JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 22-032
For Circulating Order CO-22-02 on: May 10, 2022

Title
Jury Instructions: Civil Jury Instructions (Release 41)

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

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

Agenda Item Type
Action Required

Effective Date
May 10, 2022

Date of Report
March 28, 2022

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Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approval of new and revised civil jury instructions prepared by the committee. These changes bring the instructions up to date with developments in the law over the previous six months. Upon Judicial Council approval, the instructions will be published in the official May supplement to the 2022 edition of the *Judicial Council of California Civil Jury Instructions* (*CACI*).

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective May 10, 2022, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court the following civil jury instructions prepared by the committee:

1. Addition of 1 new verdict form: CACI No. VF-2304; and

2. Revisions to 21 instructions and verdict forms: CACI Nos. VF-410, 1009B, 1306, 1621, VF-1604, 1810, 2334, 2522A, 2522B, 2522C, 2546, VF-2507A, VF-2507B, VF-2507C, VF-2513, 2754, 3714, 3905A, 3919 (renumbered from 3903Q), 4000, and 4002.

A table of contents and the proposed new and revised civil jury instructions and verdict forms are attached at pages 7–87.

Relevant Previous Council Action

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

This is release 41 of *CACI*. The council approved release 40 at its November 2021 meeting.

Analysis/Rationale

A total of 22 instructions and verdict forms are presented in this release. The Judicial Council's Rules Committee has also approved, at its meeting on April 6, 2022, changes to 19 additional instructions under a delegation of authority from the council to the Rules Committee.[2]

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

New instructions and verdict forms

The committee proposes adding one new verdict form and deferring its consideration of new instructions under the Labor Code that were circulated for public comment.

CACI No. VF-2304, *Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits*. Based on suggestions from commenters last year, the committee has developed a new verdict form based on CACI No. 2334. The committee received comments in support of the new verdict form, and a suggestion to add an option in question 7 for

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

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

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

damages specifically related to the amount of an excess judgment. The committee now recommends adding the optional item.

CACI series 2700. The committee circulated for public comment five new instructions under the Labor Code and the Industrial Welfare Commission's wage orders. Based on the complexity of the law in this area and the detailed comments received during public comment, the committee will continue considering its expansion into this area. If possible, the committee will recirculate new instructions in the next public comment cycle.

Revised instructions

CACI No. 1009B, *Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control*. In *Sandoval v. Qualcomm, Inc.*,[3] the California Supreme Court held that "hirers who fully and effectively delegate work to a contractor owe no tort duty to that contractor's workers." To make the instruction consistent with the meaning of the terms clarified in the court's opinion, the committee recommends removing one element and adding two requirements: (1) that the hirer retained some control over the manner of performing the work the contractor was engaged to perform, and (2) that the hirer actually exercised control over that work. Because ownership or control of the property, which had been included as element 1, are not required outside the context of concealed premises hazards, the committee has removed that requirement. With respect to the final element, the court clarified that "affirmatively contributed" is a different sort of inquiry than "substantial factor" causation, which the instruction had included. The committee has revised the causation element to convey the causation element as explained by the court in *Sandoval*.

Two commenters (a bar association and an attorney) agreed with the committee's proposed revisions. The Consumer Attorneys of California (CAOC) sent a comment requesting additional changes based on certain language used in the *Sandoval* opinion. With one exception, the committee thought that the language that circulated for public comment is consistent with the law and expresses the terms in a way more understandable to a jury, as compared to CAOC's suggestions. The committee concluded that the exact wording suggested by CAOC for retained control and causation are not compelled by the court's clarification of those elements. The committee, however, agreed with CAOC's suggestion to add the word "some" to new element 1 ("retained some control").

CAOC and the California Lawyers Association (CLA) both observed that the "retained control" element refers to a hirer's authority over work entrusted to the contractor. CLA proposed an additional new element specifically addressing whether part of the work had been entrusted to the contractor by the defendant. CAOC proposed adding an explanation in the Directions for Use. Because the committee believes that element 1 (with the refinement noted above) will address retained control in most cases, the committee prefers the second option. The Directions

[3] (2021) 12 Cal.5th 256, 283 [283 Cal.Rptr.3d 519, 494 P.3d 487].

for Use now state that the instruction should be modified if there is a question of fact regarding whether the defendant entrusted the work to the contractor.

CACI Nos. 1621 and VF-1604, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander—Essential Factual Elements*. In the last release, the Rules Committee approved the addition of an excerpt from *Ko v. Maxim Healthcare Services, Inc.*[4] to the Sources and Authority of No. 1620. The court in *Ko* held that element 2 can be satisfied if plaintiffs are virtually present through technological means at the scene of an injury-producing event. The committee now recommends revising element 2 in light of this recent authority. Although the verdict form was not circulated for public comment, the committee also recommends making conforming changes to it as part of this release.

CACI No. 2334, *Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits—Essential Factual Elements*. In November 2021, the committee recommended, and the council approved, revisions to this instruction based on *Pinto v. Farmers Insurance Exchange*.[5] The committee returned to the instruction because commenters in that public comment cycle raised issues that were beyond the scope of the proposal in the invitation to comment. The committee recommends several clarifying edits based on the comments received last year, including revising element 6 to offer alternative options for damages.[6] The comments on this change were generally positive, with two commenters offering minor feedback on formatting and the language of the Directions for Use. All comments disagreeing with content in No. 2334 were directed at content that the committee carefully considered in the last release. With respect to the comments that are beyond the scope of the invitation to comment, the committee will consider the proposed changes at its next meeting.

CACI Nos. 2522A, 2522B, 2522C, and related verdict forms (Fair Employment and Housing Act series). At the suggestion of an attorney preparing for a jury trial, the committee proposes revising these three work environment harassment instructions and the accompanying verdict forms to clarify that an individual defendant must be an employee of a covered entity to be liable personally for harassing someone in the workplace.[7] The committee has recommended an optional element addressing the individual defendant's status as an "employee" if it's in dispute. Based on comments asking the committee to be clearer about the parties identified in the instruction (for example, the individual defendant and the employer or other covered entity, who may also be a defendant), the committee has refined the bracketed names in these instructions.

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[4] (2020) 58 Cal.App.5th 1144, 1159 [272 Cal.Rptr.3d 906].

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

[6] See Judicial Council of Cal., Advisory Com. Rep., *Jury Instructions: Civil Jury Instructions (Release 40)* (Nov. 19, 2021), *https://jcc.legistar.com/View.ashx?M=F&ID=9932038&GUID=BAFAE3B4-EB72-4297-B851-A21E9005EA89*.

[7] See Gov. Code, § 12940(j)(3).

The committee received additional comments from two organizations broadly addressing instructions in the Fair Employment and Housing Act series on work environment harassment. These comments did not concern the instructions that were circulated for comment in this release. The committee will consider these suggestions in a future release cycle.

CACI No. 3919, *Survival Damages*. Senate Bill 447,[8] effective January 1, 2022, amended Code of Civil Procedure section 377.34 to permit recovery of noneconomic damages in survival actions. As amended, section 377.34(a) preserves a longstanding prohibition on noneconomic damages for a decedent's pain, suffering, and disfigurement, but section 377.34(b) creates a four-year exception to that prohibition for actions filed between January 1, 2022, and January 1, 2026.[9]

CACI's damages series is largely divided into economic and noneconomic damages. The existing survival action damages instruction (No. 3903Q) is currently located in the economic damages part of the series. Because the statute now allows for noneconomic damages—at least for a four-year period—the committee recommends renumbering the existing instruction to move it out of economic damages section and adding an item of damages that covers a decedent's pain, suffering, and disfigurement. Although the exception is scheduled to expire, the committee recommends explaining the statutory sunset provision in the Directions for Use. The committee will revisit the issue in 2026 (or sooner if changes in the law so require).

Policy implications

Jury instructions endeavor to express the law in plain English; there are no policy implications.

Comments

The proposed additions and revisions in *CACI* circulated for comment from January 25 through March 7, 2022. Comments were received from 13 different commenters. Seven of those commenters submitted comments on multiple instructions and verdict forms.[10] New instructions on rest breaks, meal breaks, and rounding of time entries under the Labor Code generated a relatively large number of comments. In order to consider those detailed comments, the committee has withdrawn the five new instructions that circulated for comment.

For the 22 instructions and verdict forms in this release, the committee evaluated all comments and proposes refining some of the instructions in light of the comments received. A chart of the comments received on all instructions and the committee's responses is attached at pages 88–144.

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[8] Stats. 2021, ch. 448, *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB447*.

[9] The exception also applies if the action or proceeding was granted a preference under Code of Civil Procedure section 36 before January 1, 2022. (See Code Civ. Proc., § 337.34(b).)

[10] The committee received comments from California Employment Lawyers Association and Legal Aid at Work on work environment harassment that were beyond the scope of the invitation to comment. The committee will consider their comments in a future release cycle.

Alternatives considered

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

Fiscal and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish the May 2022 supplement of *CACI* and pay royalties to the Judicial Council. Other licensing agreements with other publishers provide additional royalties. The official publisher will also make the revised content available free of charge to all judicial officers in both print and online.

Attachments and Links

1. Jury instructions, at pages 7–87
2. Chart of comments, at pages 88–144

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CIVIL JURY INSTRUCTIONS
Release 41: May 2022

VF-410. Statute of Limitations—Delayed Discovery—Reasonable Investigation Would Not Have Disclosed Pertinent Facts

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We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***]'s claimed harm occur before [***insert date from applicable statute of limitations***]?**
   ____ 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. **Before [***insert date from applicable statute of limitations***], did [***name of plaintiff***] discover, or know of facts that would have caused a reasonable person to suspect, that [he/she/***nonbinary pronoun***/it] had suffered harm that was caused by someone's wrongful conduct?**
   ____ Yes ____ No

   [*or***]**

2. **Would a reasonable and diligent investigation have disclosed before [***insert date from applicable statute of limitations***] that [***specify factual basis for cause of action~~, e.g., "a medical device" or "inadequate medical treatment"~~***] contributed to [***name of plaintiff***]'s harm?**
   ____ Yes ____ No

Signed: _____
Presiding Juror

Dated: _____

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

New December 2007; Revised December 2010, May 2022

Directions for Use

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

This verdict form is based on CACI No. 454, *Affirmative Defense—Statute of Limitations,* and CACI No.

455, *Statute of Limitations—Delayed Discovery*. If the only issue is whether the plaintiff's harm occurred before or after the limitation date, omit question 2. If the plaintiff claims that the delayed-discovery rule applies to save the action, use the first option for question 2. If the plaintiff claims that a reasonable investigation would not have disclosed the pertinent information before the limitation date, use the second option for question 2. If both delayed discovery and nondiscovery despite reasonable investigation are at issue, use both options and renumber them as question 2 and question 3.

The date to be inserted throughout is the applicable limitation period before the filing date. For example, if the limitation period is two years and the filing date is August 31, 2007, the date is August 31, 2005.

In question 1, "claimed harm" refers to all of the elements of the cause of action, which must have occurred before the cause of action accrues and the limitation period begins. (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1029 [98 Cal.Rptr.2d 661].) In some cases, it may be necessary to modify this term to refer to specific facts that give rise to the cause of action.

The first option for question 2 may be modified to refer to specific facts that the plaintiff may have known.

1009B. Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control

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

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

~~2.~~ **That [***name of defendant***] retained some control over ~~safety conditions at the worksite~~ [***name of contractor***]'s manner of performance of [***specify nature of contracted work***];**

~~3~~2. **That [***name of defendant***] ~~negligently~~ actually exercised [his/her/***nonbinary pronoun***/its] retained control over ~~safety conditions by~~ that work by [***specify alleged ~~negligent acts or omissions~~ negligence of defendant***];**

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

~~5~~4. **That [***name of defendant***]'s negligent exercise of [his/her/***nonbinary pronoun***/its] retained control ~~over safety conditions was a substantial factor in causing~~ affirmatively contributed to [***name of plaintiff***]'s harm.**

Derived from former CACI No. 1009 April 2007; Revised April 2009, December 2010, December 2011, May 2017, May 2022

Directions for Use

This instruction is for use if a dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. The basis of liability is that the defendant retained control over the ~~safety conditions at the worksite~~ manner of performance of some part of the work entrusted to the contractor. (*Sandoval v. Qualcomm Inc.* (2021) 12 Cal.5th 256, 273 [283 Cal.Rptr.3d 19, 494 P.3d 487].) Both retaining control and actually exercising control over some aspect of the work is required because hirers who fully and effectively delegate work to a contractor owe no tort duty to that contractor's workers. (See *id.*) If there is a question of fact regarding whether the defendant entrusted the work to the contractor, the instruction should be modified. For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries based on unsafe conditions not discoverable by the plaintiff's employer, see CACI No. 1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions*. For an instruction for injuries based on the property owner's providing defective equipment, see CACI No. 1009D, *Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment*.

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

The hirer's exercise of retained control must have "affirmatively contributed" to the plaintiff's injury. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202 [115 Cal.Rptr.2d 853, 38 P.3d 1081]; see *Sandoval, supra,* 12 Cal.5th at p. 277.) However, the affirmative contribution need not be active conduct but may be a failure to act. (*Hooker, supra,* 27 Cal.4th ~~*Id.*~~ at p. 212, fn. 3; see *Sandoval, supra,* 12 Cal.5th at p. 277.) "Affirmative contribution" means that there must be causation between the hirer's exercising retained control and the plaintiff's injury. Modification may be required if the defendant's failure to act is alleged pursuant to *Hooker*.~~But "affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act. Element 5, the standard "substantial factor" element, expresses the "affirmative contribution." requirement. (See *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 594–595 [207 Cal.Rptr.3d 712] [agreeing with committee's position that "affirmatively contributed" need not be specifically stated in instruction].)~~

Sources and Authority

- "A hirer 'retains control' where it retains a sufficient degree of authority over the manner of performance of the work entrusted to the contractor. … So 'retained control' refers specifically to a hirer's authority over work entrusted to the contractor, i.e., work the contractor has agreed to perform. For simplicity we will often call this the 'contracted work'—irrespective of whether it's set out in a written contract or arises from an informal agreement. A hirer's authority over noncontract work—although potentially giving rise to other tort duties—thus does not give rise to a retained control duty unless it has the effect of creating authority over the contracted work." (*Sandoval, supra,* 12 Cal.5th at pp. 274–275.)

- "We conclude that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker, supra,* 27 Cal.4th at p. 202, original italics.)

- "Imposing tort liability on a hirer of an independent contractor when the hirer's conduct has affirmatively contributed to the injuries of the contractor's employee is consistent with the rationale of our decisions in *Privette*, *Toland* and *Camargo* because the liability of the hirer in such a case is not ' "in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor." ' To the contrary, the liability of the hirer in such a case is *direct* in a much stronger sense of that term." (*Hooker, supra,* 27 Cal.4th at pp. 211–212, original italics, internal citations and footnote omitted.)

- "Contract workers must prove that the hirer *both* retained control *and* actually exercised that retained control in such a way as to affirmatively contribute to the injury." (*Sandoval, supra,* 12 Cal.5th at p. 276, original italics.)

- "Such affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent

failure to do so should result in liability if such negligence leads to an employee injury." (*Hooker, supra,* 27 Cal.4th at p. 212, fn. 3.)

- " 'Affirmative contribution' means that the hirer's exercise of retained control contributes to the injury in a way that isn't merely derivative of the contractor's contribution to the injury. Where the contractor's conduct is the immediate cause of injury, the affirmative contribution requirement can be satisfied only if the hirer in some respect induced—not just failed to prevent—the contractor's injury-causing conduct." (*Sandoval, supra,* 12 Cal.5th at p. 277, internal citation omitted.)

- "If a hirer entrusts work to an independent contractor, but retains control over safety conditions at a jobsite and then negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, the hirer is liable for those injuries, based on its own negligent exercise of that retained control." (*Tverberg v. Fillner Constr., Inc.* (2012) 202 Cal.App.4th 1439, 1446 [136 Cal.Rptr.3d 521].)

- "[A]ffirmative contribution is a different sort of inquiry than substantial factor causation. For instance, a fact finder might reasonably conclude that a hirer's negligent hiring of the contractor was a substantial factor in bringing about a contract worker's injury, and yet negligent hiring is not affirmative contribution because the hirer's liability is essentially derivative of the contractor's conduct. Conversely, affirmative contribution does not itself require that the hirer's contribution to the injury be substantial." (*Sandoval, supra,* 12 Cal.5th at p. 278, internal citations omitted.)

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- "A hirer's failure to correct an unsafe condition, by itself, does not establish an affirmative contribution." (*Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718 [208 Cal.Rptr.3d 699].)

- ~~"Although drawn directly from case law, [plaintiff]'s proposed Special Instructions Nos. 2 and 8 are somewhat misleading in that they suggest that in order for the hirer to 'affirmatively contribute' to the plaintiff's injuries, the hirer must have engaged in some form of active direction or conduct. However, 'affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions.' The Advisory Committee on Civil Jury Instructions recognized the potential to confuse the jury by including 'affirmative contribution' language in CACI No. 1009B. The committee's Directions for Use states: 'The hirer's retained control must have "affirmatively contributed" to the plaintiff's injury. [Citation.] However, the affirmative contribution need not be active conduct but may be in the form of an omission to act. [Citation.] The advisory committee believes that the "affirmative contribution" requirement simply means that there must be causation between the hirer's conduct and the plaintiff's injury. Because "affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act, the committee believes that its standard "substantial factor" element adequately expresses the "affirmative contribution" requirement.' (Directions for Use for CACI No. 1009B.) [¶] We agree with the Advisory Committee on Civil Jury Instructions that CACI No. 1009B adequately covers the 'affirmative contribution' requirement set forth in *Hooker*." (*Regalado v. Callaghan* (2016) 3 Cal.App.5th 582,~~

~~594–595 [207 Cal.Rptr.3d 712].)~~

- "When the employer directs that work be done by use of a particular mode or otherwise interferes with the means and methods of accomplishing the work, an affirmative contribution occurs. When the hirer does not fully delegate the task of providing a safe working environment but in some manner actively participates in how the job is done, the hirer may be held liable to the employee if its participation affirmatively contributed to the employee's injury. [¶] By contrast, passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution. The failure to institute specific safety measures is not actionable unless there is some evidence that the hirer or the contractor had agreed to implement these measures. Thus, the failure to exercise retained control does not constitute an affirmative contribution to an injury. Such affirmative contribution must be based on a negligent exercise of control. In order for a worker to recover on a retained control theory, the hirer must engage in some active participation." (*Tverberg, supra,* 202 Cal.App.4th at p. 1446, internal citations omitted.)

- "Although plaintiffs concede that [contractor] had exclusive control over how the window washing would be done, they urge that [owner] nonetheless is liable because it affirmatively contributed to decedent's injuries 'not [by] active conduct *but … in the form of an omission to act*.' Although it is undeniable that [owner]'s failure to equip its building with roof anchors contributed to decedent's death, *McKown* [*v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219] does not support plaintiffs' suggestion that a passive omission of this type is actionable. … Subsequent Supreme Court decisions … have repeatedly rejected the suggestion that the passive provision of an unsafe workplace is actionable. … Accordingly, the failure to provide safety equipment does not constitute an 'affirmative contribution' to an injury within the meaning of *McKown*." (*Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1093 [229 Cal.Rptr.3d 594], original italics.)

- "[U]nder Government Code section 815.4, a public entity can be held liable under the retained control doctrine, provided a private person would be liable under the same circumstances. This means that the public entity must *negligently* exercise its retained control so as to affirmatively contribute to the injuries of the employee of the independent contractor." (*McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 985 [79 Cal.Rptr.3d 777], original italics.)

- "The *Privette* line of decisions establishes a presumption that an independent contractor's hirer 'delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees.'… [T]he *Privette* presumption affects the burden of producing evidence." (*Alvarez v. Seaside Transportation Services LLC* (2017) 13 Cal.App.5th 635, 642 [221 Cal.Rptr.3d 119], internal citations omitted.)

Secondary Sources

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

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-A, *Liability For Defective Conditions On Premises*, ¶ 6:1 et seq. (The Rutter Group)

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

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.23 (Matthew Bender)

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

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

1306. Sexual Battery—Essential Factual Elements (Civ. Code, § 1708.5)

[*Name of plaintiff*] claims that [*name of defendant*] committed a sexual battery. To establish this claim, [*name of plaintiff*] must prove the following:

1. **[(a) That [*name of defendant*] intended to cause a harmful [or offensive] contact with [*name of plaintiff*]'s [sexual organ/anus/groin/buttocks/ [or] breast], and a sexually offensive contact with [*name of plaintiff*] resulted, either directly or indirectly;]**

   [OR]

   [(b) That [*name of defendant*] intended to cause a harmful [or offensive] contact with [*name of plaintiff*] by use of [*name of defendant*]'s [sexual organ/anus/groin/buttocks/ [or] breast], and a sexually offensive contact with [*name of plaintiff*] resulted, either directly or indirectly;]

   [OR]

   [(c) That [*name of defendant*] caused an imminent fear of a harmful [or offensive] contact with [[*name of plaintiff*]'s [sexual organ/anus/groin/buttocks/ [or] breast]/ [or] [*name of plaintiff*] by use of [*name of defendant*]'s [sexual organ/anus/groin/buttocks/ [or] breast]], and a sexually offensive contact with [*name of plaintiff*] resulted, either directly or indirectly;]

   [OR]

   [(d) That [*name of defendant*] caused contact between a sexual organ, from which a condom had been removed, and [*name of plaintiff*]'s [sexual organ/anus/groin/buttocks/ [or] breast];]

   [OR]

   [(e) That [*name of defendant*] caused contact between [a/an] [sexual organ/anus/groin/buttocks/ [or] breast] and [*name of plaintiff*]'s sexual organ from which [*name of defendant*] had removed a condom;]

AND

2. **That [*name of plaintiff*] did not [consent to the touching/verbally consent to the condom being removed]; and**

3. **That [*name of plaintiff*] was harmed [or offended] by [*name of defendant*]'s conduct.**

["Offensive contact" means contact that offends a reasonable sense of personal dignity.]

New October 2008; Revised May 2022

Directions for Use

Omit any of the options for element 1 that are not supported by the evidence. If more than one are at issue, include the word "OR" between them.

For sexual battery under Civil Code section 1708.5(d)(1) (defining "intimate part"), unconsented touching of a breast must involve the breast of a female. The instruction may require modification if there is a factual question on this issue.

Use the second bracketed alternative in element 2 only if option (d) or option (e) is at issue. (Compare Civ. Code, § 1708.5(a), (b), (c) with Civ. Code, § 1708.5(d), (e).) Modification of the instruction will be necessary if the plaintiff's claim involves any of options (a)–(c) and option (d) or option (e) because the consent requirement is not the same.

Give the bracketed words "or offensive" in element 1 and "or offended" in element 3 and include the optional last sentence if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

For a definition of "intent," see CACI No. 1320, *Intent*.

Sources and Authority

- Sexual Battery. Civil Code section 1708.5.
- Consent as Defense. Civil Code section 3515.
- "A cause of action for sexual battery under Civil Code section 1708.5 requires the batterer intend to cause a 'harmful or offensive' contact and the batteree suffer a 'sexually offensive contact.' Moreover, the section is interpreted to require that the batteree did not consent to the contact." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1225 [44 Cal.Rptr.2d 197], internal citation omitted.)
- "The element of lack of consent to the particular contact is an essential element of battery." (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 938 [198 Cal.Rptr. 249].)
- "As a general rule, one who consents to a touching cannot recover in an action for battery. ... However, it is well-recognized a person may place conditions on the consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 609–610 [278 Cal.Rptr. 900].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 452–488

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.01[3] (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, §§ 58.27, 58.55 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery,* § 21.27 (Matthew Bender)

California Civil Practice: Torts §§ 12:7–12:9, 12:36-12:39 (Thomson Reuters)

1621. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] suffered serious emotional distress as a result of perceiving [an injury to/the death of] [***name of victim***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] negligently caused [injury to/the death of] [***name of victim***];**

2. **That when the [***describe event, e.g., traffic accident***] that caused [injury to/the death of] [***name of victim***] occurred, [***name of plaintiff***] was [virtually] present at the scene [through [***specify technological means***]];**

3. **That [***name of plaintiff***] was then aware that the [***e.g., traffic accident***] was causing [injury to/the death of] [***name of victim***];**

4. **That [***name of plaintiff***] suffered serious emotional distress; and**

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

[*Name of plaintiff***] need not have been then aware that [***name of defendant***] had caused the [***e.g., traffic accident***].**

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

New September 2003; Revised December 2013, June 2014, December 2014, December 2015, May 2022

Directions for Use

Use this instruction in a negligence case if the only damages sought are for emotional distress. The doctrine of "negligent infliction of emotional distress" is not a separate tort or cause of action. It simply allows certain persons to recover damages for emotional distress only on a negligence cause of action even though they were not otherwise injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [167 Cal.Rptr. 831, 616 P.2d 813].)

A "bystander" case is one in which a plaintiff seeks recovery for damages for emotional distress suffered as a percipient witness of an injury to another person. If the plaintiff is a direct victim of tortious conduct, use CACI No. 1620, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Direct Victim—Essential Factual Elements.* For instructions for use for emotional distress arising from exposure to carcinogens, HIV, or AIDS, see CACI No. 1622, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements*,

and CACI No. 1623, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements*.

This instruction should be read in conjunction with instructions in the Negligence series (see CACI No. 400 et seq.) to further develop element 1.

Whether the plaintiff had a sufficiently close relationship with the victim should be determined as an issue of law because it is integral to the determination of whether a duty was owed to the plaintiff.

Include the optional language in element 2 only if the plaintiff claims virtual presence at the scene through technological means, and specify the technology used to assist the jury in understanding the concept of "virtual" presence. (See *Ko v. Maxim Healthcare Services, Inc.* (2020) 58 Cal.App.5th 1144, 1159 [272 Cal.Rptr.3d 906].)

There is some uncertainty as to how the "event" should be defined in element 2 and then just exactly what the plaintiff must perceive in element 3. When the event is something dramatic and visible, such as a traffic accident or a fire, it would seem that the plaintiff need not know anything about why the event occurred. (See *Wilks v. Hom* (1992) 2 Cal.App.4th 1264, 1271 [3 Cal.Rptr.2d 803].) And the California Supreme Court has stated that the bystander plaintiff need not contemporaneously understand the defendant's conduct as *negligent,* as opposed to *harmful.* (*Bird v. Saenz* (2002) 28 Cal.4th 910, 920 [123 Cal.Rptr.2d 465, 51 P.3d 324], original italics.)

But what constitutes perception of the event is less clear when the victim is clearly in observable distress, but the cause of that distress may not be observable. It has been held that the manufacture of a defective product is the event, which is not observable, despite the fact that the result was observable distress resulting in death. (See *Fortman v. Förvaltningsbolaget Insulan AB* (2013) 212 Cal.App.4th 830, 843−844 [151 Cal.Rptr.3d 320].) In another observable-distress case, medical negligence that led to distress resulting in death was found to be perceivable because the relatives who were present observed the decedent's acute respiratory distress and were aware that defendant's *inadequate* response caused her death. (See *Keys v. Alta Bates Summit Medical Center* (2015) 235 Cal.App.4th 484, 489−490 [185 Cal.Rptr.3d 313], emphasis added.) It might be argued that observable distress is the event and that the bystanders need not perceive anything about the cause of the distress. However, these cases indicate that is not the standard. But if it is not necessary to comprehend that negligence is causing the distress, it is not clear what it is that the bystander must perceive in element 3. Because of this uncertainty, the Advisory Committee has elected not to try to express element 3 any more specifically.

The explanation in the last paragraph of what constitutes "serious" emotional distress comes from the California Supreme Court. (See *Molien, supra,* 27 Cal.3d at p. 928.) In *Wong v. Jing,* an appellate court subsequently held that serious emotional distress from negligence without other injury is the same as "severe" emotional distress for the tort of intentional infliction of emotional distress. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747]; but see *Keys, supra,* 235 Cal.App.4th at p. 491 [finding last sentence of this instruction to be a correct description of the distress required].)

Sources and Authority

- "California's rule that plaintiff's fear for his own safety is compensable also presents a strong argument for the same rule as to fear for others; otherwise, some plaintiffs will falsely claim to have feared for themselves, and the honest parties unwilling to do so will be penalized. Moreover, it is incongruous and somewhat revolting to sanction recovery for the mother if she suffers shock from fear for her own safety and to deny it for shock from the witnessed death of her own daughter." (*Dillon v. Legg* (1968) 68 Cal.2d 728, 738 [69 Cal.Rptr. 72, 441 P.2d 912].)

- "As an introductory note, we observe that plaintiffs … framed both negligence and negligent infliction of emotional distress causes of action. To be precise, however, 'the [only] tort with which we are concerned is negligence. Negligent infliction of emotional distress is not an independent tort … .' " (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 875–876 [104 Cal.Rptr.3d 352].)

- "In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 647 [257 Cal.Rptr. 865, 771 P.2d 814].)

- "[T]o satisfy the second *Thing* requirement the plaintiff must experience a contemporaneous sensory awareness of the causal connection between the defendant's infliction of harm and the injuries suffered by the close relative." (*Fortman, supra,* 212 Cal.App.4th at p. 836.)

- "Where plaintiffs allege they were virtually present at the scene of an injury-producing event sufficient for them to have a contemporaneous sensory awareness of the event causing injury to their loved one, they satisfy the second *Thing* requirement to state a cause of action for NIED. Just as the Supreme Court has ruled a 'plaintiff may recover based on an event perceived by other senses so long as the event is contemporaneously understood as causing injury to a close relative', so too can the [plaintiffs] pursue an NIED claim where, as alleged, they contemporaneously saw and heard [their child's] abuse, but with their senses technologically extended beyond the walls of their home." (*Ko ~~v. Maxim Healthcare Services, Inc.~~ (2020) , supra,* 58 Cal.App.5th ~~1144,~~ at p. 1159 ~~[272 Cal.Rptr.3d 906]~~, internal citation omitted.)

- "[A] plaintiff need not contemporaneously understand the defendant's conduct as *negligent,* as opposed to *harmful.* But the court confused awareness of negligence, a legal conclusion, with contemporaneous, understanding awareness of the event as causing harm to the victim." (*Bird, supra,* 28 Cal.4th at p. 920.)

- "*Bird* does not categorically bar plaintiffs who witness acts of medical negligence from pursuing NIED claims. 'This is not to say that a layperson can never perceive medical negligence or that one who does perceive it cannot assert a valid claim for NIED.' Particularly, a NIED claim may arise when … caregivers fail 'to respond significantly to symptoms obviously requiring immediate medical attention.' " (*Keys, supra,* 235 Cal.App.4th at p. 489.)

- "The injury-producing event here was defendant's lack of acuity and response to [decedent]'s inability

to breathe, a condition the plaintiffs observed and were aware was causing her injury." (*Keys, supra,* 235 Cal.App.4th at p. 490.)

- "*Thing* does not require that the plaintiff have an awareness of what caused the injury-producing event, but the plaintiff must have an understanding perception of the 'event as causing harm to the victim.' " (*Fortman, supra,* 212 Cal.App.4th at p. 841, fn. 4.)

- "[W]e also reject [plaintiff]'s attempt to expand bystander recovery to hold a product manufacturer strictly liable for emotional distress when the plaintiff observes injuries sustained by a close relative arising from an unobservable product failure. To do so would eviscerate the second *Thing* requirement." (*Fortman, supra,* 212 Cal.App.4th at pp. 843−844.)

- "Absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim." (*Thing, supra,* 48 Cal.3d at p. 668, fn. 10.)

- "[A]n unmarried cohabitant may not recover damages for emotional distress based on such injury." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 273 [250 Cal.Rptr. 254, 758 P.2d 582].)

- "Although a plaintiff may establish presence at the scene through nonvisual sensory perception, 'someone who hears an accident but does not then know it is causing injury to a relative does not have a viable [bystander] claim for [negligent infliction of emotional distress], even if the missing knowledge is acquired moments later.' " (*Ra v. Superior Court* (2007) 154 Cal.App.4th 142, 149 [64 Cal.Rptr.3d 539], internal citation omitted.)

- "[I]t is not necessary that a plaintiff bystander actually have witnessed the infliction of injury to her child, provided that the plaintiff was at the scene of the accident and was sensorially aware, in some important way, of the accident and the necessarily inflicted injury to her child." (*Wilks, supra,* 2 Cal.App.4th at p. 1271.)

- " '[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' " (*Molien, supra,* 27 Cal.3d at pp. 927–928.)

- "In our view, this articulation of 'serious emotional distress' is functionally the same as the articulation of 'severe emotional distress' [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury." (*Wong, supra,* 189 Cal.App.4th at p. 1378.)

- "We have no reason to question the jury's conclusion that [plaintiffs] suffered serious emotional distress as a result of watching [decedent] 's struggle to breathe that led to her death. The jury was properly instructed, as explained in *Thing,* that '[s]erious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.' The instructions clarify that 'Emotional distress includes suffering, anguish, fright, … nervousness, grief, anxiety, worry, shock … .' Viewed through

this lens there is no question that [plaintiffs'] testimony provides sufficient proof of serious emotional distress." (*Keys, supra,* 235 Cal.App.4th at p. 491, internal citation omitted.)

- "[W]here a participant in a sport has expressly assumed the risk of injury from a defendant's conduct, the defendant no longer owes a duty of care to bystanders with respect to the risk expressly assumed by the participant. The defendant can therefore assert the participant's express assumption of the risk against the bystanders' NIED claims." (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 731 [183 Cal.Rptr.3d 234].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1144–1158

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 11-F, *Negligent Infliction Of Emotional Distress*, ¶ 11:101 (The Rutter Group)

1 Levy et al., California Torts, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.04 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.11 (Matthew Bender)

15 California Points and Authorities, Ch. 153*, Mental Suffering and Emotional Distress*, §§ 153.31 et seq., 153.45 et seq. (Matthew Bender)

VF-1604. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] negligently cause [injury to/the death of] [***name of victim***]?**
   ____ 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. **When the [***describe event, e.g., traffic accident***] that caused [injury to/the death of] [***name of victim***] occurred, was [***name of plaintiff***] [virtually] present at the scene [through [***specify technological means***]]?**
   ____ Yes ____ No

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

3. **Was [***name of plaintiff***] then aware that the [***e.g., traffic accident***] was causing [injury to/the death of] [***name of victim***]?**
   ____ Yes ____ No

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

4. **Did [***name of plaintiff***] suffer serious emotional distress?**
   ____ Yes ____ No

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

5. **Was [***name of defendant***]'s conduct a substantial factor in causing [***name of plaintiff***]'s serious emotional distress?**
   ____ Yes ____ No

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

6. **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, June 2014, December 2016, May 2022

Directions for Use

This verdict form is based on CACI No. 1621, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander—Essential Factual Elements.*

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

If specificity is not required, users do not have to itemize all the damages listed in question 6 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.

1810. Distribution of Private Sexually Explicit Materials—Essential Factual Elements (Civ. Code, § 1708.85)

[*Name of plaintiff*] claims that [*name of defendant*] violated [his/her/*nonbinary pronoun*] right to privacy by distributing private sexually explicit materials. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] intentionally distributed by [*specify means, e.g., posting online*] [a] [photograph(s)/film(s)/videotape(s)/recording(s)/[*specify other reproduction*]] of [*name of plaintiff*];**

2. **That [*name of plaintiff*] did not consent to the distribution of the [*specify, e.g., photographs*];**

3. **That [*name of defendant*] knew, or reasonably should have known, that [*name of plaintiff*] had a reasonable expectation that the [*e.g., photographs*] would remain private;**

4. **That the [*e.g., photographs*] [exposed an intimate body part of [*name of plaintiff*]/ [or] showed [*name of plaintiff*] engaging in an act of [intercourse/oral copulation/sodomy/ [or] [*specify other act of sexual penetration*]]];**

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.**

[An "intimate body part" is any part of the genitals[, and, in the case of a female, also includes any portion of the breast below the top of the areola,] that is uncovered or visible through less than fully opaque clothing.]

New December 2015; Revised May 2022

Directions for Use

This instruction is for use for an invasion-of-privacy cause of action for the dissemination of sexually explicit materials. (See Civ. Code, § 1708.85(a).) It may not be necessary to include the last definitional paragraph as the court may rule as a matter of law that an image of an intimate body part has been distributed. (See Civ. Code, § 1708.85(b).)

~~The plaintiff's harm (element 5) is~~ Plaintiff may recover general or special damages as defined in subdivision (d) of Civil Code section 48a. (Civ. Code, § 1708.85(a).) "General damages" are damages for loss of reputation, shame, mortification and hurt feelings. (Civ. Code, § 48a(d)(1).) "Special damages" are essentially economic loss. (Civ. Code, § 48a(d)(2.)

Sources and Authority

- Right of Action Against Distributor of Private Sexually Explicit Material. Civil Code section 1708.85

- General and Special Damages. Civil Code section 48a(d)(1), (2)

Secondary Sources

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.07 (Matthew Bender)

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

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.25B (Matthew Bender)

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

[*Name of plaintiff*] claims that [*name of defendant*] breached the obligation of good faith and fair dealing because [*name of defendant*] failed to accept a reasonable settlement demand for a claim against [*name of plaintiff*]. To establish ~~this~~ [*name of plaintiff*]'s claim against [*name of defendant*], [*name of plaintiff*] must prove all of the following:

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

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

3. **That ~~[*name of defendant*] failed to accept~~ [*name of claimant*] made a reasonable ~~settlement~~ demand to settle [his/her/*nonbinary pronoun*] claim against [*name of plaintiff*] for an amount within policy limits;**

4. **That [*name of defendant*] failed to accept this settlement demand;**

~~4~~5. **That [*name of defendant*]'s failure to accept the settlement demand was the result of unreasonable conduct by [*name of defendant*]; and**

~~5~~

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

[*or*]

[That [*name of defendant*]'s failure to accept the settlement demand was a substantial factor in causing [*name of plaintiff*]'s harm.]

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

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

An insurance company's unreasonable conduct may be shown by its action or by ~~the~~ its failure to act. An insurance company's conduct is unreasonable when, for example, it does not give at least as

much consideration to the interests of the insured as it gives to its own interests.

New September 2003; Revised December 2007, June 2012, December 2012, June 2016, November 2021, May 2022

Directions for Use

This instruction is for use in an "excess judgment" case; that is, one in which judgment was against the insured for an amount over the policy limits, after the insurer rejected a settlement demand within policy limits. Use the first option for element 6 if the plaintiff is seeking only the amount of the excess judgment. Use the second option for element 6 if the plaintiff is seeking damages separate from or in addition to the excess judgment. (See *Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 527 [115 Cal.Rptr.3d 42].) If there has been both an excess judgment and other damages, modify element 6 as appropriate to address all damages involved in the case.

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

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

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

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

Sources and Authority

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

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

Cal.Rptr. 13, 426 P.2d 173].)

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

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

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

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

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

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

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

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

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

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

- "Determination of the reasonableness of a settlement offer for purposes of a reimbursement action is based on the information available to [the insurer] at the time of the proposed settlement." (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793 [244 Cal.Rptr. 655, 750 P.2d 297].)

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

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

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

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

citations omitted.)

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

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

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

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

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

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

- "[F]ailing to accept a reasonable settlement offer does not necessarily constitute bad faith. '[T]he crucial issue is … the basis for the insurer's decision to reject an offer of settlement.' '[M]ere errors

by an insurer in discharging its obligations to its insured " 'does not necessarily make the insurer liable in tort for violating the covenant of good faith and fair dealing; to be liable in tort, the insurer's conduct must also have been *unreasonable*.' " ' " (*Pinto, supra,* 61 Cal.App.5th at p. 688, internal citations omitted, original italics.)

- "In short, so long as insurers are not subject to a strict liability standard, there is still room for an honest, innocent mistake." (*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1460 [7 Cal.Rptr.2d 513, 521].)

Secondary Sources

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

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

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

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

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

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

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

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

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

VF-2304. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] insured under a policy of liability insurance issued by [*name of defendant*]?**
   ____ Yes ____ No

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

2. **Did [*name of claimant*] make a claim against [*name of plaintiff*] that was covered by [*name of defendant*]'s insurance policy?**
   ____ Yes ____ No

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

3. **Did [*name of claimant*] make a reasonable settlement demand to settle [his/her/*nonbinary pronoun*] claim against [*name of plaintiff*] for an amount within policy limits?**
   ____ Yes ____ No

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

4. **Did [*name of defendant*] fail to accept this settlement demand?**
   ____ Yes ____ No

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

5. **Was [*name of defendant*]'s failure to accept the settlement demand the result of unreasonable conduct by [*name of defendant*]?**
   ____ Yes ____ No

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

6. [Was a judgment entered against [*name of plaintiff*] for a sum of money greater than the policy limits?
____ Yes ____ No]

[*or*]

[Was [*name of defendant*]'s failure to accept the settlement demand a substantial factor in causing harm to [*name of plaintiff*]?]
____ Yes ____ No

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

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

[a. Amount of judgment entered against [*name of plaintiff*]
$ _____]

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

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

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

[e. 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 May 2022

Directions for Use

This verdict form is based on CACI No. 2334, *Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits—Essential Factual Elements.*

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

Question 6 should be tailored to the facts of the case as presented in element 6 of CACI No. 2334.

If specificity is not required, users do not have to itemize all the damages listed in question 7 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.

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

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

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

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

[2. That [*name of individual defendant***] was an employee of [***name of covered entity***];]**

~~2~~3. **That [***name of plaintiff***] was subjected to harassing conduct because [he/she/***nonbinary pronoun***] was [***protected status, e.g., a woman***];**

~~3~~4. **That the harassing conduct was severe or pervasive;**

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

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

~~6~~7. **That [***name of individual defendant***] [participated in/assisted/ [or] encouraged] the harassing conduct;**

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

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

Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018, July 2019, May 2020, November 2021, May 2022

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was the target of the harassing conduct and the defendant is ~~an individual such as the alleged harasser or plaintiff's coworker~~ also an employee of the covered entity. (Gov. Code, § 12940(j)(3).) Include optional element 2 if there is a dispute about the defendant's status as an employee and include optional question 2 on the verdict form. See CACI No. VF-2507A, *Work Environment Harassment—Conduct Directed at Plaintiff—Individual*

Defendant.

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

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

Modify element ~~2~~3 if the plaintiff was not actually a member of the protected class, but alleges harassment because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

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

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

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Employee Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).

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

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

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

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

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

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

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

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

Secondary Sources

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

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

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

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

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

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

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

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

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

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

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

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

[2. That [*name of individual defendant***] was an employee of [***name of covered entity***];]**

2~~3~~. **That [***name of plaintiff***], although not personally subjected to harassing conduct, personally witnessed harassing conduct that took place in [his/her/***nonbinary pronoun***] immediate work environment;**

3~~4~~. **That the harassing conduct was severe or pervasive;**

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

5~~6~~. **That [***name of plaintiff***] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [***e.g., women***];**

6~~7~~. **That [***name of individual defendant***] [participated in/assisted/ [or] encouraged] the harassing conduct;**

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

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

Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018, July 2019, November 2021, May 2022

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is ~~an individual such as the alleged harasser or plaintiff's coworker~~ also an employee of the covered entity. (Gov. Code, § 12940(j)(3).) Include optional element 2 if there is

a dispute about the defendant's status as an employee and include optional question 2 on the verdict form. See CACI No. VF-2507B, *Work Environment Harassment—Conduct Directed at Others—Individual Defendant*.

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

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

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

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

Sources and Authority

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

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

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

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

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

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

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

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

- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment.' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does

not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment.' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284–285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

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

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

Secondary Sources

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

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

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

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

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

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

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

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

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

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

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

[2. That [*name of individual defendant***] was an employee of [***name of covered entity***];]**

~~2~~3. That there was sexual favoritism in the work environment;

~~3~~4. That the sexual favoritism was severe or pervasive;

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

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

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

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

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

Derived from former CACI No. 2522 December 2007; Revised December 2015, May 2018, July 2019, May 2020, November 2021, May 2022

Directions for Use

This instruction is for use in a hostile work environment case involving sexual favoritism when the defendant is ~~an individual such as the alleged harasser or plaintiff's coworker~~ also an employee of the covered entity. (Gov. Code, § 12940(j)(3).) Include optional element 2 if there is a dispute about the

defendant's status as an employee and include optional question 2 on the verdict form. See CACI No. VF-2507C, *Work Environment Harassment—Sexual Favoritism—Individual Defendant.*

The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (Gov. Code, § 12940(j)(1).) If the facts of the case support it, the instruction should be modified as appropriate to the applicant's circumstances.

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

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

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

Sources and Authority

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

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

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

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

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

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

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

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

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

Secondary Sources

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

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

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

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

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

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

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

2546. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process (Gov. Code, § 12940(n))

[*Name of plaintiff***] contends that [***name of defendant***] failed to engage in a good-faith interactive process with [him/her/***nonbinary pronoun***] to determine whether it would be possible to implement effective reasonable accommodations so that [***name of plaintiff***] [***insert job requirements requiring accommodation***]. In order to establish this claim, [***name of plaintiff***] must prove the following:**

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

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

3. That [*name of plaintiff***] had [a] [***select term to describe basis of limitations, e.g., physical condition***] that was known to [***name of defendant***];**

4. That [*name of plaintiff***] requested that [***name of defendant***] make reasonable accommodation for [his/her/***nonbinary pronoun***] [***e.g., physical condition***] so that [he/she/***nonbinary pronoun***] would be able to perform the essential job requirements;**

5. That [*name of plaintiff***] was willing to participate in an interactive process to determine whether reasonable accommodation could be made so that [he/she/***nonbinary pronoun***] would be able to perform the essential job requirements;**

6. That [*name of defendant***] failed to participate in a timely good-faith interactive process with [***name of plaintiff***] to determine whether reasonable accommodation could be made;**

[7. That [*name of defendant***] could have made a reasonable accommodation when the interactive process should have taken place;]**

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

~~8~~9. That [*name of defendant***]'s failure to engage in a good-faith interactive process was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2007; Revised April 2009, December 2009, May 2022

Directions for Use

In elements 3 and 4, select a term to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Modify elements 3 and 4, as necessary, if the employer perceives the employee to have a disability. (See *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61, fn. 21 [43 Cal.Rptr.3d 874].)

In element 4, specify the position at issue and the reason why some reasonable accommodation was needed. In element 5, you may add the specific accommodation requested, though the focus of this cause of action is on the failure to discuss, not the failure to provide.

For an instruction on a cause of action for failure to make reasonable accommodation, see CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*. For an instruction defining "reasonable accommodation," see CACI No. 2542, *Disability Discrimination—"Reasonable Accommodation" Explained*.

~~There is a split of authority as to whether the employee must also prove that reasonable accommodation was possible before there is a violation for failure to engage in the interactive process.~~ Bracketed element 7 reflects that there is a split of authority as to whether the employee must also prove that a reasonable accommodation was available. (Compare ~~*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1] [jury's finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] and *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837] with~~ *Shirvanyan v. Los Angeles Community College Dist.* (2020) 59 Cal.App.5th 82, 87 [273 Cal.Rptr.3d 312] ["the availability of a reasonable accommodation is an essential element of an interactive process claim"] and *Nadaf-Rahrov v. The ~~Nieman~~ Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980–985 [83 Cal.Rptr.3d 190] [employee who brings a section 12940(n) claim bears the burden of proving a reasonable accommodation was available before the employer can be held liable under the statute] with *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1] [jury's finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] and *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837] [if the employer's failure to participate in good faith causes a breakdown in the interactive process, liability follows] ~~with~~; see ~~also~~ *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1018–1019 [93 Cal.Rptr.3d 338] [attempting to reconcile conflict].) See also verdict form CACI No. VF-2513, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*.

Sources and Authority

- Good-Faith Interactive Process. Government Code section 12940(n).
- Federal Interpretive Guidance Incorporated. Government Code section 12926.1(e).
- Interactive Process. The Interpretive Guidance on title I of the Americans With Disabilities Act, title 29 Code of Federal Regulations Part 1630 Appendix.
- An employee may file a civil action based on the employer's failure to engage in the interactive process. (*Claudio, supra,* 134 Cal.App.4th at p. 243.)
- "Two principles underlie a cause of action for failure to provide a reasonable accommodation.

First, the employee must request an accommodation. Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith." (*Gelfo, supra,* 140 Cal.App.4th at p. 54, internal citations omitted.)

- "While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 242 [206 Cal.Rptr.3d 841].)

- "FEHA requires an informal process with the employee to attempt to identify reasonable accommodations, not necessarily ritualized discussions." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 379 [184 Cal.Rptr.3d 9].)

- "The point of the interactive process is to find reasonable accommodation for a disabled employee, or an employee regarded as disabled by the employer, in order to *avoid* the employee's termination. Therefore, a pretextual termination of a perceived-as-disabled employee's employment in lieu of providing reasonable accommodation or engaging in the interactive process does not provide an employer a reprieve from claims for failure to accommodate and failure to engage in the interactive process." (*Moore, supra,* 248 Cal.App.4th at pp. 243−244, original italics.)

- "FEHA's reference to a 'known' disability is read to mean a disability of which the employer has become aware, whether because it is obvious, the employee has brought it to the employer's attention, it is based on the employer's own perception—mistaken or not—of the existence of a disabling condition or, perhaps as here, the employer has come upon information indicating the presence of a disability." (*Gelfo, supra,* 140 Cal.App.4th at p. 61, fn. 21.)

- "Typically, the employee must initiate the process 'unless the disability and resulting limitations are obvious.' " (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1169 [217 Cal.Rptr.3d 258].)

- "Once initiated, the employer has a continuous obligation to engage in the interactive process in good faith. 'Both employer and employee have the obligation "to keep communications open" and neither has "a right to obstruct the process." [Citation.] "Each party must participate in good faith, undertake reasonable efforts to communicate its concerns, and make available to the other information which is available, or more accessible, to one party. Liability hinges on the objective circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the party who fails to participate in good faith." [Citation.]' " (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 971−972 [181 Cal.Rptr.3d 553].)

- "[Employer] asserts that, if it had a duty to engage in the interactive process, the duty was discharged. 'If anything,' it argues, 'it was [employee] who failed to engage in a good faith interactive process.' [Employee] counters [employer] made up its mind before July 2002 that it would not accommodate [employee]'s limitations, and nothing could cause it reconsider that decision. Because the evidence is conflicting and the issue of the parties' efforts and good faith is factual, the claim is properly left for the jury's consideration." (*Gelfo, supra,* 140 Cal.App.4th at p.

62, fn. 23.)

- "None of the legal authorities that [defendant] cites persuades us that the Legislature intended that after a reasonable accommodation is granted, the interactive process continues to apply in a failure to accommodate context. … To graft an interactive process intended to apply to the determination of a reasonable accommodation onto a situation in which an employer failed to provide a reasonable, agreed-upon accommodation is contrary to the apparent intent of the FEHA and would not support the public policies behind that provision." (*A.M. v. Albertsons, LLC* (2009) 178 Cal.App.4th 455, 464 [100 Cal.Rptr.3d 449].)

- "[T]he verdicts on the reasonable accommodations issue and the interactive process claim are not inconsistent. They involve separate causes of action and proof of different facts. Under FEHA, an employer must engage in a good faith interactive process with the disabled employee to explore the alternatives to accommodate the disability. 'An employee may file a civil action based on the employer's failure to engage in the interactive process.' Failure to engage in this process is a separate FEHA violation independent from an employer's failure to provide a reasonable disability accommodation, which is also a FEHA violation. An employer may claim there were no available reasonable accommodations. But if it did not engage in a good faith interactive process, 'it cannot be known whether an alternative job would have been found.' The interactive process determines which accommodations are required. Indeed, the interactive process could reveal solutions that neither party envisioned." (*Wysinger, supra,* 157 Cal.App.4th at pp. 424–425, internal citations omitted.)

- "We disagree … with *Wysinger's* construction of section 12940(n). We conclude that the availability of a reasonable accommodation (i.e., a modification or adjustment to the workplace that enables an employee to perform the essential functions of the position held or desired) is necessary to a section 12940(n) claim. [¶] Applying the burden of proof analysis in *Green, supra,* 42 Cal.4th 254, we conclude the burden of proving the availability of a reasonable accommodation rests on the employee." (*Nadaf-Rahrov, supra,* 166 Cal.App.4th at pp. 984–985.)

- "We synthesize *Wysinger, Nadaf-Rahrov,* and *Claudio* with our analysis of the law as follows: To prevail on a claim under section 12940, subdivision (n) for failure to engage in the interactive process, an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred. An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself because ' " '[e]mployees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. …' " ' However, as the *Nadaf-Rahrov* court explained, once the parties have engaged in the litigation process, to prevail, the employee must be able to identify an available accommodation the interactive process should have produced: 'Section 12940[, subdivision](n), which requires proof of failure to engage in the interactive process, is the appropriate cause of action where the employee is unable to identify a specific, available reasonable accommodation while in the workplace and the employer fails to engage in a good faith interactive process to help identify one, but the employee is able to identify a specific, available reasonable accommodation through the litigation process.' " (*Scotch, supra,* 173 Cal.App.4th at pp. 1018–1019.)

- "Well-reasoned precedent supports [defendant's] argument that, in order to succeed on a cause of action for failure to engage in an interactive process, 'an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred.' " (*Shirvanyan, supra,* 59 Cal.App.5th at p. 96.)

Secondary Sources

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

Chin, et al., California Practice Guide: Employment Litigation, Ch. 9-C, *Disability Discrimination—California Fair Employment and Housing Act (FEHA),* ¶¶ 9:2280–9:2285, 9:2345–9:2347 (The Rutter Group)

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

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.35[1][a] (Matthew Bender)

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

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

We answer the questions submitted to us as follows:

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

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

[2. Was [*name of defendant***] an employee of [***name of covered entity***]?**
Yes No

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

~~2~~3. **Was [***name of plaintiff***] subjected to harassing conduct because [he/she/***nonbinary pronoun***] was [***protected status, e.g., a woman***]?**
____ Yes ____ No

If your answer to question ~~2~~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.

~~3~~4. **Was the harassment severe or pervasive?**
____ 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. **Would a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
____ Yes ____ No

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

~~5~~6. Did [*name of plaintiff*] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive?
____ Yes ____ No

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

~~6~~7. Did [*name of defendant*] [participate in/assist/ [or] encourage] the harassing conduct?
____ Yes ____ No

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

~~7~~8. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

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

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

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021, May 2022

Directions for Use

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

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

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

Include optional question 2 only if optional element 2 is included in CACI No. 2522A.

Modify question ~~2~~3 if the plaintiff was not actually a member of the protected class, but alleges harassment because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

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

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

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

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

We answer the questions submitted to us as follows:

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

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

[2. Was [*name of individual defendant***] an employee of [***name of covered entity***]?**
Yes No

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

~~2~~3. Did [*name of plaintiff***] personally witness harassing conduct that took place in [his/her/***nonbinary pronoun***] immediate work environment?**
____ Yes ____ No

If your answer to question ~~2~~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.

~~3~~4. Was the harassment severe or pervasive?
____ 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. Would a reasonable [*describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
____ Yes ____ No

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

~~5~~6. **Did [*name of plaintiff*] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [*e.g., women*]?**
____ Yes ____ No

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

~~6~~7. **Did [*name of individual defendant*] [participate in/assist/ [or] encourage] the harassing conduct?**
____ Yes ____ No

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

~~7~~8. **Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?**
____ Yes ____ No

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

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

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

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

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

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021, May 2022

Directions for Use

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

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

~~Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant.*~~
Include optional question 2 only if optional element 2 is included in CACI No. 2522B.

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

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

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

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

We answer the questions submitted to us as follows:

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

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

[2. Was [*name of individual defendant***] an employee of [***name of covered entity***]?**
Yes No

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

~~2~~3. Was there sexual favoritism in the work environment?
____ 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.

~~3~~4. Was the sexual favoritism severe or pervasive?
____ 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. Would a reasonable [*describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
____ Yes ____ No

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

~~5~~6. Did [*name of plaintiff***] consider the work environment to be hostile, intimidating,**

offensive, oppressive, or abusive because of the sexual favoritism?
____ Yes ____ No

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

~~6~~7. Did [*name of individual defendant***] [participate in/assist/ [or] encourage] the sexual favoritism?**
____ Yes ____ No

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

~~7~~8. Was the sexual favoritism a substantial factor in causing harm to [*name of plaintiff***]?**
____ Yes ____ No

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

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

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

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

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

[d. Future noneconomic loss, including [physical

pain/mental suffering:]

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, December 2014, December 2016, May 2020, May 2021, November 2021, May 2022

Directions for Use

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

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

~~Relationships other than employer/employee can be substituted in question 1, as in element 1 in CACI No. 2521C.~~
Include optional question 2 only if optional element 2 is included in CACI No. 2522C.

Depending on the facts of the case, other factual scenarios for employer liability can be substituted in question~~s 6 and~~ 7, as in element ~~6~~7 of the instruction.

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

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

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

VF-2513. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process (Gov. Code, § 12940(n))

We answer the questions submitted to us as follows:

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

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

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

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

3. **Did [***name of plaintiff***] have [a] [***select term to describe basis of limitations, e.g., physical condition***] [that limited [***insert major life activity***]]?**
   ____ Yes ____ No

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

4. **Did [***name of plaintiff***] request that [***name of defendant***] make reasonable accommodation for [his/her/***nonbinary pronoun***] [***e.g., physical condition***] so that [he/she/***nonbinary pronoun***] would be able to perform the essential job requirements?**
   ____ Yes ____ No

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

5. **Was [***name of plaintiff***] willing to participate in an interactive process to determine whether reasonable accommodation could be made so that [he/she/***nonbinary pronoun***] would be able to perform the essential job requirements?**
   ____ Yes ____ No

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

6. Did [*name of defendant*] fail to participate in a timely, good-faith interactive process with [*name of plaintiff*] to determine whether reasonable accommodation could be made?

____ Yes ____ No

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

[7. Could [*name of defendant*] have made a reasonable accommodation when the interactive process should have taken place?

Yes No

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

~~7~~8. Was [*name of defendant*]'s failure to participate in a good-faith interactive process a substantial factor in causing harm to [*name of plaintiff*]?

____ Yes ____ No

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

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

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____]

Signed: _____
Presiding Juror

Dated: _____

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

New April 2009; Revised December 2009, December 2010, December 2016, May 2022

Directions for Use

This verdict form is based on CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process.*

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

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

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

Bracketed question 7 reflects that there is a split of authority as to whether the employee must also prove that a reasonable accommodation was available. (Compare *Shirvanyan v. Los Angeles Community College Dist.* (2020) 59 Cal.App.5th 82, 87 [273 Cal.Rptr.3d 312] ["the availability of a reasonable accommodation is an essential element of an interactive process claim"] and *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980–985 [83 Cal.Rptr.3d 190] [employee who brings section 12940(n) claim bears burden of proving a reasonable accommodation was available before employer can be held liable under the statute] with *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1] [jury's finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] and *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224,

243 [35 Cal.Rptr.3d 837]; see *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1018–1019 [93 Cal.Rptr.3d 338] [attempting to reconcile conflict].)

Do not include the transitional language following question ~~7~~8 and question ~~8~~9 if the only damages claimed are also claimed under Government Code section 12940(m) on reasonable accommodation. Use CACI No. VF-2509, *Disability Discrimination—Reasonable Accommodation,* or CACI No. VF-2510, *Disability Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship,* to claim these damages.

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

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

~~There is a split of authority as to whether the employee must also prove that reasonable accommodation was possible before there is a violation for failure to engage in the interactive process. (Compare *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1 [jury's finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] with *Nadaf-Rahrov v. The Nieman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980–985 [83 Cal.Rptr.3d 190] [employee who brings a section 12940(n) claim bears the burden of proving that a reasonable accommodation was available before the employer can be held liable under the statute].)~~

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.

2754. Reporting Time Pay—Essential Factual Elements

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

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

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

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

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

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

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

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

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

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

New November 2021; Revised May 2022

Directions for Use

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

Select the appropriate bracketed language in the introductory paragraph and elements 3 and 5, and indicate whether the plaintiff was not provided work at all or was provided a shortened shift, or both, in the introductory paragraph and element 5. If the case involves both first and second shifts, the instruction will need to be modified.

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

Modify the instruction as appropriate if the plaintiff claims that the defendant required telephonic reporting to work before the start of a potential shift. (See *Ward v. Tilly's, Inc.* (2019) 31 Cal.App.5th 1167, 1171 [243 Cal.Rptr.3d 461].)

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

Sources and Authority

- "Employee" and "Employer" Defined. Title 8 California Code of Regulations sections 11010–11160.
- "Person" Defined. Lab. Code section 18.
- Reporting Time Pay. Title 8 California Code of Regulations sections11010–11160 (subd. 5 of each section).
- "We conclude that the on-call scheduling alleged in this case triggers Wage Order 7's reporting time pay requirements. As we explain, on-call shifts burden employees, who cannot take other jobs, go to school, or make social plans during on-call shifts—but who nonetheless receive no compensation from [the defendant] unless they ultimately are called in to work. This is precisely the kind of abuse that reporting time pay was designed to discourage." (*Ward, supra,* 31 Cal.App.5th at p. 1171.)
- "[W]e conclude, contrary to the trial court, that an employee need not necessarily physically appear at the workplace to 'report for work.' Instead, 'report[ing] for work' within the meaning of the wage order is best understood as presenting oneself *as ordered*. 'Report for work,' in other words, does not have a single meaning, but instead is defined by the party who directs the manner in which the employee is to present himself or herself for work—that is, by the employer. [¶] As thus interpreted, the reporting time pay requirement operates as follows. If an employer directs employees to present themselves for work by physically appearing at the workplace at the shift's start, then the reporting time requirement is triggered by the employee's appearance at the jobsite. But if the employer directs employees to present themselves for work by logging on to a computer remotely, or by appearing at a client's jobsite, or by setting out on a trucking route, then the employee 'reports for work' by doing those things. And if, as plaintiff alleges in this case, the employer directs employees to present themselves for work by telephoning the store two hours prior to the start of a shift, then the reporting time requirement is triggered by the telephonic contact." (*Ward, supra,* 31 Cal.App.5th at p. 1185, original italics.)

Secondary Sources

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

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

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

3714. Ostensible Agency—Physician-Hospital Relationship—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by [***name of physician***]'s [***insert tort theory, e.g., "negligence"***].**

[*Name of plaintiff***] also claims that [***name of hospital***] is responsible for the harm because [***name of physician***] was acting as [his/her/***nonbinary pronoun***/its] [agent/employee/[***insert other relationship***]] when the incident occurred.**

If you find that [*name of physician***]'s [***insert tort theory***] harmed [***name of plaintiff***], then you must decide whether [***name of hospital***] is responsible for the harm. [***Name of hospital***] is responsible if [***name of plaintiff***] proves ~~[***Name of plaintiff***] claims that [***name of hospital***] is responsible for [***name of physician***]'s conduct because [***name of physician***] was [***name of hospital***]'s apparent [employee/agent]. To establish this claim, [***name of plaintiff***] must prove~~ both of the following:**

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

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

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

New November 2021; Revised May 2022

Directions for Use

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

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

Sources and Authority

- Agency Is Actual or Ostensible. Civil Code section 2298.
- "Ostensible Agency" Defined. Civil Code section 2300.

- "Ostensible Authority" Defined. Civil Code section 2317.

- When Principal is Bound by Ostensible Agent. Civil Code section 2334.

- "Where a patient seeks to hold a hospital liable for the negligence of a physician, the doctrine of ostensible agency is now commonly expressed as having two elements: '(1) conduct by the hospital that would cause a reasonable person to believe that the physician was an agent of the hospital, and (2) reliance on that apparent agency relationship by the plaintiff.' Generally, the first element is satisfied 'when the hospital "holds itself out" to the public as a provider of care,' 'unless it gave the patient contrary notice.' Nonetheless, a hospital's 'contrary notice' may be insufficient 'to avoid liability in an emergency room context, where an injured patient in need of immediate medical care cannot be expected to understand or act upon that information.' Reliance upon an apparent agency is demonstrated 'when the plaintiff "looks to" the hospital for services, rather than to an individual physician.' Ultimately, 'there is really only one relevant factual issue: whether the patient had reason to know that the physician was not an agent of the hospital. As noted above, hospitals are generally deemed to have held themselves out as the provider of services unless they gave the patient contrary notice, and the patient is generally presumed to have looked to the hospital for care unless he or she was treated by his or her personal physician. Thus, unless the patient had some reason to know of the true relationship between the hospital and the physician—i.e., because the hospital gave the patient actual notice or because the patient was treated by his or her personal physician—ostensible agency is readily inferred.' " (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1038 [208 Cal.Rptr.3d 363], internal citations omitted.)

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

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

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

- "Neither *Mejia*, *Whitlow*, nor *Markow* is factually on point with this case. Yet all three opinions inform our decision in this case. They rest on the same principle of California law, that although a hospital may not control, direct or supervise physicians on its staff, a hospital may be liable for their

negligence on an ostensible agency theory, unless (1) the hospital gave the patient actual notice that the treating physicians are not hospital employees, and (2) there is no reason to believe the patient was unable to understand or act on the information, or (3) the patient was treated by his or her personal physician and knew or should have known the true relationship between the hospital and physician." (*Wicks, supra,* 49 Cal.App.5th at p. 884.)

Secondary Sources

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

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

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

3905A. Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)

[*Insert number, e.g.,* "1."**] [Past] [and] [future] [physical pain/mental suffering/loss of enjoyment of life/disfigurement/physical impairment/inconvenience/grief/anxiety/humiliation/emotional distress/[***insert other damages***]].**

No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[To recover for future [*insert item of pain and suffering***], [***name of plaintiff***] must prove that [he/she/***nonbinary pronoun***] is reasonably certain to suffer that harm.**

For future [*insert item of pain and suffering***], determine the amount in current dollars paid at the time of judgment that will compensate [***name of plaintiff***] for future [***insert item of pain and suffering***]. [This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to economic damages.]]**

New September 2003; Revised April 2008, December 2009, December 2011, May 2022

Directions for Use

Insert the bracketed terms that best describe the damages claimed by the plaintiff.

If future noneconomic damages are sought, include the last two paragraphs. Do not instruct the jury to further reduce the award to present cash value. (See CACI No. 3904A, *Present Cash Value*, and CACI No. 3904B, *Use of Present-Value Tables*.) The amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585].) Include the last sentence only if the plaintiff is claiming both future economic and noneconomic damages.

For actions or proceedings filed on or after January 1, 2022, and before January 1, 2026 (or if granted a preference under Code of Civil Procedure section 36 before January 1, 2022), the survival action statute allows for recovery of a decedent's noneconomic damages for pain, suffering, or disfigurement. (Code Civ. Proc., § 377.34(b).) (See CACI No. 3919, *Survival Damages*.) Insert only the bracketed terms that apply in a survival action, and modify the instruction to make clear that the damages are for the decedent's pre-death pain, suffering, or disfigurement.

Sources and Authority

- Term-Limited Exception for Survival Damages. Code of Civil Procedure section 377.34(b).

- "One of the most difficult tasks imposed on a fact finder is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. The inquiry is inherently subjective and not easily amenable to concrete measurement." (*Pearl v. City of Los Angeles* (2019) 36

Cal.App.5th 475, 491 [248 Cal.Rptr.3d 508], internal citations omitted.)

- "In general, courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. Admittedly these terms refer to subjective states, representing a detriment which can be translated into monetary loss only with great difficulty. But the detriment, nevertheless, is a genuine one that requires compensation, and the issue generally must be resolved by the 'impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence.' " (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892–893 [103 Cal.Rptr. 856, 500 P.2d 880], internal citations and footnote omitted.)

- "[N]oneconomic damages do not consist of only emotional distress and pain and suffering. They also consist of such items as invasion of a person's bodily integrity (i.e., the fact of the injury itself), disfigurement, disability, impaired enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 300 [213 Cal.Rptr.3d 82].)

- " ' " '[T]here is no fixed or absolute standard by which to compute the monetary value of emotional distress,' " ' and a ' "jury is entrusted with vast discretion in determining the amount of damages to be awarded … ." [Citation.]' " (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1602 [146 Cal.Rptr.3d 585].)

- "Compensatory damages may be awarded for bodily harm without proof of pecuniary loss. The fact that there is no market price calculus available to measure the amount of appropriate compensation does not render such a tortious injury noncompensable. 'For harm to body, feelings or reputation, compensatory damages reasonably proportioned to the intensity and duration of the harm can be awarded without proof of amount other than evidence of the nature of the harm. There is no direct correspondence between money and harm to the body, feelings or reputation. There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation.' " (*Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1664–1665 [28 Cal.Rptr.2d 88], internal citations omitted.)

- "The general rule of damages in tort is that the injured party may recover for all detriment caused whether it could have been anticipated or not. In accordance with the general rule, it is settled in this state that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes nervousness, grief, anxiety, worry, shock, humiliation and indignity as well as physical pain." (*Crisci v. The Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 433 [58 Cal.Rptr. 13, 426 P.2d 173], internal citations omitted.)

- "We note that there may be certain cases where testimony of an expert witness would be necessary to support all or part of an emotional distress damages claim. For example, expert testimony would be

required to the extent a plaintiff's damages are alleged to have arisen from a psychiatric or psychological disorder caused or made worse by a defendant's actions and the subject matter is beyond common experience. We are not addressing such a case here. In this case, the emotional distress damages arose from feelings of anxiety, pressure, betrayal, shock, and fear of others to which [plaintiff] herself could and did testify. Expert testimony was not required." (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1099 [236 Cal.Rptr.3d 473].)

- "The law in this state is that the testimony of a single person, *including the plaintiff,* may be sufficient to support an award of emotional distress damages." (*Knutson, supra,* 25 Cal.App.5th at p. 1096, original italics.)

- "[W]here a plaintiff has undergone surgery in which a herniated disc is removed and a metallic plate inserted, and the jury has expressly found that defendant's negligence was a cause of plaintiff's injury, the failure to award any damages for pain and suffering results in a damage award that is inadequate as a matter of law." (*Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 933 [64 Cal.Rptr.3d 920].)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount in current dollars paid at the time of judgment that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra,* 19 Cal.4th at pp. 646–647.)

- "[R]ecovery for emotional distress caused by injury to property is permitted only where there is a preexisting relationship between the parties or an intentional tort." (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 203 [147 Cal.Rptr.3d 41].)

- "[W]e uphold both the economic and emotional distress damages plaintiffs recovered for trespass to personal property arising from [defendant]'s act of intentionally striking [plaintiff's dog] with a bat." (*Plotnik, supra,* 208 Cal.App.4th at p. 1608 [under claim for trespass to chattels].)

- "Furthermore, 'the *negligent* infliction of emotional distress—anxiety, worry, discomfort—is compensable without physical injury in cases involving the tortious interference with *property rights* [citations].' Thus, if [defendant]'s failure to repair the premises constitutes a tort grounded on negligence, appellant is entitled to prove his damages for emotional distress because the failure to repair must be deemed to constitute an injury to his tenancy interest (right to habitable premises), which is a species of property." (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1299 [173 Cal.Rptr.3d 159], original italics, internal citation omitted.)

- "[U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests." (*Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 156 [184 Cal.Rptr.3d 26].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1850–1854

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:140 et seq. (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.68–1.74

4 Levy et al., California Torts, Ch. 51, *Pain and Suffering*, §§ 51.01–51.14 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.145 et seq. (Matthew Bender)

California Civil Practice: Torts § 5:10 (Thomson Reuters)

~~3903Q~~ 3919. Survival Damages ~~(Economic Damage)~~ (Code Civ. Proc, § 377.34)

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

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

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

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

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

[4. [*Specify other recoverable economic damage.*][;]]

[5. The [pain/ [,/or] suffering/ [,/or] disfigurement] [*name of decedent*] suffered before [his/her/*nonbinary pronoun*] death.]

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

New May 2019; Revised November 2019, May 2020; Renumbered from CACI No. 3903Q and revised May 2022

Directions for Use

Give this instruction if a deceased person's estate claims survival damages for harm that the decedent incurred in the decedent's lifetime. This instruction addresses survival damages in a claim against a defendant who is alleged to have caused the decedent's death. However, survival damages are available for any claim incurred while alive, not just a claim based on the decedent's death. (See *County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 294 [87 Cal.Rptr.2d 441, 981 P.2d 68].) In a case that does not involve conduct that caused the decedent's death, modify the instruction to include the damages recoverable under the particular claim rather than the damages attributable to the death.

Survival damages can include punitive damages and penalties. (See Code Civ. Proc., § 377.34.) Include the bracketed language in the last sentence of the opening paragraph if either or both are sought. If punitive damages are claimed, give the appropriate instruction from CACI Nos. 3940–3949.

If items 1 and 2 are given, do not also give CACI No. 3903A, *Medical Expenses—Past and Future (Economic Damages)*, and CACI No. 3903C, *Past and Future Lost Earnings (Economic Damages)*, as

the future damages parts of those instructions are not applicable. Other 3903 group instructions may be omitted if their items of damages are included under item 3 and must not be given if they include future damages.

Though ~~D~~damages for pain, suffering, or disfigurement are generally not recoverable in a survival action (except at times in an elder abuse case), Code of Civil Procedure section 337.34(b) permits the recovery of these noneconomic damages by the decedent's personal representative or successor in interest for those actions or proceedings filed on or after January 1, 2022, and before January 1, 2026 (or if granted a preference under Code of Civil Procedure section 36 before January 1, 2022). (Code Civ. Proc., § 377.34; see *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1265 [45 Cal.Rptr.3d 222]; see also instructions in the 3100 Series, Elder Abuse and Dependent Adult Civil Protection Act.)

For actions or proceedings covered by section 337.34(b), and depending on the case, include item 5 (an item of noneconomic damages) and give CACI No. 3905, *Items of Noneconomic Damage*, with a version of CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*, that includes only pain, suffering, or disfigurement. Note that many Sources and Authority below do not recognize the availability of noneconomic damages as a result of this temporary change in law. (Sen. Bill 447; Stats. 2021, ch. 448.)

Sources and Authority

- Survival Damages. Code of Civil Procedure section 377.34.
- Term-Limited Exception for Survival Damages. Code of Civil Procedure section 377.34(b).

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

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

- "The second category requires more discussion. That consists of the reasonable value of 24-hour

nursing care that Decedent *would have provided* to his wife *after* his death and before she passed away in 2014, nearly four years later. As appellants explain this claim, 'to the extent his children were forced to provide gratuitous home health care and other household services to [wife] up to the time of her death, [Decedent's] estate is also entitled to recover those costs as damages since he had been providing those services for his wife before he died.' … The parties disagree as to whether such damages are recoverable. Appellants contend that they are properly recovered as ' "lost years" damages,' representing economic losses the decedent incurred during the period by which his life expectancy was shortened; [defendant], in contrast, contends that they are not recoverable because they were not 'sustained or incurred before death,' as required by section 377.34. We conclude that [defendant] has the better argument." (*Williams, supra,* 27 Cal.App.5th at p. 238, original italics.)

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

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

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

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

Secondary Sources

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

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

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

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

4000. Conservatorship—Essential Factual Elements

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

1. **That [*name of respondent*] [has a mental disorder/is impaired by chronic alcoholism]; ~~[~~and~~]~~**

2. **That [*name of respondent*] is gravely disabled as a result of the [mental disorder/chronic alcoholism]~~[; and/.]~~**

~~[3. That [*name of respondent*] is unwilling or unable voluntarily to accept meaningful treatment.]~~

New June 2005; Revised June 2016, May 2022

Directions for Use

~~There is a split of authority as to whether element 3 is required. (Compare *Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1467 [257 Cal.Rptr. 860] ["[M]any gravely disabled individuals are simply beyond treatment."] with *Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369] [jury should be allowed to consider all factors that bear on whether person should be on LPS conservatorship, including willingness to accept treatment].)~~ Give CACI No. 4002, *"Gravely Disabled" Explained*, with this instruction.

Sources and Authority

- Right to Jury Trial. Welfare and Institutions Code section 5350(d).
- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).
- "The Lanterman-Petris-Short Act (the act) governs the involuntary treatment of the mentally ill in California. Enacted by the Legislature in 1967, the act includes among its goals ending the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious mental disorders, guaranteeing and protecting public safety, safeguarding the rights of the involuntarily committed through judicial review, and providing individualized treatment, supervision and placement services for the gravely disabled by means of a conservatorship program." (*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1008–1009 [36 Cal.Rptr.2d 40, 884 P.2d 988].)

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

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

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

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

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

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

- "We ... hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons." (*Conservatorship of Davis, supra,* 124 Cal.App.3d at p. 328, disapproved on other grounds in *Conservatorship of K.P., supra,* 11 Cal.5th at p. 717.)

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

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

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

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

Secondary Sources

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

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

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

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

4002. "Gravely Disabled" Explained

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

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

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

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

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

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

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

Directions for Use

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

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

The ~~last~~ next to last paragraph regarding the likelihood of future deterioration may not apply if the respondent has no insight into the respondent's mental disorder. (*Conservatorship of Walker* (1989) 206

Cal.App.3d 1572, 1576–1577 [254 Cal.Rptr. 552].)

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

Sources and Authority

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

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

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

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

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

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

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

- "We ... hold that a person sought to be made an LPS conservatee subject to involuntary confinement

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

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

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

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

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

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

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

Cal.Rptr.3d 298, 489 P.3d 296].)

Secondary Sources

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

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

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

ITC CACI 22-01
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
All except as noted below	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	Agree (VF-410, 1810, VF-2304, 3714, 3905A, and 4000)	No response required.
	Orange County Bar Association by Daniel S. Robinson, President	Agree (1009B, 1306, 1621, 1810, 2334, 2522A, 2522B, 2522C, VF-2507A, VF-2507B, VF-2507C, 2754, 2765, 2769, 2770, 3905A, 4000, and 4002)	No response required
VF-410. Statute of Limitations—Delayed Discovery—Reasonable Investigation Would Not Have Disclosed Pertinent Facts (Revise)	Bruce Greenlee Attorney Richmond	New sentence added to the Directions for Use: change "non-discovery" to "nondiscovery. Prefixes should not be hyphenated unless the unhyphenated form makes a different word (e.g., re-cover and recover).	The committee agrees and has unhyphenated *nondiscovery*. The committee has also unhyphenated *delayed discovery* in the sentence because it is not being used as a compound adjective.
	Orange County Bar Association by Daniel S. Robinson, President	Disagree. "There is no authority for the suggested revisions to the instruction. Additionally, for instance, adding the language 'discover, or' to the first paragraph titled '2' would appear to cause greater confusion as the jury might wonder what is the difference between 'discover…facts' and 'know of facts'."	The change is being made to conform the verdict form to the language of CACI No. 455, *Statute of Limitations—Delayed Discovery*, which uses this phrasing. The various cases in the Sources and Authority for that instruction support the revision.
		"The suggested revision to the Directions for Use is helpful."	No response required.

Instruction(s)	Commenter	Comment	Committee Response
1009B. Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	a. We agree with the proposed revisions to the instruction but believe that another element is needed. *Sandoval v. Qualcomm Inc.* (2021) 12 Cal.4th 256, 274, indicates that for the hirer to be liable for negligence to an employee of an independent contractor based on the hirer's retained control, the employee must have been working on a task within the independent contractor's scope of work. This is because ' " 'retained control' refers specifically to a hirer's authority over work entrusted to the contractor." (*Ibid*.) We propose the following as new element 2: "2. That [*specify nature of work*] was part of the work that [*name of defendant*] entrusted to [*name of contractor*];"	The committee disagrees to the extent that another element is suggested. The Court in *Sandoval* discussed this requirement in the context of retained control (element 1). The committee, therefore, has refined element 1, and has added a sentence to the Directions for Use on the issue.
		b. We would add to the Sources and Authority language from *Sandoval* supporting new element 2: " 'A hirer "retains control" where it retains a sufficient degree of authority over the manner of performance of the work entrusted to the contractor. . . . So "retained control" refers specifically to a hirer's authority over work entrusted to the contractor, i.e., work the contractor has agreed to perform.' (*Sandoval*, *supra*, 12 Cal.5th at p. 274.)"	The committee agrees that language on the issue of contracted work should be added to the Sources and Authority, and recommends adding another excerpt from *Sandoval*, as suggested.
	Consumer Attorneys of California (CAOC), by Shounak S. Dharap Jointly with: The Arns Law Firm, The Veen Firm	On behalf of Consumer Attorneys of California (CAOC), California's state wide, nonpartisan and non-profit association of plaintiff's attorneys, we write to respectfully submit the following comment to the proposed revision to CACI 1009B. We are attorneys at the Arns Law Firm and the Veen Firm who have dedicated our practice to representing injured workers. In many cases, our clients' livelihoods depend on the jury instruction and underlying legal framework for hirer liability on multiemployer job sites set forth in CACI 1009B.	No response required.

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	San Francisco	We therefore write on behalf of CAOC to submit public comment suggesting additional proposed revisions to CACI 1009B that will build upon the work the Committee has done thus far and further align the revised instruction with the Supreme Court's conclusion in *Sandoval v. Qualcomm Inc.* (2021) 12 Cal.5th 256 that only a hirer that fully and effectively delegates work to a contractor may be shielded from liability for injuries suffered by a contractor's employee. Our additional proposed revisions are in blue. A discussion of the reasoning behind the proposed changes follows. A clean version of the proposed instruction is attached to his letter as Attachment 1. [Clean version omitted from this comment chart.]	See committee responses to the specific suggestions, below. The committee thanks CAOC for submitting its suggestions in track changes.
		I. FURTHER PROPOSED REVISIONS **1009B. Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control** [*Name of plaintiff*] **claims that** [**he/she**/*nonbinary pronoun*] **was harmed by an unsafe condition while employed by** [*name of ~~plaintiff's employer~~contractor*] **and working on** [~~*name of defendant*~~]~~'s~~ **~~property~~** [*specify nature of work that ~~defendant hired the contractor to perform~~ created the unsafe condition*]. **To establish this claim**, [*name of plaintiff*] **must prove all of the following**: **1. ~~That~~** ~~[*name of defendant*]~~ ~~[owned/leased/occupied/controlled]~~ **~~the property;~~** **~~2~~. That** [*name of defendant*] **retained the right to exercise some control over ~~safety conditions at the worksite~~ the** [*name of contractor*]'s **manner of performance of** [*specify nature of work*] **the work**; **~~3~~2. That** [*name of defendant*] **~~negligently~~ actually exercised** [**his/her**/*nonbinary pronoun*/**its**] **retained**	See the committee responses to CAOC's specific comments, below.

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		control over ~~safety conditions by~~ that work by [*specify alleged ~~negligent acts or omissions~~ negligence of defendant*]; **~~4~~3**. **That** [*name of plaintiff*] **was harmed**; and **~~5~~4**. **That** [*name of defendant*]'s **negligent exercise of** [**his/her**/*nonbinary pronoun*/**its**] **retained control ~~over safety conditions was a substantial factor in causing~~ affirmatively contributed in some way to** [*name of plaintiff*]'s **harm**. **Directions for Use** This instruction is for use if a dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. This instruction should not be used if the dangerous condition was created by work the contractor was not hired to perform. (See *Sandoval v. Qualcomm Inc.* (2021) 12 Cal.5th 256, 273.) The test for whether the work is "contracted" work subject to this instruction, as opposed to "noncontract" work outside its scope, is whether the defendant entrusted or transferred control over the work to the contractor prior to the injury. ¶ The basis of liability is that the defendant retained control over the ~~safety conditions at the worksite~~ manner of performance of some part of the work entrusted to the contractor. (*Sandoval ~~v. Qualcomm Inc.~~* (~~2021~~), 12 Cal.5th ~~256~~,at 274.) Both retaining control and actually exercising control over retst of the work is required because hirers who fully and effectively delegate work to a contractor owe no tort duty to that contractor's workers. (See *id.*) For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries based on unsafe conditions not discoverable by the plaintiff's employer, see CACI No.	

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		1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions.* For an instruction for injuries based on the property owner's providing defective equipment, see CACI No. 1009D, *Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment*. […] **Sources and Authority** […] "~~[A]ffirmative contribution is a different sort of inquiry than substantial factor causation. For instance, a fact finder might reasonably conclude that a hirer's negligent hiring of the contractor was a substantial factor in bringing about a contract worker's injury, and yet negligent hiring is not affirmative contribution because the hirer's liability is essentially derivative of the contractor's conduct. Conversely,~~ [A]affirmative contribution does not itself require that the hirer's contribution to the injury be substantial." (*Sandoval, supra,* 12 Cal.5th at p. 278), internal citations omitted.)	
		II. DISCUSSION **A. The Directions for Use Should Note That the Threshold Question to Application of this Instruction Is Whether the Work that Created the Dangerous Condition was Contracted or Noncontract Work** As the Supreme Court observed in *Sandoval*, *supra*, 12 Cal.5th 256, attachment of the rule against hirer liability requires a preliminary "transfer of control" of the condition-creating work from the hirer to the contractor. (*See id.* at p. 273 [transfer of control of the condition-creating work triggers the presumption of delegation of tort duties]; *id.* at p. 271 [the presumption attaches only after the hirer entrusts control of the work to the contactor].) This threshold question recognizes that the bar against a	The committee has refined the Directions for Use to note that the instruction should not be used when an injury results from work not entrusted to the contractor.

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		hirer's liability has historically been grounded on the principle that "hirers typically hire independent contractors precisely for their greater ability to perform the contracted work safely and successfully." (*Id.* at p. 269.) Thus, the notion that a hirer delegates control over all contracted work presupposes that the work at issue is, in fact, "work the contractor has agreed to perform" either by written contract or informal agreement. (*Id.* at p. 274.) It follows that if a hirer has reserved control over particular work and not entrusted it to the contractor, liability for injury flowing from that work must lie with the hirer. This threshold question can be traced back to the common law rule regarding hirer liability, under which a hirer was generally not responsible for injuries resulting from a contractor's performance of work entrusted to a contractor. (*See Privette*, *supra*, 5 Cal.4th at 693.) Then, too, the rule presupposed that the injury arose from the work the contractor was hired to perform. (*See ibid*. ["Central to this rule of nonliability was the recognition that a person who hired an independent contractor had 'no right of control as to the mode of doing *the work contracted for*.'"] [italics added].) Over time, policy-driven exceptions swallowed the rule to the point where "the rule is now primarily important as a preamble to the catalog of its exceptions." (*Privette*, *supra*, 5 Cal.4th at p. 693.) One such exception qualified the growing recognition among courts that a landowner undertaking dangerous activity should not escape liability simply by hiring a contractor to do the work. (*Id.* at pp. 693-94.) California adopted this "peculiar risk doctrine," which declared that a hirer had a duty to ensure precautions were taken to protect contracted workers from injuries arising out of inherently dangerous work. (*See Woolen v.*	

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		Aerojet General Corp. (1962) 57 Cal.2d 407, 410 *overruled by Privette*, at p. 689.) Still, the threshold question of whether the injuries arose out of contracted work remained. (*See Woolen*, at p. 410 [recognizing that the peculiar risk doctrine presupposes an agreement between the hirer and contractor entrusting the contractor to do that work].) In *Privette*, *supra*, 5 Cal.4th at p. 693, the Supreme Court reversed course and limited the peculiar risk doctrine as applied to hirers of contractors, holding that, even where the contracted work is likely to create a peculiar risk of harm, a hirer is not liable for a contracted worker's injury. (*Privette*, at pp. 691-92.) In establishing this exception, the Court reasoned that the California workers' compensation system was founded on the same policy rationales underlying the peculiar risk doctrine and had therefore obviated the need for the doctrine as a means for civil recovery. (*See ibid.*) As before, the Court's application of the no-liability rule was premised on the contracted nature of the work that created the unsafe condition. (*See Privette*, at p. 695 [the "critical inquiry" underlying the peculiar risk doctrine and no-liability limitation relates to "the work for which the contractor was hired"].) Half a century later, the Court addressed a resurging acknowledgement among courts that workers' compensation did not alleviate the burden on the contractor where a third party was actually responsible for a workers' injury. (*See Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 213-14 [hereafter *Hooker*].) Under *Hooker*, if a hirer retains control over the work entrusted to the contractor, and its exercise of that control affirmatively contributes to a worker's injury, the hirer can still be liable. (*Ibid*.)	

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		As the *Hooker* rule became the focus of exception to *Privette*, the threshold question that had persisted since common law faded from the foreground of the analysis. (*See*, *e.g.*, *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 586 [appellant appealed the issue of whether the defendant retained control under *Hooker* but not the threshold issue of transfer of control despite facts supporting both]; *accord Sandoval*, *supra*, 12 Cal.5th at p. 275, fn. 5 [recognizing that the facts in *Regalado* relating to retained control could also have supported an argument as to the threshold question of contracted versus noncontract work].) Courts and litigants can hardly be faulted for overlooking the threshold analysis in favor of the *Hooker* test; after all, the two rules are deceptively similar. As the Supreme Court observed in *Sandoval*: "[a]gainst the backdrop of no hirer duty respecting the manner of performance of work entrusted to a contractor" (*id.* at p. 275), "it will not always be easy to distinguish between (a) contracted work over which the hirer retained control, and (b) noncontract work in which the contractor had some involvement but which the hirer controlled to such a great extent that we would not say it was *entrusted* to the contractor" (*id.* at p. 275, fn. 5). Under the facts of *Sandoval*, the Court found that the defendant, Qualcomm, did not have a tort duty to a contractor's employee who was injured by an arcing circuit breaker. The Court found that because Qualcomm turned over control of the switchgear room in which the injury-causing circuit was located, the presumption of delegation applied, "subject only to the retained control exception[.]" (*Id.* at p. 272.) But the Court noted that if the injury had occurred *before* Qualcomm turned over control of the circuit to the contractor, it might have found that "no	

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		transfer of control of tort duties from Qualcomm to the contractor had yet occurred." (*Id.* at p. 273.) In reaching this conclusion, the Court analyzed blurred line between initial transfer of control and retained control in the context of another case involving hirer liability for a contract worker's injury—*Regalado*, *supra*, 3 Cal. App. 5th 582. (*See Sandoval*, *supra*, 12 Cal.5th at p. 275, fn. 5.) In *Regalado*, an employee of a contractor hired to install a pool was injured when he ignited a propane heater in an underground vault, causing an explosion. The Court of Appeal for the Fourth District held the homeowner-hirer liable for the injuries because, *inter alia*, the hirer participated in the installation of the underground vault and propane line but failed to obtain the proper permits despite promising to do so. (*Regalado*, at p. 597.) Discussing the case, the *Sandoval* Court emphasized that "it might be difficult to say whether the hirer in *Regalado* […] was performing the noncontract work of obtaining permits, or retaining control over the permitting aspect of the contracted work." (*Sandoval*, at 275 n. 5.) But regardless of the similarity between the two tests, *Sandoval*, *supra*, 12 Cal.5th 256, unequivocally clarified that the threshold question of the noncontract nature of the condition-creating work stands apart from *Hooker* and requires a determination antecedent to the application of rule against hirer liability. (*See Sandoval*, at pp. 272-73; *id.* at p. 275, fn. 5.) Under this refreshed framework, the analysis must begin and may end with the initial question: whether the work that created the unsafe condition was contracted work entrusted to the contractor or noncontract work outside the scope of the contractor's agreement with the hirer. If it *is* contracted work, then the next step is the	

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		analysis of whether the hirer nevertheless retained control over that work. But if it is noncontracted work, then the analysis ends and the hirer may be liable.	
		B. The Instruction Should Clarify that the "Retained Control" Element of the Test Required Only that the Defendant Retained the *Right to Exercise* Control The gateway element of the *Hooker* test*,* retained control, is met where a hirer "retains merely the right" to exercise control over the method or manner of performing the work entrusted to the contractor. (*Sandoval*, 12 Cal.5th at p. 277; *id*. at p. 274-75.) Retained control is a broadly inclusive standard that is easily met where the hirer is a general contractor with authority over worksite safety. (*See Sandoval*, at pp. 275-76; *Hooker*, *supra*, 27 Cal.4th at pp. 202-03 [triable issues of fact regarding retained control where the hirer retained the right to take corrective safety measures with respect to the contractor's performance of its work]; *Tverberg v. Fillner Construction* (2012) 202 Cal.App.4th 1439, 1448 (hereafter *Tverberg II*) [triable issues regarding retained control where the hirer assumed responsibility for workers working near a series of uncovered bollard holes and the plaintiff was injured by one of the holes while performing the unrelated task of erecting a canopy in the area].) Thus, the test should be whether a hirer retained the *right to exercise* control over the manner of the condition-creating work.	The committee believes that element 1 adequately states the requirements of a hirer's "retained control" as set forth in *Sandoval*.
		"**C. The Instruction Should Clarify that the 'Retained Control' Element of the Test Requires Only The Right to Exercise *Some* Control Over Manner of the Work** The proposed revision, as currently stated, states the requirement as retained control over the manner of the contractor's work. This is a more stringent requirement	The committee agrees in part. The committee believes that element 1 adequately states the requirements of a hirer's "retained control" as set forth in *Sandoval* but has added "some," as suggested, for additional clarity.

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		than that established by the Court in *Sandoval*: 'whether the hirer retained a *sufficient degree* of control over the manner of performing the contracted work.' (*Sandoval*, 12 Cal.5th at 274.) In discussing what constitutes a sufficient degree of control in the context of *Hooker*, the Court clarified that 'some' control is sufficient. (*Id.* at 275.) Thus, the instruction should clarify that the defendant need only retain 'some' control over the manner of the performance of the work."	
		D. The Instruction Should Qualify Affirmative Contribution by Recognizing that a Defendant Need only Affirmatively Contribute to the Injury *In Some Way* In clarifying that affirmative contribution "does not require that the hirer's contribution to the injury be substantial[,]" the *Sandoval* Court established that *some* affirmative contribution is sufficient to meet the test. The Court's reframing of this element clarified that it turns less on the *degree* of the hirer's contribution to the injury and more on whether the hirer's exercise of retained control contributed to the injury "in a way that isn't merely derivative of the contractor's contribution to the injury." (Sandoval, supra, 12 Cal.5th at p. 277.) Thus, the Court's distinction between legal causation and the lower degree of contribution required to show affirmative contribution should be specifically highlighted to prevent confusion by a jury that may also be read a separate instruction relating to legal causation.	The committee does not see improved clarity or accuracy in the suggested phrasing for affirmative contribution (element 4).
		E. The Sources and Authorities Should Omit Dicta Relating to Negligent Hiring Because It Conflicts with the Caselaw and Goes Beyond the Court's Directive in *Sandoval*	The standard for inclusion in the Sources and Authority is that the excerpt would be of interest and relevant to *CACI* users. Because the court expressly stated that

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		The Committee's proposed revisions to the Sources and Authorities section contains a quote from *Sandoval* discussing negligent hiring. This explanatory *dicta*, which follows a statement of law that affirmative contribution is not the same as substantial factor causation, seeks to provide an example of a situation where a fact-finder might find substantial causation but not affirmative contribution. But this statement generalizes the body of law regarding negligent hiring as affirmative contribution and paints the issue as a black and white in a manner not reflected in the complex jurisprudence on the subject. Moreover, the inclusion of this statement within 1009B creates a potential conflict with CACI 426, which acknowledges the holding in *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654 and states: "It appears that liability may also be imposed on the hirer of an independent contractor for the negligent selection of the contractor." This conflict would require revisions to CACI 426 on the basis of the Court's dicta and would go beyond the Court's directive in *Sandoval* to revise 1009B in a manner consistent with its holding.	substantial factor causation is not the correct standard, the committee believes this excerpt meets the standard for inclusion.
	Bruce Greenlee Attorney Richmond	"I think that the proposed revisions capture the holdings of *Sandoval* well and the revisions to the last paragraph of the DforU [Directions for Use] on 'affirmative contribution' are well done. I'm glad to see that the question of negligent exercise by a failure to act has been retained."	No response required.
		"However, 'pursuant to' is considered legalese to be avoided in legal writing circles. Change to 'under.' "	The committee believes *pursuant to* is sufficiently clear in the context of the Directions for Use.

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		There's an orphan bullet in the Sources and Authority.	The appearance of an orphan bullet is the result of track changes. No orphan bullets exist in the Sources and Authority.
1306. Sexual Battery—Essential Factual Elements (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	a. Proposed new (d) and (e) refer to "a sexual organ" and "[a/an] sexual organ/anus/. . . ." We believe the jury would better understand the instruction if the person to whom the sexual organ belongs were identified. We believe that person is either the defendant or someone else (not the plaintiff).	The committee understands that the Legislature wrote the statute to be gender neutral. The committee has maintained the statute's use of a/an to ensure that persons of any gender could be liable for intentionally making sexual contact after a condom has been removed without consent.
		b. Civil Code section 1708.5, subdivision (d)(1) defines "intimate part" to include "the breast of a female." We believe proposed new (d) and (e) are overbroad because they refer to a "breast" with no limitation. This could be remedied by inserting the words "of a female" after "breast" in (d) and (e), although that seems grammatically awkward. Alternatively, (d) and (e) could be rewritten to include the limitation, or language could be added to the Directions for Use stating that the instruction should be modified if there is a factual question whether the breast of a female is at issue.	To avoid potentially unnecessary or clunky phrasing throughout element 1, the committee recommends adding a new paragraph to the Directions for Use on the meaning of *intimate part* as it pertains to the instruction's use of the term *breast*.
		c. We believe "has been removed" in (d) should be "had been removed" and "removed" in (e) should be "had removed."	The committee agrees and has refined the language as suggested.
		d. Accordingly, we suggest the following revisions to (d) and (e): "(d) That [*name of defendant*] caused contact between ~~a~~ [*name of defendant*/*name of other person*]'s sexual organ, from which a condom ~~has~~ had been removed, and [*name*	The committee thanks CLA for submitting its suggestions in track changes. See the committee responses to specific comments, above.

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		of plaintiff]'s [sexual organ/anus/groin/buttocks/[or] breast];] "[OR] "(e) That [*name of defendant*] caused contact between ~~[a/an]~~ [*name of defendant*/*name of other person*]'s [sexual organ/anus/groin/buttocks/[or] breast] and [*name of plaintiff*]'s sexual organ from which [*name of defendant*] had removed a condom;]"	
	Bruce Greenlee Attorney Richmond	"In new option (d), remove comma after 'sexual organ.' "	The committee has tracked the language of the statute, which is clear with the comma.
		"Maybe add statute CC 1708.5 to the title as a parenthetical as this seems to be a strictly statutory cause of action."	For consistency, the committee has added the statutory information as a parenthetical in the instruction's title.
1621. Negligence— Recovery of Damages for Emotional Distress— No Physical Injury— Bystander— Essential Factual Elements) (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	a. We agree with the proposed revisions to element 2 of the instruction.	No response required.
		b. We would revise element 3 to clarify the requirement of contemporaneous observation, particularly now that element 2 allows virtual presence: "3. That [*name of plaintiff*] was ~~then~~ aware at the time the [*describe event*] occurred that the [*e.g., traffic accident*] was causing [injury to/the death of] [*name of victim*];"	The committee believes that element 3 already states the requirement of contemporaneous observation.
	Civil Justice Association of California (CJAC) by Jaime Huff, Vice President	Bystander recovery for emotional distress through a virtual presence, which entails no physical harm, can be subject to abuse. Therefore, it is important the jury instruction for this recovery mirrors the law by explicitly stating that the virtual presence be contemporaneous and via live-	The committee agrees with the commenter's summary of the case law but does not believe that the revision proposed is vague or overbroad. Because technological developments outpace updates to the *CACI* publication, the

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		streaming. The proposed wording is vague and overly broad. Case law establishes the perception be contemporaneous, and in the case of virtual perception, take place in real time. In *Thing vs. La Chusa et al*, the California Supreme Court noted that a bystander plaintiff can recover damages when they: "personally and contemporaneously perceive the injury-producing event and its traumatic consequences." [Footnote citation omitted.] And in *Ko v. Maxim Healthcare Services*, the Court of Appeals recognized that "personally and contemporaneously" was satisfied virtually through a real-time, streamed audiovisual connection. [Footnote citation omitted]"	committee prefers the bracketed text *specify technological means* to identifying just one method (live-streaming) for a plaintiff to perceive an event. And as noted in the response to CLA's comment, above, the committee believes that element 3 already states the requirement of contemporaneous observation.
		Accordingly, CJAC requests the following clarifying changes to the CACI 1621 instruction provided in blue: [Instruction text omitted] 2. That when the [*describe event, e.g., traffic accident*] that caused [*injury to/the death of*] [*name of victim*] occurred, [*name of plaintiff*] was [*virtually*] present at the scene personally and contemporaneously [through [*live-streaming in real time*]]; [remaining instruction text omitted]	The committee does not see improved clarity in adding personally and contemporaneously to element 2. And for the reasons stated in the response above, the committee declines to rephrase technological means in the bracket.
		We also recommend amending the Directions for Use to provide the holding in the *Ko v. Maxim Healthcare* decision that clarifies the virtual presence should be via a streaming technology in real time. Include the optional language in element 2 only if the plaintiff claims virtual presence at the scene through technological means, and specify the technology used to assist the jury in understanding the concept of "virtual" presence. As held in *Ko*, the plaintiffs were virtually	The Directions for Use and the Sources and Authority already both include a citation to and a direct quote from the *Ko* case. As the court in *Ko* observed, "technology for virtual presence has developed dramatically, such that it is now common for families to experience events as they unfold through the livestreaming of video and audio. Recognition of an NIED

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		present via modern technology that "streamed" the subject assault audio and video in "real time." (See *Ko v. Maxim Healthcare Services, Inc.* (2020) 58 Cal.App.5th 1144, 1159 [272 Cal.Rptr.3d 906, 919].)	claim where a person uses *modern technology* to contemporaneously perceive an event causing injury to a close family member is consistent with the Supreme Court's requirements for NIED liability and the court's desire to establish a bright-line test for bystander recovery." (*Ko v. Maxim Healthcare Services, Inc.* (2020) 58 Cal.App.5th 1144, 1146–1147, emphasis added.) The committee understands the commenter's concern but believes the issue of whether a particular technology is sufficiently akin to "livestreaming" will be a question for the jury.
2334. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements (Revise)	Karen M. Bray Attorney Horvitz & Levy LLP Burbank	"We write to support the Advisory Committee's proposed additions and revisions to CACI No. 2334, *Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits—Essential Factual Elements*. We believe that the elements listed in the new version of the instruction accurately reflect the law, as described in the recent decision *Pinto v. Farmers Insurance Exchange* (2021) 61 Cal.App.5th 676."	No response required.
		"However, we believe that the final sentence of the instruction should be omitted (i.e., 'An insurance company's conduct is unreasonable when, for example, it does not give at least as much consideration to the interests of the insured as it gives to its own interests'). Whether an insurer's conduct amounts to bad faith must be evaluated under all of the circumstances pertinent to a particular case. (*Wilson v. 21st Century Ins. Co.* (2007) 42	The comment is beyond the scope of the invitation to comment. The final sentence of the instruction was added after public comment in the last release. As noted in the committee's responses in November 2021, the committee believes that the final sentence is a correct statement of the law. (See *Pinto, supra,* at p. 692.) See Judicial Council of Cal., Advisory Com. Rep., Jury Instructions: Civil Jury Instructions

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		Cal.4th 713, 723; *Walbrook Ins. Co. v. Liberty Mutual Ins. Co.* (1992) 5 Cal.App.4th 1445, 1455–1456.) The final sentence of the instruction proposed by the Committee conflicts with that principle by making a single factor determinative, i.e., an insurer has acted unreasonably if it 'does not give at least as much consideration to the interests of the insured as it gives to its own interests.' But that may not always be true. For example, an insurer may refuse a settlement offer because (1) there is a dispute whether the claim is covered, and (2) it wants to avoid paying policy limits for one insured when there is another insured under the policy. The first reason is improper and unreasonable because it places the interests of the insurer in avoiding paying out on a policy over the interests of the insured in avoiding personal liability. (*Blue Ridge Ins. Co. v. Jacobsen* (2001) 25 Cal.4th 489, 502; *Samson v. Transamerica Ins. Co.* (1981) 30 Cal.3d 220, 237; *Johansen v. California State Auto. Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 15–16; *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658, 660.) The second reason, however, is an independently proper basis to refuse a settlement offer, because an insurer's duty of good faith extends to all of its insureds, and it cannot pay policy limits to settle a claim against one insured when doing so would leave another insured without coverage. (*Shell Oil Co. v. National Union Fire Ins. Co.* (1996) 44 Cal.App.4th 1633, 1645; *Lehto v. Allstate Ins. Co.* (1994) 31 Cal.App.4th 60, 72–75; *Strauss v. Farmers Ins. Exchange* (1994) 26 Cal.App.4th 1017, 1019,1021–1022; *Palmer v. Financial Indem. Co.* (1963) 215 Cal.App.2d	(Release 40) (Nov. 19, 2021), at https://jcc.legistar.com/View.ashx?M=F&ID=9932038&GUID=BAFAE3B4-EB72-4297-B851-A21E9005EA89.

Instruction(s)	Commenter	Comment	Committee Response
		419, 426–427, 431.) Nevertheless, the final sentence of CACI No. 2334 proposed by the Committee would erroneously direct the jury to find that the insurer acted unreasonably notwithstanding the fact that the insurer had a legally valid basis for refusing an offer. Moreover, the requirement that an insurer give equal consideration to the interests of its insureds is a broad, general concept that is already addressed in CACI No. 2330, the introductory instruction that provides an overview of the obligation of good faith and fair dealing: 'To fulfill its implied obligation of good faith and faith dealing, an insurance company must give at least as much consideration to the interests of the insured as it gives to its own interests.' Reiterating that principle in CACI No. 2334 does not provide the jury with any guidance or clarification concerning the specific conduct that a plaintiff must prove to demonstrate the form of bad faith the plaintiff has alleged, i.e., a refusal of a settlement offer without proper cause. We accordingly suggest that the Committee simply eliminate that final sentence."	
	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A.	a. We agree with the proposed revisions to the instruction, except that we would change "[or]" after the first alternative element 6 to "[and/or]" and provide an option to renumber the second alternative element 6 as element 7 because we believe both versions of element 6 should be given when the plaintiff claims both an excess judgment and other damages.	The committee understands the commenter's concern that both could be at issue and recommends addressing the possibility in the Directions for Use, rather than using a bracketed [and/or] between the options, which could be confusing.

Instruction(s)	Commenter	Comment	Committee Response
	Ginsburg, Chair	b. Although it is beyond the scope of the invitation to comment, we would revise element 5 for greater clarity and because we believe the reference to some conduct other than failure to accept the settlement demand is confusing and unnecessary: "5. That [*name of defendant*]'s failure to accept the settlement demand was ~~the result of~~ unreasonable ~~conduct by [*name of defendant*~~]; [and]"	As acknowledged by the commenter, the comment is beyond the scope of the invitation to comment. The committee addressed the phrasing of this element in the last release. See Judicial Council of Cal., Advisory Com. Rep., Jury Instructions: Civil Jury Instructions (Release 40) (Nov. 19, 2021), at https://jcc.legistar.com/View.ashx?M=F&ID=9932038&GUID=BAFAE3B4-EB72-4297-B851-A21E9005EA89.
		c. Although it is beyond the scope of the invitation to comment, we believe the first sentence in the second paragraph after the elements refers to a settlement demand that is reasonable in amount and should explicitly so state. The second sentence then makes it clear that a settlement demand that is reasonable in amount my be unreasonable for another reason: "A settlement demand for an amount within policy limits is reasonable in amount if . . . ."	As acknowledged by the commenter, the comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in a future release.
	Civil Justice Association of California (CJAC) by Jaime Huff, Vice President	We recommend striking the example provided in the instruction on pages 20-21. An insurance company's unreasonable conduct may be shown by its action or by its failure to act. ~~An insurance company's conduct is unreasonable when, for example, it does not give at least as much consideration to the interests of the insured as it gives to its own interests.~~ It is unnecessary to provide an example in this instruction. In addition, the example provided in this instruction could also be viewed as prejudicial depending on the case. Our preference is that no example be provided in this instruction. If Judicial Council opts to use examples, it	See the committee response to the comment of Karen Bray on this instruction, above.

Instruction(s)	Commenter	Comment	Committee Response
		should provide examples of both what does, and what does not, constitute reasonable conduct and do so in the Directions for Use portion of the instruction rather than in the jury instruction itself.	
	David Goodwin Attorney Covington & Burling LLP San Francisco	Disagree. "I write to oppose the proposed revision to Instruction No. 2334, which concerns a claim for 'bad faith failure to settle.' CACI should leave the current version of Instruction No. 2334 as is. The proposed revision requires an insurer's refusal to accept a reasonable settlement offer to be an 'unreasonable' refusal. The revision is based on a recent appellate decision, Pinto v. Farmers Ins. Exch. (2021) 61 Cal. App. 5th 676, 688, which adds that requirement. However, Pinto cites no California Supreme Court authority for its new requirement and none exists: all of the California Supreme Court cases addressing a 'bad faith failure to settle' claim hold only that an insurer has a duty to accept reasonable settlement offers and an insurer breaches that duty when it fails to do so. In fact, the California Supreme Court has held that an insurer that fails to accept a reasonable settlement offer on the ground that it believes the claim is not covered can be subject to bad faith liability, which necessarily means that the insurer's conduct (apart from its refusal to accept the settlement offer) can be 'reasonable' yet still subject to liability. See Johansen v. California State Auto. Ass'n Interins. Bureau (1975) 15 Cal.3d 9, 15-16; see also, e.g., Samson v. Transamerica Ins. Co. (1981) 30 Cal.3d 220, 243; Hamilton v. Maryland Cas. Co. (2002) 27 Cal.4th 718, 724-25.	The comment is beyond the scope of the invitation to comment. Revisions based on *Pinto* were approved by the council in November 2021. See Judicial Council of Cal., Advisory Com. Rep., Jury Instructions: Civil Jury Instructions (Release 40) (Nov. 19, 2021, at https://jcc.legistar.com/View.ashx?M=F&ID=9932038&GUID=BAFAE3B4-EB72-4297-B851-A21E9005EA89.

Instruction(s)	Commenter	Comment	Committee Response
		The current instruction makes sense and is far easier for courts, parties, and juries to address. As things currently stand, a 'bad faith failure to settle' action turns on a simple analysis of whether a settlement offer is reasonable: The jury considers the likelihood of liability, and whether, if liability is imposed, the likelihood of a damages award in excess of policy limits. For example, assume a 70% chance of losing and a likely verdict of $2 million if the defendant loses, then the jury would start with a $1.4 million number in the bad faith failure to settle analysis. If (a) the result of that calculation is greater than the policy limits; (b) the plaintiff has made an offer to settle within policy limits; (c) the insured has communicated the offer to the insurer with sufficient time for the insurer to evaluate and respond to the offer; and (d) the insurer refuses to accept so the case goes to trial; then (e) the insurer is responsible for the portion of the resulting judgment that exceeds the policy limits. E.g., Samson v. Transamerica, supra. The proposed revision to the instruction imposes an additional requirement on this straightforward test that will complicate trials, confuse juries, and lead to evidentiary disputes. The instruction should remain unchanged."	
	Bruce Greenlee Attorney Richmond	"Element 5 (and question 5 of new VF-2304) seems needlessly wordy. Can't you just say: 'That [*name of defendant*]'s failure to accept the settlement demand was unreasonable.'? (I probably should have made this point in the last release.)"	See the committee response to the comment of CLA, above.
		"Alternative elements (and questions) 6: I found the addition to the DforU [Directions for Use] to not be as clear as it could be. How about: 'If there has been an excess	The committee has refined the Directions for Use to address the possibility of both options, as suggested by CLA.

Instruction(s)	Commenter	Comment	Committee Response
		judgment but no other damages, use the first option only. if there is no excess judgment but there were other damages (cite to *Howard*), give the second option only. If there has been both an excess judgment and other damages, include both options.'"	
	Peter Klee Attorney Sheppard, Mullin, Richter & Hampton LLP San Diego on behalf of: Allstate Insurance Company Alliance United Insurance Company Crusader Insurance Company Fred Loya Insurance Company Government Employees Insurance Company (GEICO)	"We write to provide our comments on the most recent version of CACI 2334 that has been proposed in the wake of the California Court of Appeal's decision in *Pinto v. Farmers Insurance* (2021) 61 Cal.App.5th 676. Our principal suggestion is that the following sentence be omitted from the proposed instruction and moved to the 'Sources and Authorities' section of the instruction: An insurance company's conduct is unreasonable when, for example, it does not give at least much consideration to the interests of the insured as it gives to its own interests. We believe the addition of this sentence (i) is inconsistent with California law governing the drafting of jury instructions and (ii) introduces a misleading and unworkable jury standard for evaluating whether a liability carrier's conduct in failing to accept a settlement demand was reasonable. **<u>Our Experience and Perspective</u>** These comments are submitted by the following auto insurance companies: **Allstate Insurance Company** **Alliance United Insurance Company** **Crusader Insurance Company** **Fred Loya Insurance Company** **Government Employees Insurance Company (GEICO)** **Infinity Insurance Company**	See the committee response to the comment of Karen Bray on this instruction, above.

Instruction(s)	Commenter	Comment	Committee Response
	Infinity Insurance Company Interinsurance Exchange of the Automobile Club (Auto Club) Mercury Insurance Travelers Insurance Wawanesa General Insurance Company	**Interinsurance Exchange of the Automobile Club (Auto Club)** **Mercury Insurance** **Travelers Insurance** **Wawanesa General Insurance Company** Collectively, we issue a significant number of policies in the State of California and command a substantial share of the automobile insurance market in the state. We process tens of thousands of third-party auto liability claims in California every year. A small percentage of those claims are not settled and result in 'bad faith failure to settle' lawsuits. In a large number of those cases, there is significant confusion concerning CACI 2334 and whether it is accurate and complete. In sum, we see no justification for the instruction to provide a *specific example* of when an insurance company's conduct would be deemed to be 'unreasonable.' Indeed, our research failed to locate any other pattern jury instruction where the drafters provided an example of when, applying the instruction, the defendant would essentially lose the case. The last sentence of the instruction is virtually indistinguishable from the other legal propositions contained in the 'Sources of Authority' section of the instruction. The sentence should be moved to the Sources of Authority section; it does not belong in the body of a model jury instruction." [Proposed text of CACI No. 2334 with redlines omitted.] "**THE LAST SENTENCE** [of the proposed instruction: "An insurance company's conduct is unreasonable when, for example, it does not give at least as much consideration	

Instruction(s)	Commenter	Comment	Committee Response
		to the interests of the insured as it gives to its own interests."] **SHOULD BE DELETED AND MOVED TO THE "SOURCES AND AUTHORITIES" SECTION OF THE INSTRUCTION** For the following reasons, we request that the last sentence of the proposed instruction be deleted and moved to the "Sources and Authorities" section: First, the instruction places too great an emphasis on a single aspect of the body of case law governing an insurance company's obligations under the implied covenant. It is improper to draft an instruction—let alone a model instruction—that emphasizes a particular issue or theory. *See Santillan v. Roman Cath. Bishop of Fresno*, 202 Cal. App. 4th 708, 725 (2012) ("Instructions that unduly emphasize issues or theories, either by singling them out or making them unduly prominent, are improper"); *Munoz v. City of Union City*, 120 Cal. App. 4th 1077, 1108, 16 Cal. Rptr. 3d 521, 544–45 (2004) ('[I]t is error to give, and proper to refuse, instructions that unduly overemphasize issues, theories or defenses either by repetition or singling them out or making them unduly prominent although the instruction may be a legal proposition); *Fibreboard Paper Prod. Corp. v. E. Bay Union of Machinists, Loc. 1304, United Steelworkers of Am., AFL-CIO*, 227 Cal. App. 2d 675, 718 (1964) (same); *see also Auto Stores v. Reyes*, 223 F.2d 298, 305 (10th Cir. 1955) ('A trial court in its instructions to the jury should, so far as possible, avoid undue emphasis of issues, theories or defenses by repetition or by giving them undue prominence or by minimizing the importance of others'); see generally 89 C.J.S. Trial § 735 (2021) ('Jury instructions that unduly emphasize issues or	

Instruction(s)	Commenter	Comment	Committee Response
		theories, either by singling them out or making them unduly prominent, are improper.') As written, the proposed instruction emphasizes an argument this is frequently made by plaintiffs' attorneys in third-party bad faith cases: the insurer placed its interests above the insureds. While the insured is certainly entitled to make that argument, the correct standard for bad faith in California is reasonableness based on a 'totality of the circumstances' standard *Wilson v. 21st Century Ins. Co*., 42 Cal. 4th 713, 723 (2007) ('An insurer's good or bad faith must be evaluated in light of the totality of the circumstances surrounding its actions'). Indeed, the last two bullet points to the proposed instruction's 'Sources of Authority' provide examples of things that do not constitute unreasonable conduct: • "[F]ailing to accept a reasonable settlement offer does not necessarily constitute bad faith. '[T]he crucial issue is … the basis for the insurer's decision to reject an offer of settlement.' '[M]ere errors by an insurer in discharging its obligations to its insured " 'does not necessarily make the insurer liable in tort for violating the covenant of good faith and fair dealing; to be liable in tort, the insurer's conduct must also have been unreasonable.' " ' " (*Pinto, supra*, 61 Cal.App.5th at p. 688, original italics, internal citations omitted.) • "In short, so long as insurers are not subject to a strict liability standard, there is still room for an honest, innocent mistake." (*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1460 [7 Cal.Rptr.2d 513, 521].)	

Instruction(s)	Commenter	Comment	Committee Response
		If the proposed instruction is to be balanced, it should either include these examples as well or no examples at all." "Second, the last sentence of the proposed instruction borders on an improper 'formula instruction,' which essentially tells the jury when the plaintiff wins and the defendant loses. As the Supreme Court observed, such instructions are improper. *Chutuk v. S. Ctys. Gas Co. of California*, 21 Cal. 2d 372, 381 (1942) ('The refused instructions were in the nature of formula instructions, each purporting to set forth the circumstances under which the jury would have been required to return a verdict in favor of defendant. They were repetitious in substance and were objectionable in that said instructions could have served only to emphasize unduly the defendant's theory of the case. Insofar as the refused instructions contained correct statements of the law, we are satisfied that the substance thereof was adequately covered by the instructions given'). It would be no different from adding a sentence that states: '**An insurance company's conduct is reasonable when, for example, it gives at least as much consideration to the interests of the insured as it gives to its own interests.'** Re-wording the sentence in this fashion says the same thing, except it essentially instructs the jury to find for the insurance company if it makes that finding. One can imagine only imagine the objections such a sentence would draw from the policyholders' bar. And they would be right: providing an example is improper under either circumstance." "Third, the sentence introduces an unworkable and misleading standard. It is always in the insured's interest to	

Instruction(s)	Commenter	Comment	Committee Response
		have a third-party tort claim against them settled, regardless of whether the proposed settlement is reasonable. *Crisci v. Sec. Ins. Co. of New Haven, Conn.*, 66 Cal. 2d 425, 430 (1967) ('Obviously, it will always be in the insured's interest to settle within the policy limits when there is any danger, however slight, of a judgment in excess of those limits'). It may or may not be in the insurance company's best interest to settle a claim for the policy limits. Thus there are countless instances in which the insurer's rejection of a settlement demand is not in the insured's best interests, but nevertheless reasonable. The most obvious example is when a policy limit demand is made to settle a claim that is not worth the policy limit. In such instances, although accepting the demand would end litigation against the insured (and thus be in the insured's best interests), the insurer may reasonably decline to settle because the claim is worth less than the amount demanded. And yet, if the offending sentence is included in the model instruction, a jury could easily rationalize imposing liability even though the insurer acted reasonably. Courts and commentators alike have recognized the obvious problem with an 'equal interests' standard: Yet however much the carrier considers the interests of its insured in pondering the decision as to settlement, the moment it decides not to settle, it in effect, however reasonably, sacrifices the interests of the insured in order to promote its own. It is always to the benefit of the insured to settle and thereby avoid the danger of an excess verdict. Since an insurer serves only its own interests by declining to compromise within the insurance coverage, a decision not to settle is perforce a selfish one. In attempting to save some of its own	

Instruction(s)	Commenter	Comment	Committee Response
		money on the policy, the company necessarily and automatically exposes the insured to the risk of an excess judgment. *Rova Farms Resort, Inc. v. Investors Ins. Co. of America*, 65 N.J. 474, 498, 323 A.2d 495, 508 (1974); *see generally*, Stephen S. Ashley, *Bad Faith Actions Liability & Damages* § 3:18 (2d ed. 2021) ('What makes the equal consideration standard empty and unworkable is the fact that there is no middle alternative between accepting or rejecting the settlement offer. The insurer must either accept or reject the settlement, and a decision either way necessarily favors the interests of one party over the other. . . . [¶] If the courts seriously insisted that insurers give as much consideration to the insureds' interests as they give to their own, insurers would have no choice except to prefer the insureds' interests, for any other course would necessarily fail to give the insureds' interests equal consideration'). Moreover, while such a statement may be helpful to courts reviewing bad faith cases on appeal, it does not provide juries with a workable standard by which to evaluate the insurer's conduct. Among other problems, the statement, standing alone, is incomplete. Indeed, in case law, it is commonly coupled with other balancing statements: An insurer, however, may give its own interests consideration equal to that it gives the interests of its insured (*Egan v. Mutual of Omaha Ins. Co., supra,* 24 Cal.3d at pp. 818–819, 169 Cal.Rptr. 691, 620 P.2d 141); **it is not required to disregard the interests of its shareholders and other policyholders when evaluating claims** (*Austero v. National Cas. Co., supra,* 84 Cal.App.3d at p. 30, 148 Cal.Rptr. 653). [Emphasis added.]	

Instruction(s)	Commenter	Comment	Committee Response
		Love v. Fire Ins. Exch., 221 Cal. App. 3d 1136, 1148–49 (1990); *Griffin Dewatering Corp. v. N. Ins. Co. of New York*, 176 Cal. App. 4th 172, 207 (2009); *Progressive W. Ins. Co. v. Superior Ct.*, 135 Cal. App. 4th 263, 278 (2005). Thus, the sentence should be removed from the instruction or, at a minimum, coupled with one or more other statements to provide the requisite balance." "Finally, the instruction appears to be an isolated quote taken verbatim from several judicial opinions, which is a disfavored practice in California. As courts have recognized, '[t]he mere fact that language in a proposed jury instruction comes from case authority does not qualify it as a proper instruction. "The admonition has been frequently stated that it is dangerous to frame an instruction upon isolated extracts from the opinions of the court." [Citation.] ... [Citation.]' *Morales v. 22nd Dist. Agricultural Assn.*, 1 Cal.App.5th 504, 526 (2016); *Sloan v. Stearns*, 137 Cal. App. 2d 289, 300 (1955) ('In concluding this subject we call attention again that it is a dangerous practice, and one not to be followed, to take excerpts from opinions of the courts of last resort and indiscriminately change them into instructions to juries. The reasons are too obvious to require further comment.' *Rosander v. Market Street Ry. Co.*, 89 Cal. App. 710, 718, 265 P. 536, 540. 'It has often been decided by the supreme court that the language used by the court in writing an opinion should not be used as an instruction. Assuming, without deciding, that the proposed instruction was a correct statement of the law, it is patent that it was but a mere abstract principle of law which is embodied in and forms a part of the basis for the broader instructions which were given by the court.')	

Instruction(s)	Commenter	Comment	Committee Response
		In sum, we do not believe that it is appropriate for CACI 2334 to provide a single example of when an insurance company acts in bad faith in the context of a model jury instruction. The statement belongs in a use note, along with the other examples of what does or does not constitute reasonable conduct. If the Judicial Council believes that examples are necessary in the instruction itself, the undersigned request that the last sentence be modified to read as follows: 'An insurance company's conduct is reasonable when, for example, it gives at least as much consideration to the interests of the insured as it gives to its own interests.' Alternatively, the undersigned request that the instruction be balanced out with examples of what does not constitute unreasonable conduct, such as an 'honest, innocent mistake' or 'mere errors.' "	
VF-2304. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits (New)	Orange County Bar Association by Daniel S. Robinson, President	"The third paragraph under Directions for Use begins 'If specificity is not required, users do not have to itemize all the damages listed in **question 6** . . . .' The proper reference is to **Question 7**."	The committee has updated the reference to question 7.
		"Currently, Question 7 does not include an option for damages specifically related to the amount of an excess judgment, which are the damages available if the jury only answers option one in Question 6 (see revised CACI 2334). So, we would add a new option under Question 7: '[a. Amount of excess judgment $_____.' "	The committee agrees and recommends adding a new option (a.) for question 7.
		"The Directions for Use should also clarify that the court must give the second option in question #6 of the verdict form if the plaintiff seeks the itemized damages currently listed under question #7. That is consistent with Instruction 2334, which provides two separate options for element #6. The Directions for Use for that instruction state: "Use the	For clarity but to avoid redundancy, the committee has added a reference to CACI No. 2334's element 6 in the Directions for Use of this verdict form.

Instruction(s)	Commenter	Comment	Committee Response
		first option for element 6 ***if the plaintiff is seeking only the amount of the excess judgment***. Use the second option for element 6 ***if the plaintiff is seeking damages separate from or in addition to the excess judgment***." (Emphasis added.) The Directions for Use for the verdict form should be similarly clear as to when to use the optional question under #6 of that form."	
2522A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant (Revise)	California Employment Lawyers Association by Laura L. Horton, Chair	The bracketed language "[name of employer]" may be confusing in the rare case where the entity defendant is not an employer. For example, the FEHA's prohibition on harassment applies not only to employers, but also to other specified entities, and specifically including any "labor organization, employment agency, apprenticeship training program or any training program leading to employment." (Gov't Code § 12940(j)(1). The subdivision of the FEHA that provides for individual liability for harassment, § 12940(j)(3) states: "An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action."	The committee agrees that the bracketed language may be confusing, especially if the case involves claims against both an individual defendant and the employer or a covered entity. The committee, therefore, recommends revising the bracketed content as suggested by the commenter and the CLA, below.
		CELA recommends that, for clarity that (1) references to "[*name of defendant*]" be replaced by "[*name of individual defendant*]" and (2) "[*name of employer*]" be replaced by either "[*name of entity defendant*] or "[*name of covered entity*]" throughout the instruction. Alternatively, language could be added to the Directions for Use to modify the instruction if the covered entity is a labor organization,	For improved clarity, the committee has changed the bracketed options throughout as suggested (name of *individual* defendant and name of *covered entity*). With this refinement, the committee does not believe that additional changes to the Directions for Use are necessary.

Instruction(s)	Commenter	Comment	Committee Response
		employment agency, apprenticeship training program, or training program.	
	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	a. We believe the bracketed language "[*name of employer*]" may be confusing when the covered entity is a labor organization, employment agency, apprenticeship training program, or training program leading to employment. The prohibition against harassment applies not only to employers but also to these other entities. (Gov. Code, § 12940, subd. (j)(1).) Also, there may be both an individual and an entity defendant. To avoid confusion, we suggest that (1) references to "[*name of defendant*]" be replaced by "[*name of individual defendant*]" and (2) "[*name of employer*]" be replaced by either "[*name of entity defendant*] or (2) "[*name of covered entity*]" throughout the instruction.	See the committee response to the comments of CELA on this instruction, above.
		b. Alternatively, language could be added to the Directions for Use to modify the instruction if the covered entity is a labor organization, employment agency, apprenticeship training program, or training program, as in the Directions for Use for CACI No. 2521A.	See the committee response to the comment of CELA on this proposed instruction, above.
		c. We believe the language added to the Directions for Use regarding use of the verdict form belong in the verdict form's Directions for Use. If this language is included here as well, we would revise the language for greater specificity to "include optional question 2 on the verdict form" rather than "include an additional question on the verdict form."	For greater specificity, the committee has refined the language of CACI No. 2522A's, B's, and C's Directions for Use, as suggested.
	Bruce Greenlee Attorney Richmond	Directions for Use: Using the statutory language: "an employee of an entity subject to this subdivision" is not plain language and is clunky. How about: "…the individual	To improve clarity, the committee has refined the sentence in the Directions for Use.

Instruction(s)	Commenter	Comment	Committee Response
		defendant is also an employee of plaintiff's employer, such as the plaintiff's supervisor or coworker."	
	Joan Herrington Attorney Bay Area Employment Law Office Oakland	CACI 2522A. Work Environment Harassment-Conduct Directed at Plaintiff-Essential Elements-Individual Defendant (Gov. Code, §§ 12923, 12940(j) and subsequent dependent instructions. Proposed revision: inserting "2. That [*name of defendant*] was an employee of [*name of employer*];]" California law has long held that harassment by a third party, such as a customer of the employer, imposes liability on the Defendant. (See, e.g., *Carter v. California Dept. of Veterans Affairs*, 38 Cal.4th 914 (2006); *M.F. v. Pacific Pearl Hotel Mgmt*, 16 Cal.App.5th 693 (2017).) However, the Fair Employment and Housing Act ("FEHA") imposes liability not only on an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, but also on "*any other person*" for harassment based on a protected characteristic. (Gov. Code, § 12940, subd. (j)(1) (emphasis added.) Thus, limiting individual liability to an employee is contrary to the plain language of the statute. In this day of increased recognition of the continuing prevalence of sexual harassment, it is more efficient to allow the harasser to be sued under the FEHA along with the Defendant employer.	The committee does not disagree with the commenter's summary of the law for employers and other covered entities, but the instructions at issue (2522A, 2522B, 2522C and related verdict forms) address the personal liability of the individual alleged harasser, not employer liability for harassment by a third party. The committee disagrees with the commenter's suggestion that employee liability is contrary to the language of the statute. Government Code section 12940(j)(3) expressly provides: "An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action."
2522B. Work Environment Harassment—	California Employment Lawyers	Same comments as CACI No. 2522A.	See committee response to the comments on CACI 2522A, above.

Instruction(s)	Commenter	Comment	Committee Response
Conduct Directed at Others—Essential Factual Elements—Individual Defendant (Revise)	Association by Laura L. Horton, Chair		
	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	Same comments as CACI No. 2522A.	See committee response to the comments on CACI 2522A, above.
	Bruce Greenlee Attorney Richmond	Directions for Use: Using the statutory language: "an employee of an entity subject to this subdivision" is not plain language and is clunky. How about: "…the individual defendant is also an employee of plaintiff's employer, such as the plaintiff's supervisor or coworker."	See committee response to the comments on CACI 2522A, above.
2522C. Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant (Revise)	California Employment Lawyers Association by Laura L. Horton, Chair	Same comments as CACI No. 2522A.	See committee response to the comments on CACI 2522A, above.
	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	Same comments as CACI No. 2522A.	See committee response to the comments on CACI 2522A, above.

Instruction(s)	Commenter	Comment	Committee Response
	Bruce Greenlee Attorney Richmond	Directions for Use: Using the statutory language: "an employee of an entity subject to this subdivision" is not plain language and is clunky. How about: "…the individual defendant is also an employee of plaintiff's employer, such as the plaintiff's supervisor or coworker."	See committee response to the comments on CACI 2522A, above.
2546. Disability Discrimination —Reasonable Accommodation —Failure to Engage in Interactive Process (Revise)	California Employment Lawyers Association by Laura L. Horton, Chair	CELA is opposed to adding the proposed element: "**[7. That [***name of defendant***] could have made a reasonable accommodation when the interactive process should have taken place;]"** As the current CACI instructions state in the use notes, there is a split of authority as to whether Plaintiff must prove that reasonable accommodation was available. It is the function of the California Supreme Court to resolve this issue. Limiting the availability of the reasonable accommodation to the time when the interactive process should have taken place should be expanded to include "or that the employer know will become available in the foreseeable future." Otherwise, an employer may escape liability by arguing that, on the day of the interactive process meeting, no reasonable accommodation was available. For example, an employer could argue that there was no vacant position for the employee seeking reassignment was otherwise qualified when the employer knows that one will become available the following week. Reasonable accommodation and an interactive process are each a benefit of employment whose deprivation, in and of	The committee has recognized the existence of a split in authority and has bracketed the proposed element considering the split in authority. If the Supreme Court resolves the issue, the committee will revise the instruction accordingly. With respect to the timing of the interactive process, the committee believes "could have made" adequately encompasses the possibility of an available accommodation on the horizon.

Instruction(s)	Commenter	Comment	Committee Response
		itself, constitutes disability discrimination. For example, in *Prilliman v. United Airlines, Inc*. (1997) 53 Cal.App.4th 935 the court defined reasonable accommodation as a "term, condition or privilege of employment" whose denial constitutes disability discrimination. In light of the foregoing, and consistent with the interpretation of the concept of reasonable accommodation under the FEHA as set out in section 7293.9 of title 2 of the California Code of Regulations, we conclude that an employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with *951 the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees. Such a duty is also consistent with the provisions of Government Code section 12940, subdivision (a), which, with specified exceptions, provides in pertinent part that it is an unlawful employment practice for an employer, because of the physical disability or medical condition of any person, "*to discriminate against the person in compensation or in terms, conditions or privileges of employment*." Section 7294.2(a) of title 2 of the California Code of Regulations provides that "It shall be unlawful to condition any employment decision regarding an applicant or employee with a disability upon the waiver of any fringe benefit." Id. at 950-951 and FN 4, (emphasis added).	

Instruction(s)	Commenter	Comment	Committee Response
		The *Prilliman* court's interpretation is consistent not only with the FEHA, which states in pertinent part, "It is an unlawful employment practice [f]or an employer, because of the… physical disability, mental disability,… of any person, to … discriminate against the person in compensation or in terms, conditions, or privileges of employment", but also with the FEHA's interpretative regulations. (Gov. Code § 12940(a.) The California Code of Regulations, title 2, section 11008, subdivision (f), defines "employment benefit" as follows: "Employment Benefit." Except as otherwise provided in the Act, any benefit of employment covered by the Act, including hiring, employment, promotion, selection for training programs leading to employment or promotions, freedom from disbarment or discharge from employment or a training program, compensation, provision of a discrimination-free workplace, *and any other favorable term, condition or privilege of employment*. (emphasis added.) Disability discrimination is established by a denial of an employment benefit. "(b) Disability discrimination is established if a preponderance of the evidence demonstrates a causal connection between a qualified individual's disability and *denial of an employment benefit* to that individual by the employer or other covered entity. The evidence need not demonstrate that the qualified individual's disability was the sole or even the dominant cause of the employment benefit denial. Discrimination is established if the qualified individual's disability was one of the factors that influenced the employer or other covered entity and the denial of the employment benefit is not justified by a	

Instruction(s)	Commenter	Comment	Committee Response
		permissible defense, as detailed below at section 11067 of this article." Cal. Code Regs., tit. 2, §§ 11009, subd. (c), 11066 (emphasis added). Reasonable accommodation and an interactive process are each statutorily imposed conditions of employment, and thus are "benefits of employment" as defined in section 11008, subdivision (f), whose denial establishes disability discrimination under section 11066 of the FEHA's interpretative regulations. This is consistent with section 11008, subdivision (g), the makes the employer's "omission" of a privilege of employment an "employment practice" prohibited by Government Code section 12940, subdivision (a). This analysis is also consistent with the Americans with the Disabilities Act ("ADA"), which provides "the floor of protection" for the disability provisions of the Fair Employment and Housing Act. Thus, federal cases interpreting Americans with the Disabilities Act ("ADA") law trump California cases interpreting the FEHA if the federal cases provide greater protection. (Gov. Code, § 12926.1.) In fact, little federal case law interpretation is needed since the ADA, itself, flatly states that "the duty to make reasonable accommodations is an essential component of the duty not to discriminate." (29 CFR pt 1630, App §1630.9; see also, 42 U.S.C.A. § 12112(5)(A).) Accordingly, federal courts interpreting the ADA have long held that a failure to provide reasonable accommodation supports a disability discrimination claim. (See, e.g., *Holly v. Clairson Industries, L.L.C.* ("Holly") (11th Cir., 2007) 492 F.3d 1247, 1262 ("Thus, an employer's failure to reasonably accommodate a disabled individual *itself*	

Instruction(s)	Commenter	Comment	Committee Response
		constitutes discrimination under the ADA, so long as that individual is "otherwise qualified," and unless the employer can show undue hardship").) Accordingly, liability for failure to provide a timely, good faith interactive process does not depend on whether reasonable accommodation was available. It is the deprivation of this benefit of employment that gives rise to liability and nominal and emotional distress damages. The extent of economic damages, however, may well depend on whether reasonable accommodation could be made. Therefore, CELA asks the committee to reject the addition of element #7.	
	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	a. We agree with the proposed revision to the instruction.	No response required.
		b. We would revise the paragraph in the Directions for Use discussing the split of authority as follows for greater clarity: "Bracketed element 7 reflects that there is a split of authority as to whether the employee must also prove that a reasonable accommodation was available. (Compare *Shirvanyan v. Los Angeles Community College Dist.* (2020) 59 Cal.App.5th 82, 87 [273 Cal.Rptr.3d 312] ["the availability of a reasonable accommodation is an essential element of an interactive process claim"] and *Nadaf-Rahrov v. The Neiman Marcus Group, Inc*. (2008) 166 Cal.App.4th 952, 980–985 [83 Cal.Rptr.3d 190] [employee who brings a section 12940(n) claim bears the burden of proving a reasonable accommodation was available before the employer can be held liable under the statute] with *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1] [jury's finding that no reasonable accommodation was	The committee has refined the paragraph in the Directions for Use as suggested.

Instruction(s)	Commenter	Comment	Committee Response
		possible is not inconsistent with its finding of liability for refusing to engage in interactive process] and *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837] [if the employer's failure to participate in good faith causes a breakdown in the interactive process, liability follows]; see also *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1018–1019 [93 Cal.Rptr.3d 338] [attempting to reconcile conflict]; ~~*Shirvanyan v. Los Angeles Community College Dist.* (2020) 59 Cal.App.5th 82, 87 [273 Cal.Rptr.3d 312] [adopting the Scotch court's reasoning~~].) See also verdict form . . . ."	
	Bruce Greenlee Attorney Richmond	New optional element 7 (and question 7 of VF-2513): How about: "Had [*name of defendant*] participated in a timely good-faith interactive process, a reasonable accommodation could have been made."	The committee does not see improved clarity in the suggested language.
		"In the DforU [Directions for Use] you say that *Shirvanyan* adopted the *Scotch* court's harmonizing reasoning, but the only excerpt in the S&A seems to be in agreement with *Neiman Marcus*. You need a *Shirvanyan* excerpt that cites *Scotch*."	The committee has refined the Directions for Use to clarify the existing split in authority. The Sources and Authority already includes an excerpt from *Shirvanyan*, which is in agreement with *Nadaf-Rahrov v. Neiman Marcus Group*.
	Joan Herrington Attorney Bay Area Employment Law Office Oakland	2546. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process (Gov. Code, § 12940(n)) and subsequent dependent instructions. Proposed revision: inserting "[7. That [*name of defendant*] could have made a reasonable accommodation when the interactive process should have taken place;]" First, as the current CACI instructions state in the use notes, there is a split of authority as to whether Plaintiff	See the committee response to the comment of CELA on this instruction, above.

Instruction(s)	Commenter	Comment	Committee Response
		must prove that reasonable accommodation was available. It is the function of the California Supreme Court to resolve this issue. Second, if the Judicial Council adopts this revision, limiting the availability of the reasonable accommodation to the time when the interactive process should have taken place should be expanded to include "or that the employer know will become available in the foreseeable future." Otherwise, an employer may escape liability by arguing that, on the day of the interactive process meeting, no reasonable accommodation was available. For example, an employer could argue that there was no vacant position for the employee seeking reassignment was otherwise qualified when the employer knows that one will become available the following week. Indeed, to take the current proposed revision to the limits of absurdity, say, for example, the ergonomic desk which the employee needs will not become available for a month, the employer can argue that reasonable accommodation was not available at the time of the interactive process meeting. Third, and most significantly, just as the California Family Rights Act, and its federal equivalent, the Family Medical Leave Act, are split into deprivation of benefit cases and intent cases, the FEHA was intended to be so split. Reasonable accommodation and an interactive process are each a *benefit of employment* whose deprivation, in and of itself, constitutes disability discrimination. For example, in *Prilliman v. United Airlines, Inc.* (1997) 53 Cal.App.4th 935 the court defined reasonable accommodation as a "term, condition or privilege of employment" whose denial constitutes disability discrimination.	

Instruction(s)	Commenter	Comment	Committee Response
		In light of the foregoing, and consistent with the interpretation of the concept of reasonable accommodation under the FEHA as set out in section 7293.9 of title 2 of the California Code of Regulations, we conclude that an employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with *951 the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees. Such a duty is also consistent with the provisions of Government Code section 12940, subdivision (a), which, with specified exceptions, provides in pertinent part that it is an unlawful employment practice for an employer, because of the physical disability or medical condition of any person, "*to discriminate against the person in compensation or in terms, conditions or privileges of employment*." [Footnote omitted] The *Prilliman* court's interpretation is consistent not only with the FEHA, which states in pertinent part, "It is an unlawful employment practice [f]or an employer, because of the… physical disability, mental disability,… of any person, to … discriminate against the person in compensation *or in terms, conditions, or privileges of employment*", but also with the FEHA's interpretative regulations. (Gov. Code § 12940(a.) The California Code of Regulations, title 2, section 11008, subdivision (f), defines "employment benefit" as follows:	

Instruction(s)	Commenter	Comment	Committee Response
		"Employment Benefit." Except as otherwise provided in the Act, any benefit of employment covered by the Act, including hiring, employment, promotion, selection for training programs leading to employment or promotions, freedom from disbarment or discharge from employment or a training program, compensation, provision of a discrimination-free workplace, *and any other favorable term, condition or privilege of employment.* (emphasis added.) Disability discrimination is established by a denial of an employment benefit. "(b) Disability discrimination is established if a preponderance of the evidence demonstrates a causal connection between a qualified individual's disability and *denial of an employment benefit* to that individual by the employer or other covered entity. The evidence need not demonstrate that the qualified individual's disability was the sole or even the dominant cause of the employment benefit denial. Discrimination is established if the qualified individual's disability was one of the factors that influenced the employer or other covered entity and the denial of the employment benefit is not justified by a permissible defense, as detailed below at section 11067 of this article." Cal. Code Regs., tit. 2, §§ 11009, subd. (c), 11066 (emphasis added). Reasonable accommodation and an interactive process are each statutorily imposed conditions of employment, and thus are "benefits of employment" as defined in section 11008, subdivision (f), whose denial establishes disability discrimination under section 11066 of the FEHA's interpretative regulations. This is consistent with section	

Instruction(s)	Commenter	Comment	Committee Response
		11008, subdivision (g), the makes the employer's "omission" of a privilege of employment an "employment practice" prohibited by Government Code section 12940, subdivision (a). This analysis is also consistent with the Americans with the Disabilities Act ("ADA"), which provides "the floor of protection" for the disability provisions of the Fair Employment and Housing Act. Thus, federal cases interpreting Americans with the Disabilities Act ("ADA") law trump California cases interpreting the FEHA if the federal cases provide greater protection. (Gov. Code, § 12926.1.) In fact, little federal case law interpretation is needed since the ADA, itself, flatly states that "the duty to make reasonable accommodations is an essential component of the duty not to discriminate." (29 CFR pt 1630, App §1630.9; see also, 42 U.S.C.A. § 12112(5)(A).) Accordingly, federal courts interpreting the ADA have long held that a failure to provide reasonable accommodation supports a disability discrimination claim. (See, e.g., *Holly v. Clairson Industries, L.L.C.* ("*Holly*") (11th Cir., 2007) 492 F.3d 1247, 1262 ("Thus, an employer's failure to reasonably accommodate a disabled individual itself constitutes discrimination under the ADA, so long as that individual is "otherwise qualified," and unless the employer can show undue hardship").) Accordingly, liability for failure to provide a timely, good faith interactive process does not depend on whether reasonable accommodation was available. It is the deprivation of this benefit of employment that gives rise to liability and nominal and emotional distress damages. The extent of economic damages, however, may well depend on whether reasonable accommodation could be made.	

Instruction(s)	Commenter	Comment	Committee Response
	Orange County Bar Association by Daniel S. Robinson, President	Change the redlined element number 7 to: "That [*name of defendant*] could have made a reasonable accommodation for [*name of plaintiff*] so that [he/she/*nonbinary pronoun*] would be able to perform the essential job requirements when the interactive process should have taken place."	The committee does not see improved clarity in the suggested language.
VF-2507A. Work Environment Harassment—Conduct Directed at Plaintiff—Individual Defendant (Revise)	California Employment Lawyers Association by Laura L. Horton, Chair	The verdict form Directions for Use provide that "Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2522A." We suggest adding language to the Directions for Use to explain when to include optional question 2. We would insert the following language as a new fourth paragraph: "Include optional question 2 if optional element 2 is included in CACI No. 2522A."	The committee agrees and recommends adding a sentence to the Directions for Use on when to include optional question 2.
	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	a. We agree with the proposed revision to the verdict form.	No response required.
		b. We believe language should be added to the Directions for Use for this verdict form on when to include optional question 2. We would insert the following language as a new fourth paragraph: "Include optional question 2 if optional element 2 is included in CACI No. 2522A."	The committee agrees and recommends adding a sentence to the Directions for Use on when to include optional question 2.
VF-2507B. Work Environment Harassment—Conduct Directed at	California Employment Lawyers Association by Laura L. Horton, Chair	Same comments as VF-2507A, but refer to optional element 2 in CACI No. 2522B.	See committee response to the comments on CACI No. VF- 2507A.

Instruction(s)	Commenter	Comment	Committee Response
Others—Individual Defendant (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	Same comments as VF-2507A, but refer to optional element 2 in CACI No. 2522B.	See committee response to the comments on CACI No. VF- 2507A.
VF-2507C. Work Environment Harassment—Sexual Favoritism—Individual Defendant (Revise)	California Employment Lawyers Association by Laura L. Horton, Chair	Same comments as VF-2507A, but refer to optional element 2 in CACI No. 2522C.	See committee response to the comments on CACI No. VF- 2507A.
	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	Same comments as VF-2507A, but refer to optional element 2 in CACI No. 2522C.	See committee response to the comments on CACI No. VF- 2507A.
VF-2513. Disability Discrimination—Reasonable Accommodation—Failure to Engage in	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A.	We would revise the paragraph in the Directions for Use discussing the split of authority as stated above for CACI No. 2546 for greater clarity.	See committee response to CLA's comment to CACI No. 2546, above.

Instruction(s)	Commenter	Comment	Committee Response
Interactive Process (Revise)	Ginsburg, Chair		
	Orange County Bar Association by Daniel S. Robinson, President	Change the redlined element number 7 to: "Could [*name of defendant*] have made a reasonable accommodation for [*name of plaintiff*] so that [he/she/*nonbinary pronoun*] would be able to perform the essential job requirements when the interactive process should have taken place."	See committee response to OCBA's comment to CACI No. 2546, above.
2754. Reporting Time Pay—Essential Factual Elements (Revise)	California Employment Lawyers Association by Laura L. Horton, Chair	CELA has no objection or additional suggestion at this time on the language of the instruction itself. We have comments on the proposed revisions to the Directions for Use and Sources and Authority.	See the committee responses to CELA's specific comments on this instruction, below.
		We suggest the following for the modified direction regarding telephonic reporting to reflect the guidance in *Ward v. Tilly's* that if the defendant required employees to report to work telephonically or through other means, then the instruction should be modified accordingly. Ward's guidance was not limited to telephonic reporting for work.	The committee will continue to monitor the law in this area. Although the court in *Ward* discussed other means, the committee prefers to limit the Directions for Use to the specific issue decided by the court.
		Modify the instruction as appropriate if the plaintiff claims that the defendant required telephonic **or some other manner of** reporting before **the start of** a potential shift. (See *Ward v. Tilly's, Inc.* (2019) 31 Cal.App.5th 1167, 1171, **1185** [243 Cal.Rptr.3d 461].)	For improved clarity, the committee has added "to work" and "the start of" to the sentence in the Directions for Use.
		We suggest adding the following bullet point, or replace the existing bullet point regarding *Ward v. Tilly* with this: • "[W]e conclude, contrary to the trial court, that an employee need not necessarily physically appear at the workplace to "report for work." Instead, "report[ing] for work" within the meaning of the wage order is best understood as presenting oneself	The committee has added the suggested excerpt from *Ward* to the Sources and Authority.

Instruction(s)	Commenter	Comment	Committee Response
		as ordered. "Report for work," in other words, does not have a single meaning, but instead is defined by the party who directs the manner in which the employee is to present himself or herself for work—that is, by the employer. As thus interpreted, the reporting time pay requirement operates as follows. If an employer directs employees to present themselves for work by physically appearing at the workplace at the shift's start, then the reporting time requirement is triggered by the employee's appearance at the jobsite. But if the employer directs employees to present themselves for work by logging on to a computer remotely, or by appearing at a client's jobsite, or by setting out on a trucking route, then the employee "reports for work" by doing those things. And if, as plaintiff alleges in this case, the employer directs employees to present themselves for work by telephoning the store two hours prior to the start of a shift, then the reporting time requirement is triggered by the telephonic contact." *Ward*, *supra*, 31 Cal. App. 5th at p. 1185.	
	Civil Justice Association of California (CJAC) by Jaime Huff, Vice President	In this section, under Directions for Use, we are requesting two clarifying changes on page 60. The first is to make clear that the reporting being addressed under this section is related to work, and not another type of employer reporting requirement. Modify the instruction as appropriate if the plaintiff claims that the defendant required telephonic reporting to work before a potential shift. (See *Ward v. Tilly's, Inc.* (2019) 31 Cal.App.5th 1167, 1171 [243 Cal.Rptr.3d 461].)	For improved clarity, the committee has added "to work" to the sentence in the Directions for Use as suggested.

Instruction(s)	Commenter	Comment	Committee Response
		The second clarification, found in the Sources and Authority section, is to add context to the cited opinion in *Ward v. Tilly's, Inc*. This California Court of Appeals case dealt with the subject of on-call work; the court found that requiring reporting time pay for on-call shifts is consistent with California wage reporting laws. [Footnote citation omitted.] The quotation taken from this opinion as a stand-alone can be taken out of context. We suggest clarifying that this applies when employees are required to call into work, specifically: "We conclude that the on-call scheduling alleged in this case triggers Wage Order 7's reporting time pay requirements. As we explain, on-call shifts, [where employees are required to call into work], burden employees, who cannot take other jobs, go to school, or make social plans during on-call shifts—but who nonetheless receive no compensation from [the defendant] unless they ultimately are called in to work. This is precisely the kind of abuse that reporting time pay was designed to discourage." (*Ward*, supra, 31 Cal.App.5th at p. 1171.)	The committee does not add editorial content to the direct quotes excerpted in the Sources and Authority.
3714. Ostensible Agency—Physician-Hospital Relationship — Essential Factual Elements (Revise)	Association of Southern California Defense Counsel by Steven S. Fleishman Attorney	In response to the Judicial Council's CACI 22-01 Invitation to Comment, we write on behalf of the Association of Southern California Defense Counsel (ASCDC) regarding the proposed amendment to CACI No. 3714. While ASCDC is supportive of the amendments, as proposed, ASCDC offers additional suggestions for the CACI Committee's consideration. ASCDC is the nation's largest and preeminent regional organization of lawyers primarily devoted to defending civil actions in Southern and Central California. ASCDC has approximately 1,100 attorney members, who are among	See the committee responses to specific comments, below. No response required.

Instruction(s)	Commenter	Comment	Committee Response
		some of the leading trial and appellate lawyers of California's civil defense bar. ASCDC is actively involved in assisting courts on issues of interest to its members, the judiciary, the bar as a whole, and the public. It is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice.	
		ASCDC is generally supportive of CACI No. 3714 because it encapsulates the ostensible agency standard from *Wicks v. Antelope Valley Healthcare District* (2020) 49 Cal.App.5th 866, 884 (*Wicks*) for determining whether a physician was the ostensible agent of a hospital. As *Wicks* explained, " 'unless the patient had some reason to know of the true relationship between the hospital and the physician—i.e., because the hospital gave the patient actual notice or because the patient was treated by his or her personal physician—ostensible agency is readily inferred.' " (*Id.* at p. 882.) Accordingly, a plaintiff cannot establish ostensible agency when *either* (1) the hospital gave the plaintiff actual notice that the treating physician was not a hospital employee and there is no reason to believe the patient could not understand the information provided, *or* (2) *the patient was treated by his or her personal physician* and knew or *should have known* the doctor was not an employee or actual agent of the hospital. (*Id.* at p. 884.) When *either* of these criteria is satisfied, a plaintiff cannot prove ostensible agency. (*Id*. at pp. 884–885.)	The comment is beyond the scope of the invitation to comment. The committee considered the substance of this comment in the last release.
		ASCDC supports the proposed changes to the third paragraph of CACI No. 3714 because those proposed changes confirm that it is the plaintiff's burden, consistent with CACI No. 3709, to prove ostensible agency.	No response required.

Instruction(s)	Commenter	Comment	Committee Response
		ASCDC is concerned, however, that the first sentence of the final paragraph of CACI No. 3714 continues to create an apparent presumption that hospital hold themselves out as providers of *physician* care unless the hospitals give the patient adequate notice that treating physicians are not the hospitals' agents or employees. This presumption squarely conflicts with California law banning the corporate practice of medicine. (Bus. & Prof. Code, §§ 2032, 2400; *Wicks*, *supra*, 49 Cal.App.5th at p. 884 [hospitals "may not control, direct or supervise physicians on its staff"].) A presumption that hospitals hold themselves out as providing physician services also ignores the common situation where the patient is being treated by his or her personal physician. As currently written, the instruction seems to presume that patients *always* seek medical services from physicians on the medical staff at hospitals only in urgent or emergency care situations and without seeking advice from their own personal physician. To the contrary, patients commonly follow the advice of their personal physicians to seek treatment by that physician at a hospital where the physician has clinical privileges. Such patients certainly look to the hospital for supportive medical services, but the hospital has done nothing to create any reasonable impression that the patient's personal physician is acting as its agent. For example, in a case where the patient gave no thought to the potential agency issue until after he or she spoke with an attorney about an unsuccessful surgery by their personal physician (who they personally selected before the surgery), there should not be ostensible agency no matter what notice the hospital gave since there was no reasonable reliance on any apparent agency relationship. (*Wicks*, *supra*, 49 Cal.App.5th at pp. 882, 884–885.)	The comment is beyond the scope of the invitation to comment. Nevertheless, the committee considered the substance of this comment in the last release, and the committee continues to disagree.

Instruction(s)	Commenter	Comment	Committee Response
		CACI No. 3714 should be modified, consistent with *Wicks*, to instruct the jury that ostensible agency does not exist if the plaintiff was treated at a hospital by his or her personal physician and the patient either knew or should have known that the physician was not the hospital's agent—i.e., where the hospital did nothing that would have reasonably caused the plaintiff to believe that his or her treating physician was an agent or employee of the hospital. (*Wicks*, *supra*, 49 Cal.App.5th at pp. 882, 884–885; CACI No. 3709.)	The comment is beyond the scope of the invitation to comment. Nevertheless, the committee considered the substance of this comment in the last release. The committee continues to disagree. The instruction adequately sets forth the requirements of *Wicks*.
		ASCDC therefore suggests that the first sentence of the last paragraph be modified to read: A hospital holds itself out to the public as a provider of <u>physician</u> care <u>whenever the patient did not select the physician providing treatment at the hospital</u>, unless the hospital gives notice to a patient that a physician is not an [employee/agent] of the hospital.	The comment is beyond the scope of the invitation to comment. Nevertheless, the committee considered the substance of this comment in the last release. The committee continues to disagree with the suggest language.
		Finally, ASCDC is concerned that because CACI No. 3714 does not track the language in *Wicks* to establish ostensible agency, some party may claim that the CACI instruction is somehow inconsistent with *Wicks*. That is not the case, since the CACI committee aims to make its instructions conform to California case law. However, in order to avoid confusion on this point, ASCDC suggests that the third paragraph of the instruction be modified as follows: If you find that [name of physician]'s [insert tort theory] harmed [name of plaintiff], then you must decide whether [name of hospital] is responsible for the harm. [Name of hospital] is responsible for [name of physician's] conduct if [name of plaintiff] proves both of the following:	The comment is beyond the scope of the invitation to comment. Nevertheless, the committee considered the substance of this comment in the last release. The committee believes that the instruction adequately sets forth the requirements of *Wicks*.

Instruction(s)	Commenter	Comment	Committee Response
		1. [Name of hospital] did not give [name of plaintiff] actual notice that the treating physician was not a hospital [agent/employee] or the patient could not understand the agency disclaimer information provided; *and* 2. [Name of plaintiff] was not treated by his or her personal physician and knew or should have known the physician was not an employee or actual agent of [name of hospital].	
	Bruce Greenlee Attorney Richmond	In the Directions for Use, you say that the instruction applies to a claim of ostensible agency. Is there any authority for the proposition that this claim applies to a partnership or any relationship other than agent/employee? If so, cite it; if not, delete reference to "other" and "partner" in second paragraph.	The committee is unaware of any authority that would limit a physician's relationship with a hospital to agent or employee for hospital-physician ostensible agency to apply. For this reason, the committee believes the option "*insert other relationship*" is supported. The committee agrees to the extent that the example used may not be helpful. The committee, therefore, recommends deleting the example from the second paragraph to ("e.g., 'partner'").
	Orange County Bar Association by Daniel S. Robinson, President	The proposed changes include removing the following, which should not be removed as it would be helpful to the trier of fact: **In deciding whether [name of plaintiff] has proved element 1, you**	The committee disagrees. The committee does not see improved clarity in the paragraph with the clause retained.
3905A. Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic	Bruce Greenlee Attorney Richmond	[See comment below on proposed CACI No. 3919.]	See response to comment on CACI No. 3919, below.

Instruction(s)	Commenter	Comment	Committee Response
Damage) (Revise)			
3919. Survival Damages (Revise and Renumber)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair	a. We agree with the proposed revisions to the instruction.	No response required.
		b. We believe CACI Nos. 3905 and 3905A should be given whenever item 5 [in this instruction] is given because No. 3905 lists the items of noneconomic damages and No. 3905A explains how to determine noneconomic damages, which this instruction does not explain. Accordingly, we would modify the second sentence of the final paragraph in the Directions for Use: "For actions or proceedings filed on or after January 1, 2022 and before January 1, 2026 (or if granted a preference under Code of Civil Procedure section 36 before January 1, 2022) and depending on the case, ~~it may be preferable either to~~ include item 5 (an item of noneconomic damages) ~~or to~~ and give CACI No. 3905, Items of Noneconomic Damage, and a version of CACI No. 3905A . . . ."	The committee agrees and recommends refining the Directions for Use in the manner similar to the commenter's suggestion.
	Bruce Greenlee Attorney Richmond	"I wonder what the scope of 'suffering' is under 377.34(b). As I read the new paragraph in the DforU [Directions for Use] of 3919, if I give 3905A in a survival action, from the extensive list of horrors in the first paragraph, I can only pick 'physical pain,' 'mental suffering,' or 'disfigurement.' I can't pick e.g., grief, anxiety, or humiliation. Yet I could make an argument that these all involve 'suffering' under 377.34(b). But it may be that 377.34 'suffering' is only that associated with physical pain or disfigurement. Maybe worth a quick peek at the legislative history."	The committee is unaware of any such limitation based on either the statutory language or the legislative history. The committee recommends removing both *physical* and *mental* from element 5 to eliminate any potential for confusion or any implied limitation on the statutory terms "pain" and "suffering."
		In new element 5 to 3919, you say "mental" suffering, while the statute just says "suffering." While there may be no difference, I would stick with the statute for now and delete "mental."	For the reasons stated above, the committee agrees and has removed *mental*, as well as *physical*, from element 5.

Instruction(s)	Commenter	Comment	Committee Response
		In the revision date line for 3919, change to: *Renumbered from CACI No. 3903Q and revised May 2022*	The committee has made the change to the date line for the instruction.
	Civil Justice Association of California (CJAC) by Jaime Huff, Vice President	We recommend adding some clarifying punctuation to make clear that pain, mental suffering and disfigurement are considered their own element under the instruction. If you decide that [*name of plaintiff*] has proved [*his/her/nonbinary pronoun*] claim against [*name of defendant*] for the death of [*name of decedent*], you must also decide the amount of damages that [*name of decedent*] sustained before death and that [he/she/nonbinary pronoun] would have been entitled to recover because of [*name of defendant*]'s conduct[, including any [penalties/ [or] punitive damages] as explained in the other instructions that I will give you]. [*Name of plaintiff*] may recover the following damages: [1. The reasonable cost of reasonably necessary medical care that [*name of decedent*] received;] [2. The amount of [*income/earnings/salary/wages*] that [*he/she/nonbinary pronoun*] lost before death;] [3. The reasonable cost of health care services that [*name of decedent*] would have provided to [*name of family member*] before [*name of decedent*]'s death;] [4. [*Specify other recoverable economic damage.*]] [5. The [physical pain,/mental suffering,/ or disfigurement] [*name of decedent*] suffered before [*his/her/nonbinary pronoun*] death.] You may not award damages for any loss for [*name of decedent*]'s shortened life span attributable to [*his/her/nonbinary pronoun*] death.	The committee agrees, and has added bracketed [,/or] between the three options in element 5.

Instruction(s)	Commenter	Comment	Committee Response
	Orange County Bar Association by Daniel S. Robinson, President	The fourth paragraph under the Directions for Use should be revised for clarity to read: "Though damages for pain, suffering, or disfigurement are generally not recoverable in a survival action (except at times in an elder abuse case), Code of Civil Procedure section 337.34(b) permits the recovery of these noneconomic damages by the decedent's personal representative or successor in interest for those actions or proceedings filed on or after January 1, 2022 and before January 1, 2026 (or if granted a preference under Code of Civil Procedure section 36 before January 1, 2022). (Code Civ. Proc., § 377.34; see *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1265 [45 Cal.Rptr.3d 222]; see also instructions in the 3100 Series, Elder Abuse and Dependent Adult Civil Protection Act.) For actions or proceedings covered by section 337.34(b), and depending on the case, it may be preferable either to include item 5 (an item of noneconomic damages) or to give CACI No. 3905, *Items of Noneconomic Damage*, and a version of CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*, that includes only pain, suffering, or disfigurement. Note that many Sources and Authority below do not recognize the availability of noneconomic damages as a result of this temporary change in law. (Stats. 2021, ch. 448 (SB 447).)"	For improved clarity, the committee has refined the language of the fourth paragraph as suggested by the commenter.
4002. "Gravely Disabled" Explained (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A.	a. We would change "unable voluntarily to accept meaningful treatment" in the final sentence of the instruction to "unable to voluntarily accept meaningful treatment" because we believe jurors would find this language more natural and comprehensible.	The committee agrees that relocating *voluntarily* between *to* and *accept* will improve jurors' ability to comprehend the sentence. To the extent the commenter may be proposing removal of *unwilling* from the sentence, the committee does not agree because unable and unwilling are different.

Instruction(s)	Commenter	Comment	Committee Response
	Ginsburg, Chair		
		b. CACI No. 4000 uses the term "gravely disabled," and this instruction (No. 4002) defines that term. But this instruction repeatedly qualifies "gravely disabled" by stating "presently gravely disabled." We believe this creates confusion as to whether "gravely disabled," the term used in No. 4000, is the same as or different from "presently gravely disabled" and the significance of any difference. We believe this instruction should consistently use the same term, "gravely disabled," and should not state "presently gravely disabled." This instruction explains that the jury should not consider the likelihood of future deterioration or relapse, so there is no need to qualify "gravely disabled" with 'presently" to convey that point.	The committee agrees and recommends deleting the term *presently* when used to modify gravely disabled.
		c. Although it is beyond the scope of the invitation to comment, but closely related to our comment above, we would strike the word "presently" from the language "is presently unable to provide for the person's basic needs" in the instruction. We believe "is" adequately conveys the present tense, the instruction explains that the jury should not consider the likelihood of future deterioration or relapse, and the word "presently" is unnecessary and potentially confusing.	The comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release.