the parties has insurance. It is only tangentially relevant to damages.

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		When I contact the attorneys in cases, the pretrial instructions are not in their files either. This leads me to the worrisome conclusion that written pretrial instructions are not always given to the jury for their use during deliberations. By placing proposed 117 in the Damages section, it will always be included in the written packet of instructions given to the jurors when the wealth or poverty of a party is an issue in the nonpunitive damages phase of a trial.	
	Civil Justice Association of California, by Brittany A. Sitzer	We respectfully disagree with the way this new Instruction is drafted. We urge the Judicial Council to examine and revise CACI 117 in harmony with the decision in *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408 to clarify that the wealth of a party is an irrelevant factor in calculating punitive damages; however, wealth may be considered when compensatory damages are high and must adhere to a 1:1 ratio. The holding in *State Farm* presents authority that wealth may not be a relevant factor in punitive damages calculation. *State Farm* also established the proportionality rule for when wealth can be considered: when compensatory damages are particularly large, punitive damages should not exceed upwards from single-digit ratios.	This instruction is not about punitive damages; it is an admonition to the jury not to consider the financial condition of any party in deliberations. There is a narrow exception for punitive damages in a nonbifurcated trial. But *Adams v. Murakami* and its progeny are adequately presented in the 3940–3949 punitive damages group. The committee has, however, added a cross reference to the punitive damages instructions in the Directions for Use.
	Hon. Elizabeth R. Feffer, Judge of the Superior Court, Los Angeles County	I do not support this proposed language. I instead propose that this instruction use the language found in Civil Code § 3295(a)(1) (which relates to punitive damages), of the "financial condition" of the parties. This language would be consistent with the statute, as well as with the language of the existing CACI	The committee agrees that "financial condition" is a more precise term than "wealth," but believes that it might raise complexities that do not need to be raised. The instruction is written to be a simple admonition to the jury to not consider how rich or poor a party may be. The committee believes that "wealth" adequately and simply makes this point.

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		instructions regarding punitive damages. CACI 3940, 3942, 3943, 3945, 3947, and 3949 all use the term "financial condition." In assessing punitive damages, a jury is tasked with assessing the defendant's financial condition. This involves delving into a defendant's income, expenses, debt, assets, profits, and the like. In addition, the terms "wealth" and "poverty" are subjective, and relative. Each individual juror may have his or her own criteria for assessing "wealth" and "poverty." Is the assessment solely income-based, or is debt also a factor? If a corporation has high gross income numbers but is operating at a net loss, is it "rich" or "poor"? What about a litigant whose sole asset is an expensive home located in a "wealthy" neighborhood, but the house is "under water" because the encumbrances exceed the equity? Likewise, what is "poverty"? What is the jury to do with someone who, in the jury's opinion, is neither rich nor poor, but solidly in the middle? As these subjective terms may create confusion, and to be consistent with the same language used elsewhere in CACI, I propose that the instruction use the term "financial condition" instead of "wealth or poverty."	The inquiry into financial condition for purposes of awarding punitive damages is a far more complex issue.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	We agree with the instruction.	The committee appreciates the commentator's support for this new instruction.
		The Directions for Use state categorically that apart from the defendant's wealth with respect to punitive damages, a party's wealth or poverty is not relevant. We believe this statement is overbroad and unnecessary. The plaintiff's financial vulnerability is a factor to consider in determining the degree of	As noted above, there is no need to discuss wealth in the context of punitive damages in this instruction.

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		reprehensibility of the defendant's conduct for purposes of evaluating the constitutional reasonableness of a punitive damages award. (*State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419.) The plaintiff's financial vulnerability in this context means his or her wealth or poverty. (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 5 Cal.App.5th 1, 18.) We suggest revising the Directions for Use as follows: "This instruction may be given unless liability and punitive damages are to be decided in the same trial. The defendant's wealth is relevant to punitive damages. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 108.) <u>The plaintiff's wealth or poverty may be relevant to the constitutional reasonableness of a punitive damages award. (*State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419; *Nickerson v. Stonebridge Life Ins. Co.* (2016) 5 Cal.App.5th 1, 18.) Otherwise, a</u> party's wealth or lack of it <u>ordinarily</u> is not relevant. (*Hoffman v. Brandt* (1966) 65 Cal.2d 549, 552-553.)"	
556. *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit*	Association of Southern California Defense Counsel, by Lisa Perrochet, Amicus Committee	We commend the Committee for addressing the effect of the recent *Drexler* opinion, but we are concerned that *Drexler* is at odds with the statement in the new paragraph that "When this [appreciable harm] has occurred is a question of fact for the jury. (*Drexler, supra,* 4 Cal.App.5th at p. 1197.)" This statement suggests that the question of appreciable harm is necessarily a question of fact that can never be resolved as a matter of law. *Drexler*, however, made clear that its holding—reversing summary judgment—was specific to the facts of that case: "*[B]ecause the evidence was not undisputed* that Drexler discovered his injury more than	The committee agrees that the issue may not always be one of fact and has revised the Directions for Use to note this point.

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		one year before he filed this action, Dr. Petersen and Dr. German were not entitled to summary judgment under section 340.5." (*Id*., emphasis added.) The court elsewhere explained that the issue of appreciable harm is "*often* a factual issue." (*Id.* at p. 1195, emphasis added.)	
		We are also concerned that the new paragraph does not fully reflect an important aspect of *Drexler,* which followed settled authority in holding that the injury that triggers the statute of limitations "is not necessarily the ultimate harm suffered, but instead occurs at 'the point at which "appreciable harm" [is] first manifested.' (*Brown v. Bleiberg* (1982) 32 Cal.3d [426,] 437, fn. 8; see *Hills v. Aronsohn* (1984) 152 Cal.App.3d 753, 762 [199 Cal.Rptr. 816] (*Hills*) ['appreciable harm' may become apparent before the ultimate harm or diagnosis].)" (*Drexler, supra,* 4 Cal.App.5th at pp. 1190-1191; see also *Id.* at p. 1191 ["When a patient experiences appreciable harm before the ultimate harm, that appreciable harm will start the limitations period"].) Without any reference to this legal principle, a jury may confuse the manifestation of "appreciable harm" with the later (in some cases) manifestation of the ultimate medical condition for which plaintiff is seeking damages.	The new paragraph is about diagnosis error. The committee sees no need to expand it to include the general point being made in the comment. Also, the paragraph does say that: "Appreciable harm determines when the injury occurred to complete the cause of action; it is not a question of delayed discovery." That would seem to address the concern of the comment.
		We further note that *Drexler* concerns specifically a claim of "failure to diagnose a preexisting, latent condition," as indicated by the heading on page 1192 of the opinion and the specific focus of the rest of the court's analysis on state and federal cases arising in that narrow context. Different considerations may come into play for a general "diagnosis error" (as phrased in the proposed new paragraph) in misinterpreting patent symptoms that a patient may present. The language	The court in *Drexler* says: "We hold that, when the plaintiff in a medical malpractice action alleges the defendant health care provider **misdiagnosed or failed to diagnose** a preexisting disease or condition, there is no injury for purposes of section 340.5 until the plaintiff first experiences appreciable harm as a result of the misdiagnosis, which is when the plaintiff first becomes aware that a preexisting disease or

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		quoted in the proposed Directions for Use regarding a patient's awareness "that his/her symptoms have developed into a more serious disease or condition" has little bearing outside the context of failure to diagnose a latent condition.	condition has developed into a more serious one." (*Drexler, supra,* 4 Cal.App.5th at pp. 1183-1184.) The committee does see that there may be different considerations if the doctor gets it wrong (misdiagnosis) in contrast to missing it entirely (failure to diagnose). But the reason for this addition to the Directions for Use is to flag the issue that what is involved is the accrual of the cause of action, not delayed discovery. That is an important consideration with regard to the three-year statute of this instruction. There is no need to distinguish between misdiagnosis and failure to diagnose to make this point.
		It is important to take heed of *Drexler's* discussion of an objective as well as a subjective component to manifestation of appreciable harm. The court explained, "With the worsening of the plaintiff's condition, or an increase in or appearance of significant new symptoms, the plaintiff with a preexisting condition either actually (subjectively) discovers, *or reasonably (objectively)* should be aware of, the physical manifestation of his or her injury." (*Id.* at p. 1194, emphasis added; see also *id.* p. 1195 ["whether measured subjectively or objectively, when a plaintiff discovers that a preexisting condition has developed into a more serious condition is often a factual issue," emphasis added]; id at p. 1197 [question is "whether Drexler actually discovered, *or reasonably should have discovered,* his injury more than a year before he filed his malpractice claim," emphasis added].)	The committee agrees with the comment and has added ", or reasonably should have become aware," to the second sentence.
		We therefore propose that the new paragraph in the Directions for Use be revised in the following ways:	In conformity to the responses to the various points of this commentator addressed above, the committee did not make the first two proposed

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		If the claim involves a ~~diagnosis error~~ failure to diagnose a preexisting, latent condition, the cause of action accrues when the plaintiff first experiences "appreciable harm" as a result of the defendant's diagnosis error. "When a patient experiences appreciable harm before the ultimate harm, that appreciable harm will start the limitations period." (*Id.* at p. 1191, citing *Hills v. Aronsohn* (1984) 152 Cal.App.3d 753, 762 [199 Cal.Rptr. 816].) Appreciable harm occurs when the plaintiff first becomes aware, or reasonably should have become aware, that his/her symptoms have developed into a more serious disease or condition. (*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1183–1184, 1194-1195, 1197 [209 Cal.Rptr.3d 332].) When this has occurred is a question of fact for the jury if the material facts are disputed. (*Id.*, at p. 1197.) Appreciable harm determines when the injury occurred to complete the cause of action; it is not a question of delayed discovery. Therefore, appreciable harm is required to trigger the three-year statute of Code of Civil Procedure section 340.5. (*Steingart v. White* (1988) 198 Cal.App.3d 406, 414–417 [243 Cal.Rptr. 678].)	revisions, but did make the last two on the objective standard and disputed facts.
	Civil Justice Association of California, by Brittany A. Sitzer	We believe the addition of "appreciable harm" in the Directions for Use would cause confusion for a jury determining the definition of "appreciable harm" and when it has occurred. The Code of Civil Procedure §340.5 uses the term "injury" which is more clear and supported by cases of general application. We recommend eliminating the "appreciable harm" language and citation to *Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, and *Steingart v. White* (1988) 198 Cal.App.3d 406 because these cases are distinguishable on their narrow set of facts.	The committee believes that *Drexler* and *Steingart* make a very important point regarding the three-year limitation period and should not be ignored.

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		We suggest the elimination of the last two paragraphs in the Sources and Authority, or in the alternative, insert "a damaging affect or" after "…the plaintiff first experiences."	As noted above, the committee thinks that Drexler and Steingart are important and that these excerpts are very helpful to CACI users. Also, the committee does not alter the text of case excerpts; they are reproduced exactly as the court states in the opinion.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181 refers to the plaintiff's discovery of the exacerbation of "a preexisting disease or condition." (*Id.* at pp. 1184.) We find the reference to worsening "symptoms" in the fourth paragraph in the Directions for Use somewhat imprecise in light of the language in the opinion and therefore would substitute "preexisting disease or condition has developed" for "symptoms have developed."	The committee agrees with the comment and has made the change suggested. While the word "symptoms" appears many times in the opinion, it is not used in the summary of the court's holding in the opening paragraph, which is what is cited in the Directions for Use.
1010, *Affirmative Defense—Recreation Immunity—Exceptions*	Association of Southern California Defense Counsel, by Robert H. Wright	ASDCD requests that the Committee not adopt the proposed revision to CACI No. 1010 for two independent reasons. First, the *Rowe* Court of Appeal expressed "no opinion" regarding whether its analysis would apply to holders of possessory interests in real property. (*Rowe, supra,* 10 Cal.App.5th at p. 575, fn. 10 ["We express no opinion concerning application of the consideration exception to multiple holders of possessory interests, such as joint tenants"].) However, the proposed revision to CACI No. 1010 does not reflect this limitation on the *Rowe* opinion and instead puts its thumb on the scale in favor of abrogating one joint tenant's immunity based on payment of consideration to a co-tenant.	The committee does not agree that it is putting its "thumb-on-the scale." The revision removes the requirement that the consideration be paid to the defendant. That is a clear holding of the case since the court holds that the abrogation of immunity extends to PG&E, who did not receive any consideration. Therefore, "paid to the defendant" must be removed. The possibility that the rule might be different to "multiple holders of possessory interests, such as joint tenants" is for another day.
		Second, even as to the holding regarding nonpossessory interest holders, *Rowe's* withdrawal of immunity for such defendants so long as the landowners accepted an entrance fee conflicts with earlier decisions interpreting	The committee sees no conflict. In *Wang*, the defendant was the property owner who received the consideration. The issue was whether the immunity protected the landowner from injuries to

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		the consideration exception to the statutory immunity.. (*Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 31 (*Wang*) [" 'consideration' in the context of section 846 must be for 'permission to enter' (§ 846, ¶ 4), i.e., payment of an entry fee to use the land or other benefit that gives the *landowner* an immediate and reasonably direct advantage" (emphasis added)]; *Mansion v. U.S.* (9th Cir. 1991) 945 F.2d 1115, 1118 (*Mansion*) ["When a *landowner* grants permission to enter property for consideration, recreational use immunity does not apply" (emphasis added)].) Until this conflict is resolved, the issue here is far from settled. The ASCDC is aware of a pending writ petition addressing this conflict in which the Court of Appeal has granted leave for the filing of an amicus curiae letter in support of the petition and requested an informal response from the real parties in interest. (*Pacific Gas & Electric Co. v. Superior Court (Valenzuela)* Case No. F076045.) The Committee should follow the better-reasoned analysis of *Wang* and *Mansion* that the consideration exception requires payment to the defendant	one who was not on the property for recreational purposes. The sentence cited in the comment in no way establishes a conflict with *PG&E* (aka *Rowe*). *Mansion* could be ignored simply because it's not binding authority. But it raises no conflict. The holding is about what constitutes consideration; not about to whom it was paid. And finally, the sentence cited in the comment is simply an accurate statement of the statute. It in no way conflicts with a holding that when a landowner grants permission to enter property for consideration, recreational immunity does not apply to a utility whose negligence causes injury on the property.
		If the Committee is nonetheless inclined to adopt the proposed revision, ASCDC respectfully requests that the Committee add to the Directions for Use a comment explaining that, "Some authorities indicate that the consideration exception to recreational use immunity applies only to defendants who themselves accepted consideration for use of the property. [Insert citations and parentheticals from the paragraph above.]" At present, the use notes cite *Wang* but not for the concept stated above, and do not cite *Mansion* at all. Additional discussion of these authorities in the Directions for Use could help trial courts and litigants	As noted above, there is no conflict.

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		determine the appropriate use of CACI No. 1010 in a particular case.	
	Civil Justice Association of California, by Brittany A. Sitzer	We believe that proposed revision to CACI 1010 oversimplifies the holding in *Pacific Gas and Electric Company v. Superior Court* (2017) 10 Cal.App.5th 563, expanding the consideration exception to recreational immunity (Civ. Code §846) beyond the case and departing from the statute's intended purpose. While *Pacific Gas and Electric* construed Civil Code section 846 in a case presenting an admitted issue of first impression under California law, the court's interpretation effectively diminishes the purpose of the statute by undermining the immunity and protection of private landowners. If an injured plaintiff must merely show they paid consideration to someone or some entity in order to enter property, without showing that the landowner approved of such fees or agreed to permit access, the result, as in *Pacific Gas and Electric*, is that the innocent landowner, who neither charged nor received any fee from the injured plaintiff for use of the property, is deprived of the statutory immunity. The Legislature's passage of section 846 was motivated, at least in part, by a desire to permit whitewater river rafters to recreate along rivers of the state, like the American River, where private landowners had property along the river's edge. The Legislature wanted to encourage these landowners to permit such recreational users to cross or use their private property without having to face liability should the users injures themselves in the process. The *Pacific Gas and Electric* court's interpretation would effectively frustrate the	The comment misstates the holding of *PG&E*. The court does not hold that a landowner loses immunity if a fee is paid to a nonlandowner. The court holds that a nonlandowner has no immunity if the landowner has no immunity through the consideration exception. However: the committee does see that simply deleting the requirement that the consideration be paid *to the defendant* could allow for the scenario that the commentator postulates. But the statute states that the consideration would have to be "for permission to enter," which can only be granted by the landowner. In recognition of this point, the committee has made two changes. The recipient of the consideration has been limited to either the defendant or the owner. And "to use" had been changed to "for permission to enter."

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		statute's intended protection in the rafting example, because practically every rafter who goes down the American River pays a fee to the rafting company and guides in order to enjoy the trip. None of these fees are shared with the private landowners along the river, who arguably now lose the immunity section 846 granted them and under the precise circumstances which helped bring about the statute's passage originally. In short, the court's interpretation of the statute is too broad to the extent it goes directly against the statute's intended purpose. The Legislature drafted the statute specifically and the unnecessary expansion by this instruction is unwarranted.	
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	We agree with the proposed revision.	The committee appreciates the commentator's support for the revisions to this instruction.
		The latter part of the instruction sets forth alternative grounds negating the affirmative defense. These are exceptions to the exception to liability. But we believe the language, "However, [*name of defendant]* is still responsible for [*name of plaintiff*]'s harm if [*name of plaintiff*] proves that" could be misconstrued to mean that the defendant is liable if the plaintiff proves any of the three alternative grounds without having to also prove the elements of the claim. We suggest modifying this language as follows: "However, [*name of defendant*] ~~is~~ may still be responsible for [name of plaintiff]'s harm if [*name of plaintiff*] proves that"	Even though the comment is outside of the scope of the proposed change that was posted for comments, the committee agrees with the point and believes that it should be addressed at this time. A finding of abrogation of immunity does not require a finding of liability. Therefore, the committee has made the change from "is" to "may be" as proposed. The committee has also added a sentence to the instruction that emphasizes the point and tells the jury if it abrogates immunity, it still must find liability based on the other instructions, as done in CACI No. 418, *Presumption of Negligence per se.*
1709, *Retraction: News Publication*	State Bar of California,	Agree	The committee appreciates the commentator's support for the renumbering of this instruction in

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or Broadcast (renumbered only)	Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair		order to place the new privilege instruction next to the current one, CACI No. 1723, *Comment Interest Privilege—Malice.*.
1722, Affirmative *Defense—Statute of Limitations—Defamation* (renumbered only)	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	Agree	The committee appreciates the commentator's support for the renumbering of this instruction in order to place the new privilege instruction next to the current one, CACI No. 1723, *Comment Interest Privilege—Malice.*.
1724, *Fair and True Reporting Privilege*	Orange County Bar Association, by Michael Baroni, President	The proposed new instruction accurately reflects the statutory language of Civil Code section 47(d). It does not, however, reflect the important case law interpretation of Section 47(d). Specifically, as written, element 3 requires that the report or communication was both "fair and true." From this, a jury easily might conclude that the report or communication must be wholly accurate and not deviate in any regard from what was true. This is, however, not the standard of accuracy. Cases such as *Burrill* and *Argentieri* have allowed a limited degree of flexibility or literary license where the effect of the words used is no different from that of the truth, so that the privilege will apply even if there is some inaccuracy in the details of the subject statement. In that *Burrill* speaks about the "substance" of the subject statement, it is suggested that element 3 be	The committee considered whether language from the opinion should be added to guide the jury on what it means for a report to be "fair and true." It was proposed that the following language from the cases be added: "The fairness and truth of a [report/communication] depends on whether the average reader or listener in the community where it was published would understand that the [report/communication] captured the gist or sting of the [e.g., hearing], or whether the [report/communication] made in the [e.g., broadcast] would affect the listener differently than what was communicated in the [e.g., hearing]." The committee decided that this language would not be helpful to a jury. The crucial words "gist or sting" are too ambiguous to be helpful. Also, what

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		modified to read, "[t]he [report/communication] was both fair and substantially true." Without some modification to the proposed instruction or a new companion instruction addressing this interpretation, the jury might go uninformed of the allowance which the law makes. In addition, it is suggested some consideration be given to including language as to the measure of deviation from the truth to be allowed in connection with concepts of flexibility or literary license.	it means to "affect the listener differently than what was communicated" would not be clear. The committee decided to leave it to counsel's arguments to further guide the jury on what it means to be both fair and true. The committee does not think that just adding "substantially" to modify "true" captures the concept the court is attempting to articulate with "gist or sting."
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	As stated in the instruction, the fair and true reporting privilege (Civ. Code, § 47(d)) is a complete defense to defamation, and the defendant has the burden to establish the privilege. Thus, the privilege is an affirmative defense, and this instruction should be labeled "Affirmative Defense—Fair and True Reporting Privilege."	Though cases do give the burden to prove the privilege to the defense, the committee is hesitant to label this instruction as an affirmative defense. An element of a defamation claim is that the plaintiff must prove that the slur is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118.) Therefore, despite the cases to the contrary, there is an argument that the plaintiff must disprove that the privilege applies.
		We would modify the second alternative in element 2 to more accurately reflect the statutory requirement that the report or communication to a public journal be of a "judicial," "legislative," or "other public official proceeding," or of anything said in the course of a "judicial," "legislative," "or other public official proceeding" (Civ Code, § 47, subd. (d)(1)):	The committee agreed to add "public official" between "other" and "proceeding" in the second alternative as it appears in the first alternative.
1802, *False Light*	Orange County Bar Association, by Michael Baroni, President	For clarity and consistent with what remains accurate language of the existing instruction, in Directions for Use, at the fourth item, the second to the last sentence as now proposed be modified to read, "[g]ive the first bracketed option for element 3 if the publication involves a public figure or a matter of public concern."	The committee does not think that the word "bracketed" is needed if the word "option" is there.

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		For accuracy as to what is being referred by use of the word "it" and consistent with what remains accurate language of the existing instruction, in Directions for Use, at the sixth item, the last sentence as now proposed be modified to read, "[t]he final paragraph addressing this point has been placed in brackets because it may not be an issue in every case."	The committee agreed and has made this revision.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	*Briscoe v. Reader's Digest Assn.* (1971) 4 Cal.3d 529, 543, and *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1385, footnote 13, support the proposition that a false light claim and a defamation claim based on the same facts may be duplicative. We believe that the Directions for Use should state this more clearly and should suggest that consideration be given to not instructing on false light if the court will instruct on defamation. The proposed language, "the standard applied in the instructions should be the same" may suggest that the CACI instructions should be modified in some manner if both defamation and false light instructions are given to ensure that the "standards" are the same, and the proposed language "[t]he court should consider whether separate instructions on each claim should be given" may suggest that the instructions should be combined into a single instruction. However, we believe the lesson from *Briscoe* and *Eisenberg* is to consider not instructing on false light if the court will instruct on defamation, as stated. We would modify the penultimate paragraph in the Directions for Use as follows:	The committee agreed and has revised this paragraph as suggested.

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		"If ~~a false light claim is combined with a~~ the jury is instructed on defamation ~~claim~~, the ~~standard applied in the instructions should be the same. The~~ court should consider whether an ~~separate~~ instruction~~s~~ on ~~each claim~~ false light would be superfluous and therefore should not be given~~. in light of~~ (See *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1385, fn. 13; and *Briscoe, supra,* 4 Cal.3d at p. 543.)"	
1803, *Appropriation of Name or Likeness–Essential Factual Elements* (and VF-1803)	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	Agree	No response is necessary.
2021, *Private Nuisance—Essential Factual Elements*	Association of Southern California Defense Counsel, by Lisa Perrochet, Amicus Committee	The instruction does not incorporate the required conduct from the Restatement and *Lussier* and instead allows a jury to impose liability in the case of an invasion that, for example, is intentional but reasonable or is entirely accidental—directly contrary to *Lussier*. (See *Lussier, supra,* at p. 102 ["a nuisance requires some sort of conduct, i.e. intentional and unreasonable, reckless, negligent, or ultrahazardous, that unreasonably interferes with another's use and enjoyment of his property"].) To more accurately reflect the law, we suggest that the instruction be revised to add an additional element as element 3: 3. That the defendant's conduct was [*insert one or more of the following*] intentional and unreasonable [or] negligent or reckless [or] an abnormally dangerous activity;	The committee agreed that there are questions about whether to include an element on the required kind of conduct to constitute a nuisance, and if so, how best to express that element. Therefore, the committee is removing this instruction from the release and will consider the question further in the next release cycle. Other comments received on this instruction will therefore not be addressed here, but will be considered for the next release.

Instruction	Commentator	Comment	Committee Response
2031, *Damages for Annoyance and Discomfort—Trespass or Nuisance*	Civil Justice Association of California, by Brittany A. Sitzer	We oppose inserting "emotional distress or mental anguish" in the Instruction. We believe that with the conflict in current law a change such as this is at best premature. If going forward with a revision, due to the conflict between the holding in *Hensley* and the holding in *Kelly*, we suggest alternative instructions offered so that the trial court can make a choice based on which line of conflicting authority it believes it should follow. (See *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315 (When there is a conflict between decisions of different districts of the court of appeal, a superior court ordinarily will follow the appellate opinion from its own district even though it is not bound to do so.)	The committee is confident that there is no real conflict and that *Kelly* is an outlier. This language appears in *Hensley* (7 Cal.App.5th at p. 1349): "SDG&E does not dispute that emotional distress damages are recoverable in trespass and nuisance cases. That proposition is indeed settled: Our high court and lower courts have long held that once a cause of action for trespass or nuisance is established, a landowner may recover for annoyance and discomfort, including emotional distress or mental anguish, proximately caused by the trespass or nuisance. (*Acadia, California, Limited v. Herbert* (1960) [54 Cal.2d 328, 337].)" Eight cases are string cited in support of this paragraph..
	Orange County Bar Association, by Michael Baroni, President	The added discussion based on the new authority is important, but can be presented with more clarity by consolidating the discussion. Suggest moving the third case excerpt in the Sources and Authority to be included within the first discussion of the *Hensley* case under "Directions for Use." Similarly, the case excerpt at the top of page 37 again referring to the *Hensley* case, should be moved to the first paragraph where the *Hensley* case is first discussed. As such, the parenthetical in the first paragraph under "Directions for Use" should be revised to read as follows: (*Hensley v. San Diego Gas & Electric Co.* (2017) 7 Cal.App. 5th 1337, 1348-1349 [213 Cal.Rptr.3d 203] [holding "once a cause of action for trespass or nuisance is established, a landowner may recover for annoyance and discomfort, including emotional distress or mental anguish,	The long parentheticals suggested by the commentator are best left in the Sources and Authority.

Instruction	Commentator	Comment	Committee Response
		proximately caused by the trespass or nuisance. This is so even when the trespass or nuisance involves solely property damage."]; and p. 1352 ["We reject [defendant's] contention that in order for emotional distress damages to 'naturally ensue' from a trespass or nuisance, the owner or occupant must be personally or physically present on the invaded property during the trespass or nuisance."].)	
		The bracketed language within the first reference to the *Kelly v. CB&I Constructors, Inc.* case, should be expanded to be more descriptive of the distinction being raised by the court, and replaced with the following quotation: ["damages for annoyance and discomfort may be recovered on nuisance and trespass claims if the distress arises out of physical discomfort, irritation, or inconvenience, caused by odors, pests, noise and the like."]	This expansion would not make the point, which is that the court in *Kelly* thinks that damages for annoyance and discomfort are something less than general damages for emotional distress. This view is what makes *Kelly* a "but see" to *Hensley*.
		The bracketed addition to the first reference to the *Vieira Enterprises, Inc. v. McCoy* case should be deleted and replaced with the following: [court found workability of distinction between annoyance and discomfort damages, versus "pure emotional distress" damages "may be questioned," but held it was relevant "to the purpose of the limitation to occupants."].	The committee finds the proposed revision to be more words than are needed to make the point that the court in *Viera* is not convinced that there is a distinction between "annoyance and discomfort" and general damages.
		The bracketed portion to the *Vieira Enterprises* case in the second paragraph under "Directions for Use" should be expanded to read as follows in its entirety: [It is "not necessary that the plaintiff be present at the moment of a tortuous invasion of the property. But it is necessary that the annoyance and discomfort arise from and relate to some personal effect of the interference with the use and enjoyment which lies at the heart of the tort of trespass."]	Parentheticals should be short and to the point. They are not the place to set forth the law.

Instruction	Commentator	Comment	Committee Response
		The excerpt in the Sources and Authority to the *Fulle v. Kanani* case should be revised to include the full quote of the case as follows: "Together, *Kornoff* [*Kornoff v. Kinsberg* Cotton Oil Co. (1955) 45Cal.2d 265] and *Kelley* stand for the proposition that a plaintiff may recover damages for annoyance and discomfort proximately caused by tortuous injuries to trees on her property if she was in immediate and personal possession of the property at the time of the trespass."	The committee does not think that it is necessary to set forth the origin of language excerpted in the Sources and Authority. The court in *Fulle* is not questioning the proposition that damages for annoyance and discomfort can be recovered for injury to trees; therefore, there is no need to cite the cases that establish the point.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	Agree	No response is necessary.
2334, *Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements*	Civil Justice Association of California, by Brittany A. Sitzer Sheppard, Mullin, Richter, & Hampton, by John T. Brooks makes the same point	This proposed revision of the instruction raises conflict with the California Supreme Court's holding in *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal. 4th 718, 730 (2002): "A defending insurer cannot be bound by a settlement made without its participation and without any actual commitment on its insured's part to pay the judgment, even where the settlement has been found to be in good faith for purposes of section 877.6." The Supreme Court went on to hold: "Where, as here, the insured, without the insurer's agreement, stipulates to a judgment against it in excess of both the policy limits and the previously rejected settlement offer, and the stipulated judgment is coupled	*Hamilton* is a refusal to accept policy limits offer case. The Supreme Court did hold that the insurer is not bound by a settlement reached between the insured and the injured person because of the possible collusive nature of such a settlement. Therefore, the committee is removing this instruction from the release, and *Ace American* will not be considered further. Other comments received on this instruction will therefore not be addressed.

Instruction	Commentator	Comment	Committee Response
		with a covenant not to execute, the agreed judgment cannot fairly be attributed to the insurer's conduct, even if the insurer's refusal to settle within the policy limits was unreasonable." (*Id.* at 731.) Accordingly, even a settlement coupled with a stipulated judgment is unavailing.	
	Sheppard, Mullin, Richter, & Hampton, by John T. Brooks	More generally, CACI 2334 by focusing solely on the reasonableness of the settlement demand continues to inappropriately invite juries to hold insurers strictly liable for failing to accept a reasonable settlement demand, regardless of other circumstances.	This point is outside of the scope of changes posted for public comment. It was the subject of a long and arduous process in 2015, at the end of which the committee concluded that the issue remains unresolved. At that time, the committee made some major changes to the Directions for Use to present the position of the commentator, but made no change to the instruction. The committee will not revisit this decision until such time as there is a clear resolution from the courts.
2805, *Employee Not Within Course of Employment—Employer Conduct Unrelated to Employment*	Civil Justice Association of California, by Brittany A. Sitzer	This new instruction raises concerns that this remedy could only be considered when and if workers compensation coverage is deemed inapplicable and the employer's activity is the source of the plaintiff/employee's injury. We believe this Instruction will create confusion instead of clarity in determining when the *Fermino* exception to the exclusivity of workers compensation applies and respectfully request the Judicial Council to revise.	The commentator's argument would seem to be circular. The rule of the instruction takes the claim out of the workers compensation system. "This remedy could only be considered when and if workers compensation coverage is deemed inapplicable." So if "the employer's activity is the source of the plaintiff/employee's injury," then workers compensation is inapplicable.
	State Bar of California, Litigation Section, Jury Instructions	Agree	No response is necessary.

Instruction	Commentator	Comment	Committee Response
	Committee, by Reuben A. Ginsburg, Chair		
3053, *Retaliation for Exercise of Free Speech Rights—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	Element 2 of CACI No. 2505, *Retaliation—Essential Factual Elements* (Gov. Code, § 12940(h)), on which this instruction seems to be patterned, includes alternative language to use if the parties dispute whether the alleged retaliatory act constituted an adverse employment action. An adverse employment action is required for this section 1983 cause of action as well, as noted in the Directions for Use and in *Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1071. We suggest modifying the Directions for Use for this instruction to state that element 2 should be modified if the parties dispute whether the alleged retaliatory act constituted an adverse employment action, with a cross-reference to No. 2505.	The committee agreed to make the suggested additions to the Directions for Use.
		We would strike the language "even if [he/she/it] also retaliated based on [*name of plaintiff*]'s protected conduct" at the end of element 7. The introductory sentence before element 6 already states that if the plaintiff proves elements 1 through 5, the defendant is not liable if element 6 or 7 is true. There is no need to repeat this in element 7	While the comment is technically correct, that there is a redundancy here, the committee believes that it is one that is helpful. By specifically pointing out in element 7 that there may be two motives, the mixed motive point is made more clearly. If all that is said is to go on if 1-5 were proved, the mixed motive issue is not really presented as clearly as it could be.
		This language seems to equate a substantial factor with "based on," which may confuse or mislead the jury.	The committee sees no potential for confusion.
		We suggest adding a cross-reference to CACI No. 430, *Causation: Substantial Factor.*	The committee believes that is speculative to conclude that CACI No. 430 applies under federal law in a 1983 case.
3724, *Social or Recreational*	State Bar of California, Litigation	Agree	No response is necessary.

Instruction	Commentator	Comment	Committee Response
Activities (renumbered only)	Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair		
3726, *Going-and-Coming Rule—Business-Errand Exception* (renumbered only)	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	We agree with this proposed new instruction, except that we would add the words "part of the employment relationship" at the end of (b) to make it clear that social or recreational activities must be a customary part of the employment relationship, rather than just "customary."	This is not a proposed new instruction; it is only being renumbered in order to group the going and coming instructions together. Other changes to the instruction are not under consideration at this time. The comment may be addressed in the next release cycle.
3727, *Going-and-Coming Rule—Compensated Travel Time Exception*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	We would add the following language at the end of the Directions for Use to emphasize the important point that reimbursement of travel expenses is insufficient to make the employee's commuting time within the scope of employment: "The mere reimbursement of the employee's travel expenses is not sufficient to bring the employee's commute time into the scope of employment. (*Caldwell v. A.R.B., Inc.* (1986) 176 Cal.App.3d 1028, 1042.)"	This suggestion would move the *Caldwell* excerpt from the Sources and Authority to the Directions for Use. The committee sees no reason to do that.
4111, *Constructive Fraud*	Civil Justice Association of California, by Brittany A. Sitzer	We recommend clarifying the first element to accurately capture when a real estate broker or salesperson has a fiduciary duty under California Civil Code §2079. For example, as described in section 2079, a listing broker or salesperson who only represents the seller has a "fiduciary duty of utmost care, integrity, honesty, and loyalty" to the seller; in comparison, that listing broker or salesperson has a more limited duty of "honest and fair dealing and good faith" to the buyer. It is crucial to clarify that a real estate broker or salesperson defendant	This is an instruction on constructive fraud, not on the duties of real estate professionals. There are several CACI instructions on the fiduciary duties of real estate professionals. CACI No. 4108 addresses CC 2079.

Instruction	Commentator	Comment	Committee Response
		does not necessarily have a fiduciary duty to all parties involved in the real estate transaction.	
		We also recommend clarifying the fourth element to eliminate the implication that there is constructive fraud if any fact is inaccurate within the scope of real estate transactions. We suggest revising the Instruction to be consistent with case law regarding the real estate licensee's duty to disclose "known material facts that affect the value or desirability of the property." *Easton v. Strassburger* (1984) 152 Cal.App.3d 90.	The committee does not believe that element 4 implies anything about the scope of real estate transactions.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	Element 5 expresses the reasonableness of the plaintiff's reliance in a way that may be difficult for the jury to understand. *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239, stated: "Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction." Accordingly, we would modify element 5 as follows for greater clarity: "5. That had [name of defendant] disclosed complete and accurate information, [*name of plaintiff*] ~~reasonably~~ would ~~have~~, <u>in all reasonable probability,</u> have behaved differently."	Per the response to the comment below, Element 5 has been deleted. (The proposed revision is not a correct statement of the law. It is not the reasonable probability of reliance; it is whether it was reasonable for the plaintiff to have relied.)
		Actual and reasonable reliance are presumed when the defendant is a fiduciary. The presumption is rebuttable. (*Edmunds v. Valley Circle Estates* (1993) 16 Cal.App.4th	*Edmunds* holds that there is a rebuttable presumption of reliance in a fiduciary relationship. However, the presumption shifts the burden of proof to the defense to prove that there was no

Instruction	Commentator	Comment	Committee Response
		1290, 1302; *Estate of Gump* (1991) 1 Cal.App.4th 582, 601.) In light of the rebuttable presumption of reliance, we believe that element 5 should be made optional and should be given (together with CACI Nos. 1907 and 1908) only if the defendant presented evidence that there was no reliance. The Directions for Use should explain this, and *Edmunds* and *Gump* should be added to the Sources and Authority.	reliance. Therefore, under *Edmunds*, the proposed revision is wrong because there should be no reliance element. The committee has removed element 5. The Directions for Use now explain that reliance is presumed in a fiduciary relationship, and that the defendant has the burden to disprove reliance. *Edmunds* has been added to the Sources and Authority.
		The final sentence in the third paragraph in the Directions for Use is difficult to understand. Perhaps the point is that the plaintiff, acting reasonably, would have behaved differently had all correct information been disclosed.	The third paragraph was completely revised in light of the comment above.
4207, *Affirmative Defense—Good Faith*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	The meaning of "collude" may be unclear to jurors. We would modify the first sentence in the last paragraph of the instruction as follows: " 'Good faith' means that [*name of defendant/third party*] acted without actual fraudulent intent and that [he/she/it] did not ~~collude with [*name of debtor*]~~ know of or otherwise actively participate in any fraudulent scheme."	The committee does not find "collude" to be an unclear word. Nor does the proposed rewrite fully capture the meaning of "collude." With the disjunctive "or" between "know of" and "otherwise actively participate," just knowing of the scheme would be enough to defeat the defense. But it is not; one has to "collude" with the debtor; that is, be actively involved in the fraud.
4606, *Whistleblower Protection—Unsafe Patient Care and Conditions—Essential Factual Elements*	Traci M. Hinden, Attorney at Law, San Francisco	Revoking whistleblower protection 4606 pursuant to the *Shaw* case is wrong. The case says you can't have a right to jury on that claim alone. However, if you have other claims and you are going to a jury trial, the Jury will still need instruction on that claim and revoking it entirely will leave them with no instruction and force the parties to squabble over that issue. You can limit the instruction with that statement.	The court in *Shaw* holds that the plaintiff may have a jury trial on her *Tameny* claim. The commentator apparently thinks that if there's going to be a jury on a related claim, the jury can try the 1278.5 claim also. But the committee disagrees. Under *Shaw*, the jury tries the *Tameny* action first. The court in then deciding any equitable issues under the statute

Instruction	Commentator	Comment	Committee Response
			must accept the jury's findings under the *Tameny* claim. Nothing in the case suggests that the jury decides the 1278.5 claim.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	Agree	No response is necessary.
4700, *Consumers Legal Remedies Act—Essential Factual Elements*	Civil Justice Association of California, by Brittany A. Sitzer	We oppose the addition of a new series because CLRA cases involve a wide range of prohibited practices and are not susceptible to such a broad instruction. Instead, special instructions that address particular issues in a case or class action are preferable to adopting a broad, entirely new CACI instruction.	The commentator's point did deter the committee from adding this series for several years. But in an unpublished case, *David v. Winn Auto.,* 2016 Cal. App. Unpub. LEXIS 6433, the court held that plaintiffs forfeited their right to a jury trial on their CLRA claim when they failed to propose correct instructions on that claim. While the committee does not cite unpublished cases of course, it does consider situations in which a jury instructions issue has created a procedural problem in the trial. The committee believes that the complexity of addressing 27 different prohibited practices is ameliorated in element 2 by just leaving the statutory violation open for the user to insert the act(s) at issue.
	Orange County Bar Association, by Michael Baroni, President	Under the fourth paragraph of Directions for Use, recommend clarifying the *Nelson* cite as follows: *Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1022 [112 Cal.Rptr.3d 607], disapproved of on other	The committee has added the notation that the case was disapproved on other grounds.

Instruction	Commentator	Comment	Committee Response
		grounds in *Raceway Ford Cases* (2016) 2 Cal.5th 161 [211 Cal.Rptr.3d 244]	
4701, *Consumers Legal Remedies Act—Notice Requirement for Damages*	Association of Southern California Defense Counsel, by Allison W. Meredith	The courts have yet to decide whether the "appropriateness" of a defendant's correction is a discretionary question for the court or a question of fact for the jury. To date, most CLRA litigation resulting in published appellate opinions has been in the class action context, which involves notice requirements different from those addressed here. (See Civ. Code, § 1782, subds. (c) & (d).) As a result, there is little published guidance for trial courts on how to address a defendant's offer to correct an issue raised in a pre-filing notice letter. In *Benson v. Southern California Auto Sales, Inc.* (2015) 239 Cal.App.4th 1198, the Court of Appeal held that the trial court did not abuse its discretion by deciding that the defendant's offer of correction was appropriate within the meaning of Civil Code section 1782(b), "thereby negating [plaintiff's] ability to maintain a cause of action for damages." (*Id.* at p. 1209.) The Court of Appeal explained, "Determining whether a correction offer was appropriate is a matter California law wisely leaves *to the trial court's discretion*." (*Id.* at 1203, emphasis added.) However, in the experience of the ASCDC's members, many trial courts decline to decide whether a defendant's offer was appropriate, and instead present the issue to the jury.	The comment is presenting a somewhat different question from that presented in the instruction. The instruction assumes that the plaintiff must prove that the statutorily required notice was given. The comment is concerned with the appropriateness of the defendant's response to the notice; whether it is a sufficient cure to avoid liability. Regardless of the commentator's anecdotal evidence that courts are making this a jury issue, the committee believes that it must follow *Benson* and assume that the adequacy of the defendant's cure is a question of law.
		ASCDC requests the following revisions to the proposed CACI 4701: To recover actual damages in this case, [*name of plaintiff*] must prove ~~that, 30 days or more before filing a~~	Per the response above, a new element 5, that there was no appropriate correction from the defendant cannot be added because of *Benson*. And without element 5, the committee sees no

Instruction	Commentator	Comment	Committee Response
		~~claim for actual damages, [he/she] gave notice to [*name of defendant*] that did~~ all of the following: 1. ~~Informed [*name of defendant*] of the particular violations for which the lawsuit was brought~~ **That 30 days or more before filing a claim for damages under the CLRA, [he/she] gave notice to [*name of defendant*] of the particular violations for which the lawsuit was brought**; **2. That the notice was in writing;** ~~2~~**3**. **That the notice d**~~D~~emanded that [*name of defendant*] correct, repair, replace, or otherwise fix the problem with [*specify product or service*]; **4.** ~~Provided the notice to the defendants in writing and~~ **That the notice was sent** by certified or registered mail, return receipt requested, to the place where the transaction occurred or to [*name of defendant*]'s principal place of business within California[**; and].** **[5. That within 30 days of the receipt of the notice, [*name of defendant*] failed to give, or failed to agree to give within a reasonable time, an appropriate correction, repair, replacement, or other remedy to [*name of plaintiff*].]** [*Name of plaintiff*] must have complied exactly with these notice requirements and procedures. First, the proposed revisions present the requirements of the 30-day notice requirement of Civil Code section	need to reorganize the instruction in the manner proposed.

		1782(a) as a series of straightforward elements. The current proposed draft breaks up the statutory requirements, by listing them in both the preamble and the numbered paragraphs, which makes it more likely that the jurors will be confused as to which facts they must find. The proposed revisions move all of the elements down into the numbered paragraphs, making it clearer to the jurors that the plaintiff must satisfy all of the Civil Code section 1782(a) requirements. Second, the proposed revisions more accurately follow the Legislature's restrictions on damages under the CLRA, by including an optional element setting forth the requirement that the defendant failed to respond appropriately to the notice with an offer to cure the alleged violation. (Civ. Code, § 1782, subd. (b).) This requirement is foundational: if a plaintiff chooses to reject a fair offer from the defendant, that plaintiff cannot recover damages under the CLRA. (*Kagan v. Gibraltar Savings & Loan Assn.* (1984) 35 Cal.3d 582, 590; *Meyer v. Sprint Spectrum, L.P.* (2009) 45 Cal.4th 634, 642.) Finally, the proposed use note and optional "appropriateness" element reflect the current ambiguity as to whether the appropriateness of a defendant's response is a discretionary question for the court or a question of fact for the jury. Given the undecided state of the law, CACI 4101 should not present one approach at the exclusion of the other—either by omitting the Civil Code section 1782(b) requirement entirely, suggesting that the question is one of law for the court, or by adding the Civil Code section 1782(b) element as a necessary one, suggesting that the question is always a question of fact for the jury. The proposed revisions	

Instruction	Commentator	Comment	Committee Response
		acknowledge the ambiguity and will enable the court to instruct the jury properly under either approach.	
		ASCDC also requests the Committee add a note to the Directions for Use relating to the bracketed fifth element: "The court may in its discretion resolve the appropriateness of efforts to correct, repair, replace or otherwise remedy the problem identified by the plaintiff. (*Benson v. Southern California Auto Sales, Inc.* (2015) 239 Cal.App.4th 1198.) However, if the court presents the issue to the jury, the court should give the bracketed fifth element." (Civ. Code, § 1782, subd. (b).)	As noted above, there is no authority for the possibility that this is a jury issue.
	Civil Justice Association of California, by Brittany A. Sitzer	Proposes the same revisions for the same reasons as ASCDC.	See responses above
	Orange County Bar Association, by Michael Baroni, President	This instruction may be confusing to a jury due to the fact that notice may be given after the filing of a complaint. This is also an issue that is likely to have been resolved before trial.	The committee does not understand the point. First, the notice must be sent "thirty days or more prior to commencement of an action for damages." (CC 1782(a).) And it certainly is possible that the adequacy of the notice will have been resolved before trial. But if it was not, then this instruction will be helpful to the court and counsel.
		If instruction is to be adopted, recommend adding a third bullet point in the "Sources and Authority" section as follows: "Because plaintiffs in this case alleged that they sent the required notice [to defendant] more than 30 days before they filed the third amended complaint and that defendant failed to correct the alleged wrongs, the trial court erred by sustaining the demurrer for failure to comply with the CLRA notice requirements." (*Morgan, supra,* 177 Cal. App. 4th at 1261.)	The committee does not see that this excerpt adds anything that is not already said.

Instruction	Commentator	Comment	Committee Response
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	Agree	No response is necessary.
4702, *Consumers Legal Remedies Act—Statutory Damages—Senior or Disabled Plaintiff*	Civil Justice Association of California, by Brittany A. Sitzer	We oppose the addition of this instruction because Civ. Code §1780(b) and existing case law expressly and adequately provide a foundation for claims by a senior citizen or disabled person; a broad catch-all is unnecessary	The committee does not understand how the fact that there may be an adequate statutory and case law foundation for claims by a senior citizen or disabled person makes a jury instruction unnecessary. The purpose of CACI is to provide bench and bar with instructions that can be used for these claims.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	We agree with this instruction, but we would modify it to make it clear which items are listed in the conjunctive and which are listed in the disjunctive. There are several series or lists in this instruction: three elements (1, 2 & 3) listed in the conjunctive, three factors listed in the disjunctive (2(a), (b) & (c)), and three items listed in the disjunctive (2(b)(1), (2) & (3)). Following the usual convention of stating "and" or "or" only after the penultimate item in each series would make it necessary for jurors to refer to the penultimate item in each series, or to the introductory sentence preceding each series, to determine whether the jury must find each item in the series is true or need only find that one item in the series is true. Inserting "and" or "or," as appropriate, after each item would make it clear to the jury whether they must find all items are true or only one of them is true	The committee agrees that the instruction needs an "and" at the number level and an "or" at the letter level and has moved them accordingly.

Instruction	Commentator	Comment	Committee Response
4710, *Consumers Legal Remedies Act—Affirmative Defense—Bona Fide Error and Correction*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	The statutory language "bona fide error" used in element 1 of this instruction may be difficult for jurors to understand. We would substitute the words "an honest mistake" for "a bona fide error."	The committee does not believe that the two terms are synonymous, It is the context that makes the difference. A bona fide error happens even though its maker used reasonable practices or procedures, a concept expressed in the statute. An honest mistake could happen whether or not the maker used reasonable practices or procedures, and so subtly downgrades that latter concept in the statute. Also, a jury is more likely to be sympathetic to somebody who made an honest mistake, as that person is honest, versus a person who made a bona fide error, which sounds like a real or serious error. The proposed change could tip the emotional scales in ways that the Legislature did not intend.
All Others	Orange County Bar Association, by Michael Baroni, President	Agree with all others not specified above	No response is necessary.